The Rules of War & Fourth World Nations

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During the fifteen year period between 1970 and 1985, international legislation has undergone major and significant changes recognizing the greater role being played by Indigenous Nations in international relations. These changes have also begun to be reflected in the organization and procedures of various international institutions.

In 1971, the rights of Indigenous Nations were sufficiently prominent as an issue that the Sub-Commission on the Prevention of Racism and Protection of Minorities under the United Nations Commission on Human Rights commissioned the **Study on the Situation of Indigenous Populations**. In 1975, the rights of Indigenous Nations within the territory of the United States of America were admitted to be of sufficient importance to become an issue of compliance under Principles VII and VIII of the Helsinki Final Act. The United States Government supplemented those commitments in 1979 by reporting extensively on its compliance to the Commission on Security and Cooperation in Europe. In 1977, the United Nations concluded its conference on Protocols I and II which have been the topic of this paper. In 1980, the United Nations Economic and Social Council authorized the establishment of a United Nations Working Group on Indigenous Populations to conduct a ten-year inquiry into international standards concerning the rights of Indigenous Nations.

The World Bank in 1982 issued a policy under the title of Tribal Peoples and Economic Development which has become the basis for new standards for loans to states — requiring that they provide for mitigation of World Bank project impacts on Indigenous Nations. And, in 1984, the International Labor Organization announced its intention to consider new revisions to ILO Convention 107 - Convention on the Protection of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1957). All of these reflect changes in the approach state governments have taken toward Indigenous Nations, and while not substantially altering existing international law these moves have set in motion what appears to be a growing trend toward new political openings.

Of these changes, only the changes and additions to the 1949 Geneva Conventions and the World Bank's new Indigenous Nation's policy may be said to have significance in terms of actually elevating the political status and strategic importance of Indigenous Nations. For it is in the strategic and economic arenas that Indigenous Nations have shown a presence that actually makes a difference to states and their interests. The economic and strategic security of states has become increasingly unstable, and so, when any nation takes independent initiatives which further add to the unstable climate they become a political factor with which states must deal.

Indigenous Nations have increasingly taken independent political, economic and strategic initiatives that have had a profound effect on internal state stability, regional state relations and, indeed global state relations. Third World states, particularly, have experienced escalating confrontations with Fourth World Indigenous nations over the competing economic interests of the state versus the political and strategic interests of nations. These confrontations have been frequently escalated into full blown wars as a result of interventions (economic and military) by the Union of Soviet Socialist Republics and the United States of America, various European states like France, Britain and the states of China, Cuba, Israel and Brazil among others.

Of the two protocols adding to and revising the 1949 Geneva Conventions, Protocol I may likely have the most profound importance in the future relations between states and nations. Because of the role of international supervision and the exacting provisions concerning the methods and means by which parties to armed conflict may conduct warfare, the strategic significance of Indigenous Nations will become amplified and subsequently *regularized* within international and regional state forums.

Civilizing War

When states aggressively and violently attack one another, they are generally considered to be engaged in acts of warfare. The military leaders of these states guide and direct combat actions according to rules of war (in theory, at least) that have evolved over centuries. And, by virtue of these rules, the conduct of war is made more *civilized*.

Until the end of World War Two, these rules were thought to be adequate to ensure that warring parties would fight fairly. Changes in the technology of warfare, and the horrors and atrocities committed by virtually all participants in World War Two — from the massacres of Jews, Gypsies and other nationalities by the Nazis to the death camps of Japan and the Soviet Union, and the atomic obliteration of civilians by the United States — combined to create widespread guilt and revulsion. The global response was to convene an international conference that subsequently produced the Geneva Conventions for the Protection of Victims of War (August 12, 1949).

The Conventions prescribe methods and means for warfare, rules for the treatment of wounded, sick and shipwrecked civilians, conditions for determining the status and treatment of combatants and prisoners-of-war, provisions for the protection of civilian populations against the effects of hostilities, and rules for the treatment of refugees and stateless persons. The International Red Cross and other international humanitarian organizations, and a third-party state are described as parties to oversee the implementation of the Conventions in theatres of warfare. States subscribing to the Geneva Conventions, and even those states that did not sign, are subject to the rules of war as spelled out in detail.

Independence movements launched by Indigenous Nations or disenchanted religious or political minorities were not covered by the Geneva Conventions. Only war between states could *qualify*.

Before and immediately after 1949, wars of liberation peppered the globe. Vietnam fought against the French as did the people of Algeria. England, Holland and Spain were also being challenged by independence movements. The Nation of Naga fought against the newly independent forces of India, while the Balukistan Nation fought the military forces of Pakistan. The Karen Nation engaged the state of Burma, Turks and Armenians battled the Soviet Union's military. China was also engaged in conflict with the Nation of Tibet. Colonial powers which had been victorious after World War Two became embroiled in battles internally and externally with nations and groups eager to throw off the colonial bonds. Indeed, many of these armed conflicts continue to this day.

The superstructure of colonial empires had been cleaved and nations long confined saw their chance to be free. But, no sooner had the door to freedom been opened by the post-war preoccupations of the *great powers*, it swiftly shut. Indigenous Nations which had become surrounded by newly created states were denied the right to choose their own political future, and other political and religious minorities had become unwilling captives within new states. Nations and groups long encircled by states created during the 19th century and after the turn of the century also challenged the status quo.

Euphemisms were coined to describe the non-state combatants. *Insurgents, rebels, bandits, guerrillas, terrorists* and other such terms were invented as every-day terms to describe the forces fighting against the state. The use of these terms hide a cruel reality: Indigenous Nations or any other disenchanted group which attempts to defend itself against the violence of a state; or challenge the right of a state to exercise powers over it may have its combatant forces tortured and civilian populations massacred as a result of police actions. A state may commit genocide as long as it is battling *insurgents, or rebels*.

The modern rules of war fostered by the 1949 Geneva Conventions to safeguard the interests of victims (civilian and military) of warfare were beyond the reach of unwilling captives of a state. Whether located inside the boundaries of a state or inside a distant colony, police actions and civil conflicts were designated as an internal matter of the state.

The term *warfare* was rarely used to describe the violence between Indigenous Nations and states, or between political or religious movements and states. Brutalities between warring elements had all of the characteristics of battles among states. Yet, a state encountering resistance to its animus would be accountable only to itself. Brutalities imposed on civilian populations or prisoners-of-war would be hidden behind the shroud of state sovereignty.

Regional and Local Wars Abound

States have been quite free to massacre civilian populations (Nigeria and the Ibo, Bangladesh and the Chakma and twelve other tribes, Indonesia and the Papuans, Timorese and Mollucans; Ethiopia and the peoples of Eritrea, Tigre and Wollo), torture captive combatants, and fear no world condemnation or even a whimper of concern. Indigenous Nations and their political organizations and the scars they bore from warfare with a state could be exhibited before the United Nation Human Rights Commission. But, no effort would be made to require state accountability; to act fairly and with some degree of civility in the treatment of prisoners of war and civilian populations. State terror against Indigenous Nations and other resistance groups has continued unabated to the present date.

By 1984, no fewer than 50 wars flared on every continent save Antarctica. (See: Occasional Paper #2 "Fourth World Wars": Ryser) The state of Indonesia alone is engaged in three wars involving West Papua, East Timor and Molluca. Nicaragua, Ethiopia, Burma, Morocco, Spain, France, Colombia, Peru, Soviet Union, Israel, Britain, South Africa, Zimbabwe, Lebanon, Kampuchea, Guatemala and Brazil are among the states involved in armed conflicts: Wars of resistance and wars of independence. Liberation movements like the POLISARIO, Southwest African Peoples Organization (SWAPO), Palestinian Liberation Organization (PLO), Kanak Liberation Front, Asla, Eritrean People's Liberation Front and the Free Papua Movement (OPM) are among the non-state politico-military resistance groups challenging state authority.

Indigenous Nations like the Karen in Burma, Naga of India, Kalinga and Bontac of the Philippines, Chakma of Bangladesh, Pipil of El Salvador and Yanamomu of Brazil are engaged in defensive wars against states. Of the wars currently raging, some thirty-two involve Indigenous Nations as direct combatants.

None of these internal and external wars are being conducted in accord with the Geneva Conventions of 1949. Two new Protocol Agreements expanding the coverage of the Geneva Conventions to include international and internal armed conflicts, previously excluded, may change the political and military environment now hidden from world scrutiny. If invoked by non-state combatants, Protocol I and Protocol II of the 1949 Geneva Conventions may actually cause a new political dynamic to evolve between states and Indigenous Nations — one that can reduce the violence and increase the chance for peaceful settlements to evolve.

What do the New Agreements Say?

With the encouragement of the Southwest African Peoples' Organization, and the Palestinian Liberation Front many non-aligned states took steps during the early 1970s to organize a United Nations Conference to consider improvements to the 1949 Geneva Conventions on the protection of victims of armed conflicts. On June 8, 1977 the Conference adopted Protocols I and II and placed the documents open for signature by state governments in Berne, Switzerland on December 12, 1977.

Before the end of the twelve-month signing period, sixty-two states had signed Protocol I and

fifty-nine states had signed Protocol II. In order for both Protocols to become accepted as binding international law, ratification or accession by two states was required. By December of 1978 El Salvador and Ghana had ratified both Protocols, and Libya had notified the Swiss Federal Council (the formal repository for the documents) that it had acceded to both Protocols on June 7, 1978. In accordance with the Protocol Agreements, they had become international law in 1979. As of June 1985, fifty-one countries had ratified or acceded to Protocol I and forty-four countries had ratified or acceded to Protocol II.

As the language of the Protocols indicate, both are concerned with the protection of *victims of armed conflict*. However, there is an important distinction between them: Protocol I applies to *the protection of victims of international armed conflicts*, while Protocol II applies to *the protection of victims of non-international armed conflicts*. While both Protocols are far reaching in their implications for the responsibility of belligerents in an armed conflict for the care and protection of civilian populations and prisoners-of-war, Protocol I is much more substantial. Protocol I requires international peace-keeping initiatives to become organized, and Protocol II simply imposes "rules of conduct" on the belligerent parties while leaving the responsibility for reestablishing "law and order" up to the state.

Protocol for Wars of Libetation

The fifty-one pages of Protocol I contain statements about definitions of parties, care and treatment of the wounded, sick and shipwrecked; methods and means of warfare and combatant and prisoner-of-war status, protection and treatment of civilian populations, measures for executing the conventions and the Protocol, conditions under which breeches of the conventions and the Protocol are determined, regulations concerning identification: Of medical facilities, provision of emblems, use of light, radio and electronic signals, identity cards for civil defense; and identity cards for journalists on dangerous professional missions. The parties to a conflict are responsible for establishing mechanisms within their own organization to ensure compliance with all of the provisions.

Scope

Protocol I extends to a wide range of *international* conditions of armed conflict. As is indicated in the first part, the provisions of Protocol I apply to situations of armed conflict *in which peoples are fighting against colonial domination and alien occupation and against racist rẻgimes in the exercise of their right of self-determination*. (Protocol I, Part I, Article 1, Paragraph 4) No fewer than fifty wars currently characterized as regional or *sub-regional* would fall within the Scope of this Protocol. Consequently, Protocol I and the original conventions drawn up in 1949 would extend to conflicts as apparently unsimilar as the wars of Indonesia with West Papua, the Republic of Molluca and East Timor; and the Soviet Union's war against the Indigenous Nations of Afghanistan. This Protocol would apply to Nicaragua's war with the Miskito, Sumo and Rama Nations and France's war with the Kanak Nation in New Caledonia. Ethiopia's wars with Eritrea, Tigre and Wollo; Morocco's war with the

Saharawi peoples (Polisario Front); the Philippine wars against the Kalinga and Bontac peoples; Israel's war with the Palestinian peoples, and Bangladesh's war with the Indigenous Nations of the Chittagong Hill Tract Region would also be applicable under Protocol I.

Article 2 under General Provisions specifies that the Geneva Conventions and the Protocol apply from the beginning of a conflict to the *general close of military operations*. But, it notes that certain provisions remain in force until the release, and repatriation of prisoners and displaced persons, and reestablishment of normalcy. None of the parties to armed conflict may denounce or *deny applicability* of the Protocol and the Geneva Conventions after a conflict has begun. And, though only one of the parties may be bound by virtue of ratifying the Conventions and Protocol, and the other party is not, both are bound for the duration of the conflict. (Part VI, Articles 96,99).

Protecting Powers and other International Supervision

Significantly, Protocol I does not attempt to define the legal status of either the parties to an armed conflict or the status of the territory which may be the focus of the conflict. In this respect, the Protocol is neutral. But, it does allow for international measures which seek to ensure compliance by the belligerents with the provisions of the Protocol and the 1949 Conventions. One or more Protecting Powers may be secured through a process involving the International Committee of the Red Cross, or similar neutral party, to supervise the implementation of the Geneva Conventions and the Protocol. The Protecting Powers, once secured, have the responsibility for *safeguarding the interests of the Parties to the conflict*. (Part I, Article 5, Paragraph 1) Though this is a clearly rational approach to conflict resolution, this provision has not been invoked by any of the parties to conflicts presently raging in the world despite the requirement that such steps must be initiated *from the beginning of any situation* of armed conflict as defined within the scope of the Protocol.

Acting as the depository for the Protocol, the Swiss Federal Council has the duty to convene a meeting (at intervals of five years) of representatives from those states which have ratified or acceded to the Protocol for the purpose of electing a fifteen member International Fact-Finding Commission. (Part V, Section II, Article 90) The Commission is established to inquire into *any facts alleged to be a grave breach* of the Protocol or the Geneva Conventions. It also has the obligation to *facilitate the restoration of an attitude of respect for the Conventions and this Protocol* by all parties to an armed conflict. The Commission's initiatives are to be carried out by a *Chamber consisting of seven members* including five individuals appointed from the Commission and two independent ad hoc members. And, any initiatives taken by the Chamber will be predicated on a request by one of the parties, and all parties to a conflict giving consent.

By virtue of this process, the International Fact-Finding Commission functions as a *quasi-judicial body,* which gathers evidence, discloses the evidence for review by all parties and permits

each party the opportunity to challenge the evidence. After preparing a report on its findings, the Commission is then authorized to make recommendations to the conflicting parties for ensuring their compliance with the Geneva Conventions and the Protocol.

If a state or non-state party to armed conflict is found to have violated provisions of the Geneva Conventions or the Protocol, it is bound by the agreements to *pay compensation, and retain responsibility for all acts committed by persons forming part of its armed forces*.

By specifying a roll for international institutions and individual states in a supervisory capacity, Protocol I suggests that the international community is willing to accept a non-state combatant (i.e. Southwest African Peoples' Organization, the Nations of Miskito, Sumo and Rama; Free Papua Movement, the Nation of Chakma, or Kanak Liberation Front) as a legitimate sovereign to be treated with the same level of respect as a state. In no other, so-called, new international legislation has such admission been made. In no other new international legislation is there a provision included which implicitly grants international recognition of sovereignty to an Indigenous Nation or other organized group resisting state power. This is a major change in international law which has long asserted the supremacy of state sovereignty and state power even at the expense of Indigenous Nations and other resistance groups.

Methods and Means of Warfare

Few individuals outside of diplomatic or military circles are aware that extensive and detailed rules have been specifically developed to guide the conduct of warfare. Despite the requirement contained in practically all pieces of international legislation that each state widely disseminate the actual documents of international agreement, few states actually do this. It should not be surprising, therefore, that little is generally known about the extent to which crimes are committed during acts of warfare.

Provisions expressly forbid attack or injury to a person or persons who have surrendered, taken prisoner or who have been rendered unconscious or incapacitated by wounds or sickness. (Part III, Section I, Article 41) Protocol I specifically addresses the status of combatants and prisoners-of-war.

Where a member of an armed force fails to abide by these rules and falls under the control of an adversary, the right to be classified as prisoner-of-war is forfeited. The individual may then be treated as a civilian prisoner and may be tried and punished for any offenses committed.

Spies and other persons engaged in espionage are not considered to have the right to the status of prisoner-of-war. Provision is, however, made for individuals who *gather or attempt to gather information* inside the adversary's territory if they are wearing a uniform identified with his or

her armed forces. In this situation, the person is considered a prisoner-of-war if captured. Individuals who participate in hostilities as mercenaries, do not have the right to prisoner-of-war status.

While engaged in actual combat, participants in armed conflict are regarded as being in compliance with the Geneva Conventions and Protocol I if they direct their military operations against military objectives and military personnel only. If, however, such military operations become directed at civilian populations or civilian objects the offending party is considered in violation of the agreements.

Protection of Civilian Populations

An often used tactic in warfare is the killing and destruction of civilian populations and their homes and property. In armed conflicts involving non-state and state combatants, civilian populations are frequently considered strategic targets because they represent material support to the armed forces. The Geneva Conventions and Protocol I pay significant attention to prohibitions in connection with civilian populations. The Rules of War expressly deny the legitimacy of attacks by armed forces on civilian populations either as indiscriminate acts, overt acts or as acts of reprisal. Belligerents are also prohibited from moving civilian populations in such a way as to shield military objectives from attacks or to shield military operations.

Conflicting parties are required to avoid the destruction of *cultural objects* (historic monuments, works of art, places of worship), and they are enjoined from using these objects to support the military effort.

It is considered a violation of the Geneva Conventions and Protocol I for any party to an armed conflict to engage in practices aimed at the starvation of a civilian population or destruction *of objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works for the specific purpose of denying them for their sustenance value to the civilian populations or to the adverse Party. (Part IV, Section I, Chapter III, Article 54).*

Treatment of women and children is also specifically mentioned in Protocol I. Rape, forced prostitution and other forms of *indecent assault* are strictly forbidden, and if committed they are considered a violation of the Geneva Conventions and the Protocol. Assaults on children are also banned. Provision is made for the protection of journalists who are *accredited to the armed forces* or provided identification cards by the state, non-state organization or news organization.

State and non-state parties to armed conflict are obliged to grant safe passage to the International Committee of the Red Cross or other international humanitarian organizations to ensure their ability to assist civilian populations. Indeed, all parties to a conflict are required to furnish assistance to humanitarian organizations (i.e. Red Cross Red Crescent, Red Lion and Sun among them) as they carry out their efforts to aid civilian populations and refugees.

Protocol II: "Internal Conflicts"

Many wars between states and non-state interests are being prosecuted solely within the boundaries of an established state. These wars are thought to involve dissident armed forces with whom, presumably it is thought that future reconciliation with the state is possible. Protocol II extends certain provisions of the 1949 Geneva Conventions to these situations. Emphasis is placed on *humanitarian principles and fundamental human rights protections*. Virtually all aspects of armed conflict within the framework of warfare are absent from Protocol II, as distinct from Protocol I. But, it is clear that many of the same obligations imposed on belligerent parties by the Geneva Conventions remain intact as they relate to the treatment of prisoners, protection of the wounded, sick and shipwrecked, and the protection of civilian populations.

The circumscribed character of Protocol II does suggest a narrowing of applications, but it does have the potential for modifying the political and military behavior of both state and non-state parties to armed conflict. But, because of its limited scope, it is unlikely that many contemporary or future conflicts will have this Protocol applied to them.

Furthermore, because of its narrow scope, few parties to whom the Protocol would apply would be able to invoke its provisions since their access to international institutions and the state are, by definition, severely restricted. But, surprisingly, despite these limitations Protocol II is generally considered the most controversial of the two agreements. Signatory states, and states which have ratified or acceded to Protocol I have demonstrated greater reluctance and more reservations toward Protocol II. The Philippine government willingly signed Protocol I, and with Vietnam, Greece and Cyprus failed to sign Protocol II. Vietnam and Cyprus ratified Protocol I with seventeen other states, but they were unwilling to ratify Protocol II. Similarly, thirty-two states acceded to Protocol I though only twenty-seven acceded to Protocol II. Included among the thirty-two states acceding to Protocol I are Mexico, Mozambique, Zaire, Syria, Cuba, Angola and Zaire. These states were unwilling to agree to Protocol II.

Signature, Ratification and Accession provisions for Protocol II are the same as for Protocol I. The Protocol is exactly the same as Protocol I where provisions for amendments, denunciations, modifications and entry into force are concerned.

Nations must Act

Before a change in relations between nations and states can become a reality, Indigenous Nations must initiate steps in accordance with the Geneva Conventions and their Protocols to invoke provisions of the agreements within the responsible forums. In addition, Indigenous Nations must take steps to formally review and ratify the accords, register their agreement with the Swiss National Council and notify the relevant international institutions. While this latter step is clearly not stipulated by the protocols specifically in terms of Indigenous Nations, there is no provision in either protocol limiting the definition of High Contracting Party to states. Indigenous

Nations can become High Contracting Parties to the Geneva Conventions and the subsequent protocols on their own initiative.

By becoming a party to the Geneva Conventions and the Protocols, and by invoking the provisions of particularly Protocol I, Indigenous Nations can, perhaps decidedly, cause a shift in the balance of power in their current conflicts with states. By causing such a political shift to occur, Indigenous Nations can, for the first time, introduce impartial international parties (i.e. International Red Cross and Protecting Powers) as legitimate supervisors of the conflict, and potential parties to facilitating a peaceful settlement of the conflict.

Without the invocation of impartial parties, and without the benefit of enforceable international rules of conduct, Indigenous Nations are left to the currently "protected" will of state powers. With the imposition of the Geneva Conventions in current armed conflicts, both states and Indigenous Nations will have a structure and a forum through which peaceful alternatives to the conflict can be formulated — in accordance with standards accepted by state and national peers.

Furthermore, new mechanisms can be evolved through internationally sanctioned institutions which can assist in the resolution of seemingly unending and growing conflicts between Indigenous Nations and States which currently have no such forums. Political alternatives to the intractable confrontations may be possible if-and-only-if the actual reasons for armed conflict can be aired.

These potential peace-making alternatives can be substantially enhanced by the prospects that civilian populations will become protectable in accordance with internationally accepted standards. Indigenous Nations have suffered extensive deprivations at the hands of state terrorism under the guise of police actions or civil actions to establish law and order. Were the thirteen Indigenous Nations of the Chittagong Hill Tracts Region of Bangladesh to invoke the Geneva Conventions and Protocol I, the State of Bangladesh may have second thoughts about its transmigration program and police actions which have resulted in the destruction of hundreds of indigenous villages and the killing of in excess of 200,000 Indigenous Nationals since 1972. Similarly, Indonesia may reconsider its unfettered attacks on West Papua, the Republic Of Molluca and East Timor which have resulted in an estimated killing of 300,000 Indigenous Nationals since 1969. The State of Nicaragua may reconsider its persistent attacks on the Nations of Miskito, Sumo and Rama; and Ethiopia, Morocco and the Soviet Union may reconsider their attacks on Indigenous Nations.

So called regional wars, may become manageable according to accepted international law if Indigenous Nations took the initiative to invoke the Rules of War now ratified by many states. Super powers and secondary powers which choose to intervene in nation and state wars to protect what they consider to be their strategic interests may be restrained if they saw that an alternative to their intervention was possible.

As has always been the case, Indigenous National initiatives in the international arena are essential to the changing of violent conditions which surround them. Perhaps, if Indigenous Nations will take the initiative to embrace the Geneva Conventions and Protocols I and II, they can not only shift the balance of power in relations between nations and states, but they can significantly alter the anarchic climate created by self-interested super powers to establish important alternatives to the resolution of conflict within states and regions of the world. It is possible that the smallness of Indigenous Nations is not a disadvantage to affecting international change, but rather the most important advantage that large states do not enjoy. The political and strategic opening which is apparent by the existence of Protocols I and II may be the first real opportunity available to Indigenous Nations since the beginning of the colonial era to once again become full members of the family of nations — joining states on an equal plain.

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