

An International Law of Guerrilla Warfare: the Global Politics of Law-Making, by Keith Suter

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LAW OF CONFLICTS AND CONFLICT RESOLUTION

AN INTERNATIONAL LAW OF GUERRILLA WARFARE: THE GLOBAL POLITICS OF LAW-MAKING. By Keith Suter. New York, N.Y.: St. Martin's Press, 1984, 192 pp., \$27.50.

The author of this study states quite candidly that "the book does not devote as much attention to guerrilla warfare as might be expected from its title. . . ."¹ While it is true that much of the book is concerned with matters other than the substantive rules of international law applicable in guerrilla warfare, this does not detract from its overall value, but merely from the validity of its title. This book is an outstanding survey of the political and practical problems that have beset attempts to upgrade the law of war between 1949 and 1977. While, as will appear later in this review, the present reviewer does not always agree with the opinions stated or the conclusions reached by the author, this book represents solid scholarship and its purview goes far beyond the limits which appear to be drawn by the title.

The author lists his three main objectives as being:

- a. to examine the attempt to devise rules for guerrilla warfare;
- b. to analyze the politics that went into the drafting of the 1977 Additional Protocols; and
- c. to give the story behind the Additional Protocols.

He succeeds admirably in attaining all three of these objectives.

Beginning with the anonymous, but authoritative, article in the 1920 British Yearbook of International Law² and continuing with the unfortunate 1949 decision of the International Law Commission³, there is a detailed discussion of the failure of the League of Nations and of the United

1. K. SUTER, *AN INTERNATIONAL LAW OF GUERRILLA WARFARE* 3 (1984). The first four of the seven chapters include only an occasional passing reference to guerrillas and guerrilla warfare. Other subjects include "case studies on transnational organizations at work, notably the United Nations, the ICRC and some human rights international non-governmental organizations (NGOs). . . ." *Id.* Fortunately, Michel Veuthey's *GUERRILLA ET DROIT HUMANITAIRE* (2d ed. 1983), which discusses the substantive rules on the subject, is in the process of being translated into English. When it is available the two books will supplement each other.

2. *The League of Nations and the Laws of War, 1920-1921* BRIT. Y.B. INT'L L. 109. Dr. Suter identifies that anonymous author as Philip Noel-Baker. K. SUTER, *supra* note 1, at 39-40.

3. *Report of the International Law Commission to the General Assembly on the Work of the First Session, 1949* Y.B. INT'L L. COMM'N 277, 281 (para. 18).

Nations to enter the field of the law of war between 1920 and 1968.⁴ Despite this lack of activity by these international organizations, there were attempts made to develop the law of war during this period, many unsuccessful, but some successful, to which the author perhaps accords too little credit.⁵ The emphasis which he places on the adoption of the four 1949 Geneva Conventions for the Protection of War Victims⁶ is, of course, fully warranted. He seems, however, somewhat ambivalent concerning the importance of these instruments. Thus, speaking of Common Article 3 of those Conventions, the so-called "mini-convention" for non-international wars, he quotes with approval the statement:

The resulting solution was new, daring and paradoxical; it marks a decisive step in the evolution of modern law, which tends to restrict the sovereignty of the state in the interests of the individual.⁷

and again

. . . it was useful in enabling governments to become accustomed to the principle of non-international conflicts being regulated by international law.⁸

but elsewhere he states that

By grafting the [1977] protocols onto the [1949] conventions, the drafters have grafted an ambitious text to a near moribund set of rules.⁹

4. K. SUTER, *supra* note 1, at 39-44.

5. Particular reference could be made to the work of the Commission of Jurists which drafted the 1923 Hague Rules for the Control of Radio in Time of War, 32 AM. J. INT'L L. 2 (Supp.1938), and the 1923 Rules of Aerial Warfare, *id.* at 12; the 1930 London Naval Treaty, 46 Stat. 2858, T.S. No. 830, 112 L.N.T.S. 65; and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 240.

6. Geneva Conventions for the Protection of War Victims, 6 U.S.T. 3114/3217/3316/3516; T.I.A.S. Nos. 3362/3363/3364/3365; 75 U.N.T.S. 31/85/135/287.

7. K. SUTER, *supra* note 1, at 15, citing J.S. PICTET, HUMANITARIAN LAW AND THE PROTECTION OF VICTIMS 55 (1975).

8. *Id.* at 17. He does not mention, in this connection, the problem of securing from the anti-government forces an acceptance of the fact that their acts are likewise "regulated by international law." In Algeria the anti-French forces demanded its application. M. BEDJAOU, LAW AND THE ALGERIAN REVOLUTION 207-220 (1961). As a more usual procedure, the anti-government forces have asserted that they were "not bound by the international treaties to which others besides itself subscribed. . .," 5 INT'L REV. RED CROSS 636 (1965).

9. K. SUTER, *supra* note 1, at 178.

While there is no question but that numerous provisions of the 1949 Geneva Conventions have been violated in many of the armed conflicts which have occurred since their adoption and that they have not always been accorded the respect which they deserve, there has been compliance with some, and sometimes many, of their provisions in all such conflicts, and compliance with substantially all of their provisions in some conflicts, notably the 1982 Falkland Islands War. Even in a conflict such as that between Iran and Iraq, where there is only minimal compliance, the fact that both sides have, from time to time, permitted the International Committee of the Red Cross (ICRC) to function and to visit prisoner-of-war camps may be attributed to those Conventions. Moreover, many of the "points of special concern" expressed by both of those countries to the Mission dispatched by the Secretary-General of the United Nations were based upon the standards of the Conventions.¹⁰ Under these circumstances they can scarcely be termed "moribund."

In 1956 the ICRC circulated a set of "Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War" for presentation to the XIXth International Red Cross Conference to be held the following year in New Delhi. Resolution XIII adopted by the Conference directed the ICRC to transmit the Draft Rules to the governments for their examination.¹¹ There they met with a "crushing silence." The author ascribes this failure to the fact that

. . . the ICRC overlooked one of the main lessons from the recent history of the development of the law of armed conflicts: the development of such law occurs after an armed conflict, not during one. For it is immediately following an armed conflict that there is considerable public and official antipathy towards war which can be channelled into drafting an international law which, being based on the experiences of that conflict, can try to avoid similar experiences in future conflicts; lawyers, like soldiers, are always concerned with the last war.¹²

This is a bit of philosophy which both the ICRC and the governments genuinely interested in extending the range of the coverage of the law of war would do well to bear in mind. This, too, is why diplomats and lawyers are frequently charged with making law for the last war, rather than for the next one. Of course, if they were sufficiently clairvoyant to foresee the

10. Prisoners of War in Iran and Iraq: The report of a mission dispatched by the Secretary-General, U.N. Doc. S/16962 at 67-71 (1985).

11. Compte rendu de la XIXe Conférence Internationale de la Croix-Rouge 170 (1957).

12. K. SUTER *supra* note 1, at 93.

weapons and methods of war that would be developed and employed in the next war, they might do a better job. Unfortunately, they have the normal human limitations!¹³

Dr. Suter sets the 1968 Teheran United Nations International Conference on Human Rights as the real beginning of the renaissance of governmental interest in updating the law of war. It adopted a resolution on the subject which, in effect, called on the United Nations to reverse its long-standing policy and enter that neglected field.¹⁴ The General Assembly thereafter adopted Resolution 2444 (XXIII), "Respect for Human Rights in Armed Conflicts," 19 December 1968,¹⁵ which, with subsequent similar annual resolutions, resulted in a series of reports on the subject by the Secretary-General (prepared for him by the Secretariat's Division of Human Rights)¹⁶. Throughout Chapter 3, titled "Maintaining the Momentum: the United Nations," the author indicates dissatisfaction with the fact that during the period subsequent to the 1971 Report of the Secretary-General the United Nations had gradually moved into a passive role with respect to the task of updating the law of armed conflict, allowing the initiative to pass to the International Committee of the Red Cross and the Swiss Federal Council. He frequently refers to "the opposition of the ICRC towards the UN involvement in this subject."¹⁷ He implies that the ICRC was averse to the idea of the United Nations moving into its "turf." This may well have been part of the ICRC's motivation—but another part was undoubtedly the fear, not limited to the ICRC, of the involvement of the UN, a highly political animal, in an area best left devoid of politics to the maximum extent possi-

13. The author also points out that another reason for the failure of the Draft Rules was the breadth of such a provision as Article 14 which prohibited "the dissemination of incendiary, chemical, bacteriological, radioactive or other agents. . . ." He correctly states: "This was a foolish proposal to make and in retrospect it is difficult to see why the ICRC should have decided on this course of action." K. SUTER, *supra* note 1, at 94. (This reviewer's copy of the Draft Rules contains the following notation made in 1956 beside Article 14: "This is disarmament without effective international control.")

14. For the text of the resolution, see K. SUTER, *supra* note 2, at 30-31. Dr. Suter ascribes this action to the single-handed efforts of Sean MacBride, then the Secretary-General of the International Commission of Jurists. There can be little doubt that the author is a great admirer of MacBride. He devotes eleven pages (24-35) to MacBride's life, his efforts in the law of war area, and his success in guiding a resolution on the subject through the 1968 Conference; another eleven pages (44-55) on MacBride's efforts to ensure a follow-up by the United Nations; and frequently refers to him elsewhere. There is, however, a considerable question as to whether MacBride is actually entitled to all the accolades so showered upon him.

15. For the text of the resolution, see K. SUTER, *supra* note 1, at 54.

16. U.N. Doc. A/7720 (1969); U.N. Doc. A/8050 (1970); U.N. Doc. A/8370 (1971); and U.N. Doc. A/8781 (1972).

17. K. SUTER, *supra* note 1, at 44, 56.

ble. The events at the 1974 Geneva Diplomatic Conference clearly demonstrated this. The author himself says:

The Western delegations attended the [1974] session expecting to find an international law gathering and so tried to discuss the session's business, especially in regard to wars of national liberation, in legal terms. The other delegations saw it more as a political gathering with legal considerations taking second place. The 1974 session seemed to consist of two sets of delegations, which did not fully understand what the other side was talking about.¹⁸

and again:

Why, then, should the Third World Governments have risked this collapse [of the 1974 Diplomatic Conference] to incorporate a provision in Protocol I which the governments at which it was aimed would not ratify? The explanation to this conundrum could only be found in politics, it did not make legal sense.¹⁹

This reviewer shudders at the possibility of the General Assembly drafting, or even merely attempting to oversee the drafting, of provisions updating the law of war. Moreover, the author seems to denigrate the work of the ICRC. Thus, he says: "In retrospect the [UN's] delay was fatal. It augmented the trend of letting the ICRC handle the work [of updating the law of war.]"²⁰ And again: "The resolution represented success for the lobbying of the ICRC and Swiss Federal Council, in being able to relegate the UN's role in this subject to that of monitoring the ICRC's work. . . ."²¹ Although the author states that he is "an admirer of the International Red Cross"²² and cites another study to support that statement, one certainly does not reach that conclusion from this book!

The United Nations having "abandoned" to the ICRC the task of updating the law of armed conflict, the latter convened meetings of Government Experts in 1971²³ and 1972,²⁴ meetings which resulted in two "Draft Additional Protocols" to the 1949 Geneva Conventions; and then, at its request, the Swiss Government convened a Diplomatic Conference in Febru-

18. *Id.* at 128.

19. *Id.* at 146.

20. *Id.* at 66.

21. *Id.* at 68.

22. *Id.* at Ch. 4, n.11, at 126.

23. *Id.* at 109-15.

24. *Id.* at 117-23.

ary 1974 to consider those drafts. The author's discussion of the trials and tribulations of this Conference,²⁵ particularly the political problems of the first session, would alone accomplish all of his three objectives by giving a behind-the-scenes view of what transpired at Geneva and, to the extent possible, why.

On a number of occasions Dr. Suter refers to the lack of expertise of members of national civil services in the field of the law of armed conflict, particularly in the Third World countries, as having a negative effect on the actions taken by those nations in this area.²⁶ This is, unfortunately, true—and it is not restricted to Third World countries. This reviewer can recall commiserating some years ago with an expert from the United Kingdom that in neither his country nor in the United States was there any substantial number of younger men entering the field. This is, perhaps, understandable with respect to a young practitioner as it is scarcely a field that will start him on the road to wealth and to security for his family—but it is not understandable in so far as young political scientists and young lawyers in the academic world are concerned. The decade of 1970-80 saw tremendous activity in this area of international law.²⁷ Despite the prognostication of the author, this reviewer believes, as does the senior editor of the series of which this book is a part,²⁸ that much additional activity in this field and in the related field of disarmament can be expected well before the end of the century, among which might be: a convention banning the development, production, and stockpiling of chemical weapons; an additional convention (or conventions) on conventional weapons; further prohibitions on the use of the environment for the purposes of war; further prohibitions on the use of outer space for the purposes of war; further restrictions on the use of nuclear weapons; etc. Moreover, what the author says about the lack of personnel in the Third World countries trained in international law may no longer be true. Individuals trained in these areas in other countries have returned to their own countries and have joined their foreign services or have served as the nucleus for faculties in schools opened there. Books on various aspects of the subject are flowing from the pens of newly trained scholars from such countries. Today the President of the International Court of Justice is from one of those countries.

Finally, a few critical comments which, while they do not really detract from the value of the book, do appear to warrant mention. First, Dr.

25. *Id.* at Chs. 5, 6, and 7, pp. 128-85.

26. *Id.* at 70.

27. Levie, *Some Recent Developments in the Law of War*, 25 GERMAN Y.B. INT'L L. 252 (1982).

28. K. SUTER, *supra* note 1, at vii.

Suter states that "[t]he distinction between international and non-international conflicts is not longer feasible."²⁹ This reviewer must disagree with that conclusion. The applicable law has probably moved in this direction as to "national liberation movements," but there are many conflicts which are civil wars, pure and simple, to which that statement is not applicable. Salvador, Nicaragua, and a number of other indigenous attempts to overthrow existing regimes in South America and Africa are obvious examples. This is why there is an Additional Protocol II dealing with non-international armed conflicts.

Second, the author's methodology can be said to follow the advice once given to a speaker: "Tell them what you are going to tell them; then tell them all that you told them you were going to tell them; and then tell them what you told them." Each chapter starts with a numbered outline of its contents; then sets forth the substance; and then presents a numbered summary of what was contained in the chapter. (He also uses a numerical breakdown for almost every analysis.) While this leaves no doubt with respect to the author's facts, intentions, arguments, and conclusions, the reader soon acquires a feeling of *déjà vu*.

Third, throughout the book the author displays what this reviewer understandably considers to be unwarranted and unjustified antipathy towards "international lawyers." This is climaxed by the following, at the very end of the book:

If war is too serious to be left to generals, then this book has shown that the law of armed conflict is too serious to be left to international lawyers. Disarmament negotiations, by the same token, are too important to be left to the negotiators. NGOs should seek to be involved in one way or another at all stages of the work.³⁰

Apart from the fact that many members of the delegations at the Diplomatic Conference were not "international lawyers," it would seem that treaties on the law of war and on disarmament (which are often the same thing) are to materialize out of the thin air, drawn therefrom, perhaps, by Sean MacBride,³¹ assisted by non-governmental organizations (NGOs), many of which have such narrow mandates that they would be interested in only a single article of a document like the 1977 Additional Protocol I.

Fourth, two minor comments on a personal note: The author states

29. *Id.* at 149.

30. *Id.* at 184-85. See also the pejorative reference to "government legal experts and UN lawyers." *Id.* at 37.

31. For a discussion of Suter's views about MacBride, see *supra* note 14.

that when General Halleck wrote to Francis Lieber on 5 [actually 6] August 1862, requesting his views on the activities of guerrillas, the former was "then commander of the Union forces in the west during the American Civil War."³² In fact, Lincoln had appointed Halleck General-in-Chief of the Union armies on 11 July 1862 and the latter had arrived in Washington to assume that position on about 23 July.³³ Halleck's letter to Lieber was written from "Headquarters of the Army, Washington, D.C."³⁴ And, finally, either the author, or his typesetter, or his proofreader, is guilty of one of the solecisms most disliked by this reviewer—confusing "principle" and "principal."³⁵

These critical comments detract only to a very slight degree from the overall value of this book which should unquestionably be on the shelves of every library that purports to serve as a resource for studies in depth of the law of armed conflict.

*Howard S. Levie**

32. *Id.* at 1.

33. T.H. WILLIAMS, *LINCOLN AND HIS GENERALS* 132-33 (1952).

34. II U.S. DEP'T OF WAR, *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES* 301 (Ser. III 1902).

35. "The UN has six principle organs." K. SUTER, *supra* note 1, at 52.

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