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A BRIEF ANALYSIS OF THE 1977 GENEVA PROTOCOLS

by

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INTRODUCTION

In analyzing the two 1977 Protocols additional to the Geneva Conventions for the protection of war victims one should never forget that they are not the product of a sudden inspiration. The first cornerstone for Protocol I, on international armed conflicts, was laid in the early Fifties. The Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, drawn up by the International Committee of the Red Cross (ICRC) and submitted to the Nineteenth International Red Cross Conference (New Delhi, 1957), were an unsuccessful attempt to improve the protection of the civilian population against the effect of hostilities: the predecessor of Part IV of Protocol I. The legal staff of the ICRC built largely on this text — and on the experience of its rejection — while drafting the new text which eventually became Protocol I.

It took the wars of the Sixties (Viet Nam, Nigeria, Bangladesh, the Middle East) and decolonization to induce States to take a real interest in the reaffirmation and development of international humanitarian law. The famous UN Resolution 2444 (XXIII) is another cornerstone of the new edifice. Unanimously adopted in 1968 by the United Nations General Assembly, the resolution affirms three fundamental principles which must be respected “by all governmental and other authorities responsible for action in armed conflicts,” among them the absolute prohibition of attacks on the civilian population as such. At the same time, Resolution 2444 (XXIII) invites the Secretary-General “in consultation with the International Committee of the Red Cross” to study “the need for additional humanitarian international conventions.” As we know, the ICRC took up the issue once more, consulted innumerable experts, drafted two Protocols and finally asked the Swiss Government to convene the Diplomatic Conference which negotiated the Protocols, from 1974 to 1977, in Geneva.

The first session of the Diplomatic Conference was characterized by a clash between some countries from the Western world and others from the Third World. The issue was whether wars of national liberation should be qualified as international armed conflicts (and no longer as civil wars, which makes them an internal affair of the country concerned). We will come back to this issue later, but it should be recalled at this juncture that the Diplomatic Conference in Geneva was the first occasion for newly independent countries to participate in drafting rules of international humanitarian law. So it is not surprising that their delegates emphasized a point which was particularly im-

portant for them.

The emotional clashes on the subject of wars of national liberation subsided and gave way to calm negotiations, to a search for an acceptable balance between humanitarian considerations and military necessity. Most observers are of the opinion that the Conference succeeded in finding the right answers.

Before turning our attention to some contentious issues, let us have a look at the *major contributions of both Protocols*:

1. Protocol I increases the *protection of the civilian population* against the effects of hostilities, by codifying and supplementing the rules of customary law known as the "law of The Hague." The reaffirmation and simultaneous incorporation into treaty law of the prohibition of attacks against civilians is an event of historic significance.

2. Protocol I adds weight to the rules of customary law regulating *methods and means of warfare*. Indeed, in these final years of the twentieth century, governments have again committed themselves to the long-established principle that the right to choose the means of warfare is not unlimited. The text then goes on to adapt the provisions governing combatant status to present-day realities.

3. Protocol I fills certain *lacunae in the "law of Geneva."*

4. Protocol II brings a welcome advance in the *protection of victims of non-international armed conflicts* by developing the existing law (the provisions of Article 3 common to the four Geneva Conventions).

The American press has reported on the Joint Chiefs of Staffs' recommendation not to ratify Protocol I. Inasmuch as military considerations are meant to justify the rejection, the author of these lines, a lawyer, a foreigner and an official of a humanitarian organization, is hardly qualified to make a rebuttal. Nevertheless, the following comment seems permissible: Protocol I was negotiated over many years, with the participation of military experts in many delegations, and was finally adopted by consensus, no doubt after consultation of the military authorities back home: so the rules cannot be too far away from what is compatible with military considerations. It should be possible to find a solution for the remaining controversial issues in declarations of understanding or, if necessary, in reservations. Non-ratification of Protocol I by a major power, however, would make it impossible to find a common framework of rules accepted by all sides, a framework which would have to be respected by all parties to future conflicts.

Others have voiced the criticism that Protocol I blurs the distinction between combatants and civilians, and that it introduces subjective criteria in the categorization of armed conflicts. These objections cover two distinct issues, **which have to be treated separately.**

ON THE DISTINCTION BETWEEN COMBATANTS AND CIVILIANS IN PROTOCOL I:

Articles 43 and 44 give a new definition of the criteria which, in an international armed conflict, have to be met if a person wants to qualify as a combatant and a prisoner of war. By taking into account the realities of guerrilla warfare, the new rules introduce a novel solution for the most difficult problem of striking the balance between the different interests involved. The resulting Article 44 is a compromise worked out at the Diplomatic Conference with the decisive participation of the United States delegation. It safeguards the immunity of the civilian population and brings guerrilla forces into the ambit of international humanitarian law, its rights and — particularly important — its obligations.

It is important to bear in mind that, while the law may be new, the problems raised by the presence of irregular forces on the battlefield are very old indeed. As long ago as 1874, at the Brussels Conference, governments tried to hammer out a compromise. It is interesting to note that, even at that time, representatives of small nations — the likely victims of enemy occupation — pleaded for the recognition of guerrilleros as lawful combatants, without success (the provision relating to a “levee en masse” being the concession made by the Conference). Article 43 and 44 of Protocol I are therefore the outcome of a long historical process.

A careful reading of Article 44, in particular paragraph 3, reveals that it does not permit war in civilian disguise. It is clearly stated that combatants have an obligation under the law to distinguish themselves from the civilian population (paragraph 3, first sentence). Feigning of civilian, non-combatant status by combatants is an act of perfidy (Article 37, paragraph 1(c)) and liable to sanctions as a violation of the law of war. Only under exceptional circumstances is the requirement of distinction weakened. Article 44, paragraph 3, second sentence, states: “Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself . . .” But even in these *exceptional* circumstances a combatant still has an obligation to distinguish himself from the civilian population and to carry arms openly “during each military engagement” and “during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.”

The keys for understanding this rule are the interpretation given to “exceptional circumstances” and to the word “deployment.” At the Diplomatic Conference, the general opinion was that only two situations might qualify under Article 44, paragraph 3, i.e., military occupation, and wars of national liberation. With respect to the interpretation of “deployment,” the U.S. delegation made a declaration at the signature of Protocol I which reads as follows: “It is the understanding of the United States of America that the phrase

“military deployment preceding the launching of an attack” in Article 44, paragraph 3, means any movement towards a place from which an attack is to be launched.” This understanding should safeguard its forces against surprise by the use of civilian disguise.

Under Protocol I, failure to meet the minimum standards became for the first time a breach of international humanitarian law liable to be penalized at national level.

The Diplomatic Conference had to find a compromise on the issue if it wanted to bring the three-year effort to modernize the law of international armed conflict to a successful conclusion. The new rule brings those guerrilla fighters who meet the new strict criteria into the orbit of international law. Those who qualify as lawful combatants are now under the obligation to respect the whole body of international humanitarian law. They may not attack civilians, take hostages, or spread terror among the civilian population. To do so would be a violation of international law and, under qualified circumstances, would constitute a grave breach, a war crime. The alternative would have been the exclusion of guerrilla fighters from the rights and obligations of the law of war — and the failure of the 1974-1977 Diplomatic Conference.

Those “fighters” who do not meet the strict criteria of Protocol I do not acquire combatant status and remain liable to penal prosecution under national law. They have to be guaranteed a fair trial. Otherwise, their status has not been affected by the law of 1977.

WARS OF NATIONAL LIBERATION

Article 1, paragraph 4, of Protocol I qualifies certain struggles for self-determination under very limited conditions as international armed conflicts. The idea is of course not new. Since the adoption of the Charter of the United Nations and, in particular, since 1960, the United Nations Organization has been consistently developing the concept of a right to self-determination.

The Diplomatic Conference chose to bring international humanitarian law into line with this evolution. It did not break new ground. Moreover, the Conference took a very narrow approach to the concept of self-determination, consistent with the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (24 October 1970, 2625 (XXV)).

It may be recalled that only *peoples* have a right to self-determination. Any entity not qualifying as a people, such as a minority, or, *a fortiori*, a group of political opponents, does not have that right. Indeed, the above mentioned Declaration (to which Article 1, paragraph 4 of Protocol I refers) states clearly that there is no justification for any action which would break up an existing

sovereign state.

It has been said that under the Protocol regional organizations will decide which entity is a people and which is not. There is nothing in Protocol I which points in that direction. It is always the government of the State against which a group is opposed which ultimately decides on the character of the conflict.

New Article 1, paragraph 4, of Protocol I has to be viewed in this narrow sense and understood accordingly. In no way has Protocol I abolished the distinction made by international humanitarian law between international and non-international armed conflicts.

The legal effect of Article 1, paragraph 4, is that the two sides involved in such a conflict will be obliged to respect the whole body of humanitarian law applicable in international armed conflicts, including, of course, its far-reaching rules on protection of the civilian population. Both sides are subject to the *same* obligations. Protocol I does *not* call the doctrine of the "just war" back from oblivion.

In the opinion of most delegations at the 1974-1977 Diplomatic Conference, only a very small number of situations could actually be covered by this rule. It is well known that the States whose names have been advanced in this context will not ratify Protocol I. The problems raised by Article 1, paragraph 4, are therefore mainly academic in character.

These few remarks conclude with a reminder to the audience that the 1977 Protocols are also a product of their time. They are the mirror of the hopes and the controversies of recent decades. The overwhelming majority of the new rules are universally considered as a positive achievement, an important step forward, in particular in protecting civilians against the horrors of war. The presence of a small number of controversial rules which do not belong with the overall gist of the texts should not mask the fact that the Protocols provide far greater protection for the victims of war. They should therefore be very widely accepted and ratified.

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