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INTERNATIONAL REVIEW

OF THE RED CROSS

SPECIAL
20th anniversary
of the Additional Protocols



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The *ICRC*, which gave rise to the Movement, is an independent humanitarian institution. As a neutral intermediary in the event of armed conflict or unrest it endeavours, on its own initiative or on the basis of the Geneva Conventions, to bring protection and assistance to the victims of international and non-international armed conflict and internal disturbances and tension.

INTERNATIONAL REVIEW OF THE RED CROSS

No. 320

September-October 1997

A note from the Editor 469

20th anniversary of the 1977 Additional Protocols

**Appeal by the International Committee of the Red Cross on the
20th anniversary of the adoption of the Additional Protocols
of 1977** 471

The Protocols additional to the Geneva Conventions
Jean de Preux 473

**The 1977 Protocols: a landmark in the development of international
humanitarian law**
René Kosirnik 483

The 1977 Additional Protocols: 20 years on 507

Comments on the Geneva Protocols
George H. Aldrich 508

Adoption of the 1977 Additional Protocols
Igor P. Blishchenko 511

467

Comments on Protocol I	
<i>Yoram Dinstein</i>	515
Growth of expertise as a result of treaty-making	
<i>Dieter Fleck</i>	520
The prohibition of reprisals in Protocol I: Greater protection for war victims	
<i>Konstantin Obradovic</i>	524
Persuading States to accept humanitarian treaties	
<i>Hans-Peter Gasser</i>	529

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* *
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The philosophy of international law: Suárez, Grotius and epigones	
<i>Sergio Moratiel Villa</i>	539
Origin of the twin terms <i>jus ad bellum/jus in bello</i>	
<i>Robert Kolb</i>	553

Reports and Documents

Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction	563
1977 Additional Protocols — short bibliography	579

Geneva Conventions and Additional Protocols

Accession to the Additional Protocols by the Lebanese Republic	582
Tajikistan: Declaration in accordance with Article 90 of Protocol I ...	582
Implementation of international humanitarian law by Denmark	583

Miscellaneous

Training seminars for university teachers on international humanitarian law	591
International Review of the Red Cross — Table of contents 1988-1995	593

A note from the Editor

Twenty years ago, on 8 June 1977, two Protocols additional to the 1949 Geneva Conventions were adopted by a Diplomatic Conference especially convened for the purpose of reaffirming and developing international humanitarian law applicable in armed conflict. The two new treaties adapted the universally accepted 1907 law of The Hague and the 1949 Geneva Conventions for the protection of war victims — themselves a response to lessons learned during the Second World War — to the challenges of warfare in the fourth quarter of the twentieth century. The main goal of the treaty-making process was to remedy the main lacunae left in 1949, that is, to strengthen the international rules protecting the civilian population from the effects of military operations and other acts of hostility.

Although States' acceptance of the 1977 Protocols through ratification or accession and, in parallel, the incorporation of their provisions into an international consensus on what is acceptable or otherwise in the conduct of military operations are success stories in themselves, this is no time for self-congratulation. There have been too many serious violations of international humanitarian law in recent or ongoing conflicts. They remind us all too often that the capacity of the law to influence human conduct is limited. Instead the *Review* proposes to mark this anniversary by publishing a number of articles that throw light on various aspects of the new law. In particular, at the invitation of the *Review*, several scholars and government lawyers who were involved in the codification process in the 1970s share some thoughts on the new treaties, 20 years later. Last but not least, the President of the ICRC appeals to governments not only to accept the Protocols formally but also to comply with their provisions.

The *Review* is also publishing two articles that will respond to our readers' interest in the history and philosophy of international humanitarian law. Sergio Moratiel Villa examines the contribution of the Spanish school of internationalists to the evolution of international humanitarian law, and Robert Kolb traces the history of the terms *jus ad bellum* and *jus in bello*.

On 18 September 1997, a Diplomatic Conference convened by the government of Norway adopted a new treaty prohibiting the use of anti-personnel landmines, weapons whose destructive impact on civilians has come to be regarded as totally unacceptable. Readers of the *Review* will find the text of the Convention in this issue.

The Review

Appeal

by the International Committee of the Red Cross on the 20th anniversary of the adoption of the Additional Protocols of 1977

Twenty years ago, on 11 June 1977, the plenipotentiaries of over a hundred States and several national liberation movements signed the Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. This Conference had been convened by the government of Switzerland, the depositary State of the Geneva Conventions. After four sessions held between 1973 and 1977, themselves preceded by several years of preparatory work, the Conference drew up two Protocols additional to the Geneva Conventions of 12 August 1949, relating to the protection of the victims of international armed conflicts (Protocol I) and of non-international armed conflicts (Protocol II).

At present, 148 States are party to Protocol I and 140 to Protocol II. The two instruments constitute a significant development in international humanitarian law and are binding on nearly three quarters of the world's States. Recent conflicts have demonstrated only too clearly that States can become involved at any time in a situation covered by these treaties.

The adoption of the Protocols is a milestone in the long history of efforts to secure better protection for the individual in armed conflicts. This process includes the emergence of the Geneva Conventions in their successive versions of 1864, 1906, 1929 and 1949, which have offered invaluable safeguards for countless people over the years. The 1949 Conventions, comprising some 450 articles, were supplemented in 1977 by the 150 or so provisions of the two Additional Protocols, almost all of which were adopted by consensus.

The 1977 texts represent a considerable advance in the codification of the principles of humanitarian law recognized by all peoples. Today a number of their articles already form a set of rules of customary law

valid for every State, whether or not it is party to the Protocols. Another merit of the instruments lies in their multicultural nature, all the world's major powers having actively been involved in drafting them. The Protocols provide a timely reaffirmation of the respect due to a disarmed enemy and to persons taking no part in the hostilities. They also give those who come to the assistance of victims a more effective basis for their action, which is so vitally necessary.

The International Committee of the Red Cross wishes to take the opportunity offered by the 20th anniversary of the adoption of the 1977 Protocols to launch a solemn appeal to the governments of the 188 States party to the Geneva Conventions of 1949, urging those States which are not yet bound by the 1977 Protocols to ratify or accede to them as rapidly as possible. Governments must be aware of the universal scope of the Additional Protocols, which guarantees effective protection for conflict victims. The international community therefore has a collective responsibility to ensure the universality of the remarkable heritage that the Geneva Conventions and their Additional Protocols represent for mankind.

By becoming party to the Additional Protocols through ratification or accession, and by making the declaration provided for in Article 90 of Protocol I (International Fact-Finding Commission), governments will demonstrate the importance they attach to promoting greater respect for the basic rules of the law of Geneva throughout the world and their resolve to ensure that the law is implemented. In this way they will respond to the wish of all peoples to see the essential guarantees for protection of victims of armed conflict universally accepted, and will help make sure that the barbarous acts perpetrated in recent conflicts will not recur in the future.

Cornelio Sommaruga
President of the ICRC

What are they all about, the 1977 Protocols additional to the Geneva Conventions of 12 August 1949 for the protection of war victims? As a preliminary answer to that question, the Review is offering an article written in 1987 by Jean de Preux, former legal adviser and member of the ICRC's Legal Division, to mark the tenth anniversary of the adoption of the Protocols. The author, who worked at the ICRC for several decades, succeeded in outlining in just a few pages the essence of these treaties and the major advance they represent for international humanitarian law.

Readers wishing to acquire more in-depth knowledge may consult the already abundant literature on the Additional Protocols, their content and implications for contemporary international humanitarian law (see the summary bibliography, p. 579 ff.).

The Protocols additional to the Geneva Conventions¹

by Jean de Preux

The world now has a population of 5 billion, as against 1 billion in 1863 when the Red Cross was founded and the codification of the law of armed conflicts was initiated. For almost a century, the Red Cross concerned itself successively with soldiers wounded in action, victims of naval warfare, prisoners of war and civilians abandoned in wartime to the arbitrariness of foreign rule.

Today, without disowning what has been accomplished to date, we must look further afield and turn our attention towards other victims, the victims of present-day conflicts and the potential victims of future conflicts: the civilian population. This cannot be done without concern for

¹ Reprint. *IRRC*, No. 258, May-June 1987, pp. 250-258.

the conduct of those who do the fighting. Weapons proliferate while diverging views take root and limited armed conflicts grow in number, very often with no foreseeable outcome.

With huge sums being spent every year on armaments and countless human lives at stake, we must see to it that dramatic losses are prevented, or at least kept to a minimum. That is the purpose of the Protocols additional to the Geneva Conventions. Not that States are less inclined now than in the past to safeguard first and foremost what they consider to be their national interests; but they must realize that by protecting the civilian population they protect themselves. By promoting regulations concerning the conduct of combatants, they provide the conditions that are necessary to ensure respect—even, and especially, in times of armed conflict—for a modicum of legal rules and a nucleus of human society.

In one sense, Protocol I, applicable to international armed conflicts, appears to be a collection of disparate texts: Part II deals with the wounded, sick and shipwrecked, with missing and dead persons, and with medical services, that is with the victims of war. Part III deals with the definition of “combatants” and with their conduct, i.e., with combat. Part IV governs the conduct of hostilities as such, yet it also mentions civil defence, relief, and matters directly related to human rights. This heterogeneous collection demonstrates that the distinction between the Law of Geneva (law for the protection of victims of conflicts) and the Law of The Hague (law relative to the conduct of hostilities and the administration of occupied territories) is artificial and outdated. The law of armed conflicts is a single entity. It consists of rules governing space and of rules governing time. The former—covering where it is allowed (under *jus in bello* exclusively) and where it is not allowed to strike—deal mainly with the conduct of hostilities. The rules governing time fix the point in time when the duty of implementation, or even the obligation of providing assistance, starts to arise. They concern the victims of war. There is a constant correlation between the two types of rules.

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Yet it was not the need to amend the 1949 Conventions which gave rise to the Protocols, but the need to supplement them, owing to the gradual emergence of two major factors: first, the new forces appearing in the conduct of hostilities tend to extend the battlefield *ad infinitum*, which engenders tremendous risks for the civilian population; secondly, armed

conflicts take on new forms which it is impossible to ignore or to pass over in silence.

The protection of the civilian population against the effects of hostilities is the crucial question. It is expressly dealt with not only in Part IV but also in Part II—indeed, in the whole Protocol. Since the end of the First World War, aerial weapons can strike virtually anywhere in the enemy's territory, and their use is subject to hardly any regulations. Today, their technological sophistication is such (missiles, for instance) that nothing can stand in their way—save law. This fact at least has the advantage of reminding us that, when all is said and done, the survival of any society rests on law: *ubi societas, ibi jus*. Despite the terrible air raids of the Second World War, the issue was not broached by those who drafted the 1949 Conventions. But even worse than the bombings were the atrocities committed against certain categories of civilians in occupied territories and in the territories of the Parties to the conflict. Consequently, the primary object of the Geneva Convention relative to the protection of civilian persons in time of war (Fourth Geneva Convention of 1949) is to protect civilians against abuses of power and arbitrary measures by foreign rulers. It deals with civilians in enemy countries and the inhabitants of occupied territories. Protocol I merely supplements the provisions relative to protection with rules for the safety of the most vulnerable categories of civilians, without any adverse distinction. It also comprises a list of fundamental guarantees amounting to a summary of human rights, to which anyone affected by a situation of armed conflict should be entitled.

Just as those defending a fortress must man the most exposed section of the battlements, so those who drafted Protocol I were drawn inevitably to consider the lack of protection of civilians against the effects of hostilities. To make up for the deficiencies, Protocol I features three types of provisions: basic rules, rules of application and assistance measures.

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The fundamental principles enshrined in customary law are set forth in Part III, generally in an updated form. At a time when technical advances make it possible to cause virtually unlimited losses and damage, Art. 35 very appropriately reaffirms that the right of the parties to the conflict to choose methods or means of warfare is not unlimited. Although it does not take a definite stand on weapons, it does establish a ban on

superfluous injury (in relation to the military operation in progress and the military objective to be neutralized) and affirms the need to protect the environment. Fairness and humanity have from time immemorial distinguished combatants from bandits and highwaymen. Protocol I does not fail to confirm the main rules in the matter. Thus, all States party to the Conventions are invited to join in the reaffirmation of principles recognized by all armies throughout the world.

Yet the protection of the civilian population against the dangers of modern warfare calls for more. It implies that States must be fully aware of their responsibilities in the matter. Consequently, Protocol I states that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives”. In wartime, States must make this distinction even as regards their own population, since only on this condition will Parties to a conflict be able to “direct their operations only against military objectives”. Part IV lays down all the provisions necessary to ensure respect for this obligation, which constitutes the essence of Protocol I as it concerns the protection of the civilian population. In the process, it reaffirms some traditional rules, develops and supplements them where necessary and even creates new ones.

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In addition to reaffirming these fundamental principles, Protocol I states that attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which could be excessive in relation to the concrete and direct military advantage anticipated” are prohibited. This reaffirms the principle of proportionality and the prohibition of indiscriminate attacks which have always been deemed forbidden and are now explicitly banned. The same applies to attacks intended to spread terror among the civilian population. The definition of civilians, civilian population and civilian objects (as opposed to armed forces and military objectives, which alone are legitimate targets) is essential for the application of the principle of distinction.

The Protocol provides detailed definitions of these terms. Finally, it goes beyond the established rules in that it prohibits attacks against the civilian population and civilian objects by way of reprisals, provides unequivocally for the protection of objects which constitute the cultural

or spiritual heritage of peoples, states that starvation of civilians as a method of warfare is prohibited, forbids the use of methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment and thereby to prejudice the health or survival of the population, and bans attacks against works and installations containing dangerous forces. Those in charge of military operations must take the necessary precautions to ensure respect for these provisions and ascertain that attacks are directed against the adversary and not against civilians.

These aims may well be ambitious, but they are justified by the fact that vast numbers of human beings are helpless against the tremendous arsenal of modern means of destruction. Science advances by leaps and bounds, driven by the imagination, the tenacity and rigour of its researchers. But there is no reason why it should monopolize intelligence and progress. Good faith—that tenet which is to lawyers what rigorous regard for the facts is to scientists—must enable the law to catch up with the growing dangers engendered, for the civilian population, by the progress of modern technology.

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Assistance measures are to be found primarily in Part II concerning the wounded, sick and shipwrecked. The Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (First Convention of 1949) provides for the protection of the wounded and sick in the armed forces, medical and religious personnel attached to the armed forces, their establishments, units, equipment and means of transport. The Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea (Second Convention of 1949) establishes similar protection in the maritime sphere. As the civilian population and civilian individuals are not legitimate objects of attack, there was basically no need to provide for the protection of civilian wounded, sick and shipwrecked. However, experience has shown that civilians become casualties of military operations, and it is primarily to keep the number of civilian victims to a minimum that the rules relative to the conduct of hostilities were drawn up. However, with the weapons available nowadays, we must admit that even if the provisions of the Protocol are implemented, incidental civilian losses are unavoidable.

Thus it is to assist the victims of unintentional acts difficult to prevent that the Protocol extends the protection laid down in the First and Second Geneva Conventions to all sick and wounded persons, that is, including wounded and sick civilians and civilian medical services which, under the supervision of the State, may henceforth also display the red cross or red crescent as a protective emblem. Also under the Protocol, wounded members of the armed forces are now entitled to be helped by the use of medical aircraft. Humanitarian work on behalf of the civilian population is further promoted by provisions concerning the search for missing persons, the relief operations that must be permitted under suitable supervision, the preferential treatment to be given to women and children, and the civil defence services.

With all these rules, the Protocol confirms that war—if war there must be—should be waged against the enemy, which literally means against those who try to do harm, and not against defenceless people. Even so—and this is of paramount importance—suitable measures must be taken.

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Present-day armed conflicts are characterized not only by the emergence of new forces, but also by new forms of warfare. Guerrilla warfare is to be seen on most modern battlefields. It is fluid, light, flexible, mobile, invisible and elusive. It puts down its roots in the population, which is nowadays—at least potentially—threatened by modern weapons. This means that the old patterns have become blurred. The Third World considers the international humanitarian law system to be heavily tainted by European centrist attitudes. Under customary law and the Third Geneva Convention (Art. 4), the guerrilla fighters of a Party to the conflict are entitled to combatant status, and therefore to prisoner-of-war status, only if they fulfil the following conditions: being commanded by a person responsible for his subordinates, having a fixed distinctive sign recognizable at a distance, carrying arms openly, and conducting their operations in accordance with the laws and customs of war.

In the event of an invasion, civilians may temporarily (i.e. until they can form themselves into regular armed units) take up arms to resist the invading forces “provided they carry arms openly and respect the laws and customs of war” (this is the “mass uprising”). As for combatants who do not fulfil these conditions, they are not outlawed, but remain at all times “under the protection and authority of the principles of international law

derived from established custom, from the principles of humanity and from the dictates of public conscience” (Martens clause).

In today’s armed conflicts, guerrilla fighters very seldom comply with the obligation to wear a uniform at all times, or a fixed distinctive sign recognizable at a distance. Consequently, those who do not comply are not entitled to prisoner-of-war status if captured. However, this penalty has never dissuaded guerrilla fighters from pursuing their struggle. Furthermore, it is unlikely to induce them to respect the laws of war since these laws deny them combatant status. Consequently, the Protocol relaxed the obligation for combatants to wear a distinctive sign at all times, something which guerrilla fighters consider an obstacle to successful operations. The Protocol requires combatants to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. What is more, in particular instances (occupied territories, so-called asymmetric conflicts setting regular armed forces against guerrilla fighters), it suffices for guerrilla fighters to distinguish themselves from the civilian population by carrying their arms openly (i.e. visibly) during military engagements and before launching an attack. Guerrilla fighters who fail to meet these requirements, either by not carrying their arms openly or by taking unwarranted advantage of the possibility to limit themselves solely to this distinction—the exercise of which must be supervised by the authority to which they are answerable— forfeit their combatant status. They are civilians liable to prosecution for illegally carrying arms and for any hostile act they may have committed, but nevertheless entitled to the safeguards accorded to prisoners of war if and when they are tried and punished.

Thus, the law does not come after the event, but attempts to regulate it. Although guerrilla fighters are recognized by the Protocol, they are subject to an internal disciplinary system which must enforce compliance with the rules of international law applicable in armed conflicts. They are answerable for any breach of that law. They are not entitled to wage war in an individual or private capacity. They must belong to organized armed forces which are under a command responsible for the conduct of its subordinates to the Party to the conflict concerned, which cannot shed its obligation to respect the law of armed conflicts without incurring disqualification for the forces which represent it, and possibly even for itself.

Rejecting these rules would not stop guerrilla warfare. Accepting them and implementing them in good faith, always taking care not to jeopardize the lives of the civilian population, is currently the only way to put an end to the prevailing chaos.

Even a Party to a conflict “represented by a government or an authority not recognized by an adverse Party” may be called on to comply with these rules. This provision refers in particular to national wars of liberation launched in the exercise of peoples’ right of self-determination as enshrined in the Charter of the United Nations and recognized, in the Protocol, as international armed conflicts. In the present-day international community, there are still many instances where a new State was recognized only after an armed struggle, and not following a democratic process. It follows that the inclusion of national wars of liberation in the scope of the Protocol was requested—and obtained—by most of the members of the Diplomatic Conference.

Finally, Protocol I supplements the 1949 Geneva Conventions in several other fields: it refines the procedures for the designation of Protecting Powers, invites National Red Cross and Red Crescent Societies to train qualified personnel in international humanitarian law, and requests the Parties to a conflict to grant these Societies all the facilities they need to perform their humanitarian tasks on behalf of conflict victims. It provides for legal advisers in armed forces, it specifies the duties and responsibilities of military commanders, in particular as regards the failure to act when under a duty to do so, it provides for the establishing of fact-finding commissions in the event of alleged violations, and lists the grave breaches of the Protocol which should be prevented.

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Additional Protocol II, relating to the protection of victims of non-international armed conflicts, supplements Article 3 common to the four Geneva Conventions. The principles enshrined in Article 3—which are also to be found, for instance, in Lieber’s Instructions—are virtually all derived from customary law applicable in international armed conflicts. Thus, should a dispute arise over the qualification of a conflict (i.e. whether it is international or non-international), the Parties to the conflict are always bound to apply, as a minimum, the provisions of Article 3 which, in all internal armed conflicts opposing organized armed forces, has rendered invaluable services since 1949. But the scale, proliferation and violence of these conflicts required the adoption of more detailed rules.

In this respect, Protocol II provides major improvements. It establishes fundamental guarantees for all persons who take no direct part in hostili-

ties, in particular those deprived of their liberty and those against whom penal prosecutions have been instituted. Special protection is afforded to the sick, wounded and shipwrecked, as well as to medical and religious personnel, medical units and transports allowed to display the distinctive emblem of the red cross or red crescent. Medical activities as such are granted general protection. The civilian population, objects indispensable to survival, works and installations containing dangerous forces, cultural objects and places of worship are also the subject of special provisions meant to protect them from the effects of hostilities. Except in special circumstances, forced transfers of civilians are prohibited. Protocol II paves the way for relief work of an exclusively humanitarian and impartial nature, conducted without any adverse distinction.

The requisite concessions were doubtless obtained from governments at the cost of a relatively limited field of application. Concern to safeguard the State's sovereignty, the fear of being hampered in fighting insurgent or dissident elements, meant that it was not possible to give Protocol II a field of application comparable to that of Article 3 common to the four Geneva Conventions, although, from a humanitarian point of view, this would have been highly desirable. However, it sets forth, for non-international armed conflicts, standards recognized by the international community. On this count, it is a step forward and its effects should be felt not only in situations where its applicability is formally acknowledged, but in all non-international armed conflicts.

The 1977 Protocols: a landmark in the development of international humanitarian law

by René Kosirnik

Drafting the 1977 Protocols: an arduous but successful task

By adopting on 8 June 1977 the two Protocols additional to the 1949 Conventions, the States meeting in Geneva brought to a successful conclusion four years of arduous negotiations. The Protocols took four years, the Conventions only four months. Why such a huge difference?

In 1949, once the initial period of instinctive rejection of anything related to war had passed, a natural consensus emerged regarding the main evils which needed to be banned by law. Besides, the delicate subject of the rules governing the conduct of hostilities — the law of The Hague, as it is called, also part of humanitarian law — was left out of the discussions. It was also a time when the political map of the world was fairly monolithic, in the sense that the North still dominated the South, and East-West tensions had not yet escalated.

The idea of the Protocols was launched in a very different environment. The Third World had risen against the existing order, the decolonization process was well under way. The “capitalist” and “socialist” blocs were at each other’s throats. One instance was the painful war in Vietnam, both from the political point of view and as regards the atrocities that took

René Kosirnik holds degrees in law and international political science and a Master of Arts in Law and Diplomacy. Currently Deputy Director of the Department of International Law and Policy at the ICRC, he previously carried out several field missions and held a number of senior positions at headquarters, including that of Head of the Legal Division.

Original: French

place (especially mass bombardments, torture and summary executions). This ideological and political confrontation could also be seen in the clash between the defence of individual interests and those of the collectivity.

It is then easier to understand why the 1974-1977 Diplomatic Conference was so lengthy and laborious; also that it was a time of intense military, humanitarian, political and legal negotiation. We thus share Geoffrey Best's opinion that "all law-making is at some level a political process".¹ It is all the more political when it comes to drafting universal treaty law on matters dealing with war.

In view of the overall context at the time and of the issues and challenges that had to be addressed, the outcome merits unreserved praise. It was inevitably a compromise, however, and therefore could not satisfy each and every participating State equally in all respects.

Strengths and weaknesses

What was done to meet the needs left unfulfilled by the 1949 treaties, to respond to the new ways of conducting hostilities and to the consequences in humanitarian terms of civil wars and wars of national liberation? The answer came in the form of two treaties of unequal length — 102 articles in one and 28 in the other — but of comparable humanitarian scope: the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); two treaties which do not invalidate the 1949 Conventions, but supplement them by strengthening existing rules and introducing new protective provisions. Above all, the Protocols added a whole set of rules relating to the conduct of hostilities and behaviour in combat, which had remained untouched since the Hague Conventions of 1907.

When the idea of the Protocols was first put forward, the ICRC advocated a parallel approach to the rules governing internal and international conflicts.² But its hopes were dashed already at the first Prepa-

¹ Geoffrey Best, *War and law since 1945*, Clarendon Press, Oxford, 1994, p. 342. The author is joint winner of the 1997 Paul Reuter Prize.

² See the report submitted by the ICRC to the 21st International Conference of the Red Cross (Istanbul, 1969), published in the *International Review of the Red Cross (IRRC)*, No. 100, July 1969, pp. 343-352.

ratory Conference of Governmental Experts of 1971.³ The participants were not prepared to extend to rebel forces the same rights and obligations as those accorded to the regular forces of enemy States.

On the other hand, the newly independent countries pulled out all the stops in order to have it agreed that when it came to the applicability of humanitarian treaties, armed national liberation movements should be treated just like regular armed forces. Whence the much-debated content of Article 1, paras 3 and 4, of Protocol I.⁴ This was also one of the main reasons for the drastic “scissoring” of Protocol II at the end of the negotiations phase. Once the problem of national liberation wars had been settled, there were not many voices left in favour of a full, coherent set of rules applicable to civil wars. This is undoubtedly a weakness, but fortunately it does not leave the victim bereft of protection under the law.

Protocol I breaks new ground

Let us look at the main innovatory features of Protocol I.

Special protection was extended to cover civilian medical personnel, transport and units, which represents a considerable improvement in medical assistance to victims. This is a good illustration of the significant breakthrough made by the Protocol, since it broadens the generic category of objects and persons protected by the 1864 Geneva Convention. In addition, the means of identification of medical transports (radio signals, radar, acoustic, etc.) were adapted to modern technology.

The second major innovation — and one of the most controversial — was the change in the conditions conferring combatant status, and consequently prisoner-of-war status in the event of capture. In order to take account of the specific circumstances prevailing in wars of national lib-

³ See in particular the comments by François Bugnion, *Le CICR et la protection des victimes de la guerre*, ICRC, Geneva, 1994, pp. 386-387.

⁴ Paragraphs 3 and 4 of Article 1 of Protocol I read as follows:

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in 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.

eration, the wearing of the uniform at all times was no longer mandatory.⁵ This was seen by some as a realistic and necessary measure, and by others as a regrettable blurring of the distinction between civilians and combatants. We feel that both opinions have merit, since there is undeniably a grey area, and hence a heightened risk of both blunders and abuse. There are three ways of limiting this risk:

- by applying strictly the other conditions required for combatant status, in particular the obligation to carry arms openly in an attack;
- by reaffirming and requiring respect for the rules of conduct in combat, and in particular precautionary measures;
- by constantly promoting the ethic underlying the principle of distinction so that, as Jean de Preux has rightly pointed out, the belligerents come to understand that “by protecting the civilian populations they protect themselves”.⁶

But the major breakthrough of Protocol I was the substantial progress achieved in the rules relating to the conduct of hostilities, the authorized methods and means of warfare and the protection of the civilian population.⁷

The three basic rules governing the conduct of hostilities were very clearly expressed and incorporated within a single, general text of law:

1. “[T]he right of the Parties to the conflict to choose methods or means of warfare is not unlimited.” (Article 35, para. 1)
2. “It is prohibited to employ weapons (...) and methods of warfare of a nature to cause superfluous injury.” (Article 35, para. 2)
3. Civilians and civilian objects must not to be the target of attack (Articles 48, 50 and 52); these articles set out the principle of the distinction between civilians and combatants and between civilian objects and military objectives.

In addition to these three rules we should mention precautionary measures, obligatory both in attack and in defence (Articles 57 and 58

⁵ See Articles 43 and 44, Protocol I.

⁶ *IRRC*, No. 258, May-June 1987, p. 250.

⁷ See Protocol I, Part III, Section I: “Methods and means of warfare” (Articles 35-42); Part IV: “Civilian population”, Section I: “General protection against effects of hostilities” (Articles 48-60).

respectively). These key rules are accompanied by detailed rules of application.

All of the above adds up to one of the three major developments in the rules of international humanitarian law since the Second World War, the other two being the Fourth Convention of 1949 relative to the protection of civilian persons in times of war, and the adoption of treaty-based rules applicable to civil wars (i.e., Article 3 common to the 1949 Conventions; Protocol II).

In this connection, two other developments should be mentioned. The first is the obligation to determine whether the use of a new weapon being developed or adopted would be prohibited by humanitarian law (Article 36: "New weapons"). The second is the introduction in international humanitarian law of the institution of "civil defence", a practical tool intended to protect and assist the civilian population; its scope and characteristics are defined in Articles 61 to 67. Twenty years after the adoption of the Protocols, it must be acknowledged that national "civil defence" systems have achieved mixed results, however, which means that the role and future development of civil defence should perhaps be reassessed.

The last major category of innovations contained in Protocol I concerns monitoring and implementation mechanisms. International humanitarian law is often criticized for its lack of muscle when it comes to mechanisms intended to ensure or even impose respect for its rules, and the criticism is justified. It illustrates the fact that this law, adherence to which is partly voluntary, can only have the means of implementation that the States are willing to give it. So long as the international community is made up of very independent members, loath to accept external constraints, implementation mechanisms are bound to be imperfect. This does not mean that progress is impossible or that the legitimate pressure of domestic and international "civil society" should not be maintained or even stepped up, as was the case in 1977. Some advances have in fact been made since then.

Implementation mechanisms

First of all, we have in mind Article 7 of Protocol I, which provides for meetings of the High Contracting Parties to consider problems concerning the application of the Conventions and of the Protocol. It was pursuant to this provision that Switzerland, the depositary of the Conventions and the Protocols, convened an International Conference for the Protection of War Victims, held in Geneva from 30 August to 1 September 1993. That extraordinary meeting, replacing in part the International Con-

ference of the Red Cross and Red Crescent, which had been unable to meet since 1986,⁸ provided an opportunity to tackle the main implementation problems of the moment and to propose remedies.⁹

Another point is the greater degree of responsibility assigned to commanders. Under Article 87, commanders are required “to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol”. This is a just and heavy responsibility, but one which is not sufficiently well known and is therefore neither duly observed nor complied with.

Article 90 of Protocol I brings a new control mechanism to international humanitarian law: the International Fact-Finding Commission. The 1949 Conventions did include the idea of an enquiry, but it was never put into effect. The Fact-Finding Commission constitutes an effort to remedy the shortcomings of the Conventions system, making it mandatory in particular to accept an enquiry concerning any allegation of a serious violation of international humanitarian law. This is a new and powerful means of imposing respect for international humanitarian law. It still has two weaknesses, however: first, a State is not bound by simply acceding to the Protocol, it has to make a declaration specifically accepting the Commission’s competence. By 31 October 1997, out of 148 States party to Protocol I, only 50 had made such a declaration. This is why a major promotion effort still needs to be made. The other weakness concerns its material competence, for the Commission is empowered to enquire only into situations falling within the scope of Protocol I, that is international armed conflicts. Yet most of the tragedies of recent times have taken place in the course of civil wars or hybrid situations of violence. Therefore, an effort should now be made to extend the Commission’s field of competence.

The fourth and last development we would like to highlight is the extension of acts qualified as grave breaches or war crimes, defined in Articles 11 and 85 of Protocol I. These new war crimes include:

- attacks on the civilian population or on individual civilians;
- attacks against works or installations containing dangerous forces (such as nuclear plants);

⁸ On the role of the Conference, see Articles 8-11 of the Statutes of the International Red Cross and Red Crescent Movement.

⁹ See the Final Declaration of the Conference and the ICRC’s Report on the protection of war victims, *IRRC*, No. 296, September-October 1993, pp. 377-381 and 391-445.

- forced deportations or transfers of population;
- attacks against monuments constituting the cultural or spiritual heritage of peoples;
- denial of the right to a fair and regular trial.

The acts thus designated by the Protocols, together with the serious breaches listed in the Conventions, constitute an appropriate penal response to the most reprehensible acts committed in wartime.

And yet few criminals are ever prosecuted and convicted. This is first of all because States do not respect their obligation under the Conventions and the Protocol to search for all persons guilty of war crimes and to bring them before the competent national courts.¹⁰ Second, under treaty law the acts concerned constitute war crimes only if they were perpetrated in situations of international armed conflict or those qualified as such. This is a serious handicap, given the nature of present-day conflicts in which the worst atrocities are being committed.

Nevertheless, both law and practice are moving towards qualifying all these acts as war crimes, whatever the nature of the armed conflict. A significant step forward in this regard is the *Tadic* decision of the International Tribunal for the Former Yugoslavia.¹¹ A similar trend may also be perceived in the work of the Preparatory Committee on the establishment of an international criminal court. It is crucial that this tendency be confirmed. The opposite would be a serious setback for the efforts aimed at strengthening the implementation mechanisms of international humanitarian law, and a bad portent for much-needed developments in other areas of international humanitarian law.

Protocol II: the first treaty relating to civil wars

The first thing to say about Protocol II is that at least it exists. This is not at all meant to be a disparaging statement. Indeed, it was far from easy to adopt the first-ever universal treaty devoted exclusively to the protection of the individual and restriction on the use of force in civil wars

¹⁰ See the Fourth Convention, Articles 1, 2, 3 and 146.

¹¹ See the decision by the International Criminal Tribunal for the Former Yugoslavia: *The Prosecutor v. Dusko Tadic a.k.a. "Dule"*: Decision on the defence motion for interlocutory appeal on jurisdiction, of 2 October 1995, Case No. IT-94-1-AR72; and the article on the same subject by Marco Sassòli, "La première décision de la chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie: Tadic (compétence)", *Revue générale de droit international public (RGDIP)*, No. 1, January-February 1996, pp. 101-134.

or non-international armed conflicts. In this sense, Protocol II is a remarkable complement to Article 3 common to the four Conventions, which was until then the only provision applicable to such situations.

There is a reverse side to the coin, however: in order to pass the consensus test, the draft submitted to the negotiators had to suffer a number of cuts and deletions.¹² Although the issue of a privileged status for combatants had been disposed of at an earlier stage of the proceedings, the rules on the conduct of hostilities, assistance, medical missions and implementation mechanisms were dropped only during the last diplomatic round.

Nevertheless, even after those cuts Protocol II represents a new milestone in the protection of victims of civil wars. For instance, there is the detailed enumeration of fundamental guarantees (Article 4), of the rights of persons whose liberty has been restricted (Article 5) and of judicial guarantees (Article 6), which all go far beyond those contained in the “hard core” of human rights law.¹³

While it is true that the chapter on the conduct of hostilities was radically curtailed, the principle of prohibiting attacks against the civilian population was fortunately retained (Article 13). It is a considerable improvement on common Article 3 which did not — or at least not explicitly — protect civilians against the effects of hostilities. In addition to that basic rule, we might also mention the crucial new rules on the “Protection of objects indispensable to the survival of the civilian population” (Article 14) and the “Prohibition of forced movement of civilians” (Article 17).

Global assessment

As far as the substantive rules of conduct are concerned, the overall result is therefore very satisfactory. The value of the Protocols also resides in their multicultural backdrop; indeed, all of the world’s main powers took part in drafting the texts. The adoption of the Protocols drew the curtain on a whole chapter of international humanitarian law which had in the past often come under attack as being too Western-oriented.

¹² M. Bothe, K.J. Partsch, W.A. Solf, *New rules for victims of armed conflicts. Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949*, Nijhoff, The Hague/Boston/London, 1982, pp. 604 ff.

¹³ See, for example, Karel Vasak (ed.), *The international dimensions of human rights*, 2 volumes, UNESCO/Greenwood Press, Paris/Westport, 1982.

The assessment is less favourable, however, where the monitoring and implementation mechanisms are concerned. This demonstrates the lack of sufficient will on the part of States to respect and to do everything to “ensure respect for” international humanitarian law.

Another criticism often levelled at these texts is that they are very complicated, sometimes excessively so. This may be a slight drawback, but it does not amount to a real weakness, for no one expects officers or soldiers to move around the battle zone carrying a copy of the Protocols. As General A.P.V. Rogers recently wrote quite rightly: “Protocol I cannot stand by itself as a document issued to military personnel. It has to be incorporated into military manuals with explanatory commentaries, cross-references and practical guidance, but it does form the foundation of those manuals”.¹⁴

Lastly, in our view the main contribution of the Protocols is the clear reaffirmation of the three basic functional principles of international humanitarian law, applicable in all situations of armed conflict.¹⁵

- Humanity: non-combatants enjoy general protection against the effects of hostilities; they must be respected, protected and treated humanely.
- Military necessity: military personnel and objects may be attacked, but the injury and damage inflicted must be as limited as possible.
- Proportionality: when protection is not absolute, the requirements of “humanity” and “military necessity”¹⁶ should be weighed against each other in good faith.

Advancing towards universality

What the state of participation tells us

As at 31 October 1997, 148 States were party to Protocol I and 140 to Protocol II; this puts the Protocols among the most widely accepted legal instruments, though still quite far behind the 1949 Conventions,

¹⁴ A.P.V. Rogers, *Law on the battlefield*, Manchester University Press, 1996, p. 156. The author is joint winner of the 1997 Paul Reuter Prize.

¹⁵ Principles qualified as customary law in the *Tadic* decision, see *supra*, note 11.

¹⁶ Many authors link the principle of “proportionality” to that of “military necessity” or incorporate it into the latter. We prefer to draw a distinction between them since, on the one hand, “proportionality” does not apply only to the rules on the conduct of hostilities, and, on the other, the basic opposition between the notions of “humanity” and “military necessity” can be understood properly only when the “proportionality” factor is taken into account. See in particular Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 1994, pp. 205-208.

which are practically universal (188 States Parties). But given that nearly three-quarters of the States making up the international community have adhered to the Protocols, any fundamental reconsideration of the treaties is no longer conceivable.

In order to see what lessons may be drawn from the state of participation, let us look at the facts and figures more closely. What does the world map of the Protocols tell us?

Africa: one of the top two continents where participation is concerned, though there are a few notable absentees, namely Ethiopia, Somalia and Sudan. Two countries recently involved in civil wars — Angola and Mozambique — have not yet acceded to Protocol II.

The Americas: the continent of extremes. The South has accepted the Protocols completely, while the North features a major absentee — the United States — and one participating State, Canada.

Asia and Oceania: this is the region with the highest number of non-participating countries, with some encouraging exceptions such as Australia, China and Vietnam (Protocol I only).

Europe: very satisfactory on the whole, though with three major absentees — the United Kingdom, France (party to Protocol II) and Turkey.

Middle East and North Africa: participation in Protocol I is generally satisfactory, despite four important exceptions — Iran, Iraq, Israel and Morocco; several other countries are not party to Protocol II.

The above picture prompts three observations.

First, there is a group of non-participating countries which are currently or were recently involved in an active or latent armed conflict.

Second, the major and medium-sized powers which have not yet acceded to the treaties do not have or no longer have any declared reservations regarding the substance of the texts. Their reasons therefore lie outside international humanitarian law itself. Do they relate to any political or strategic considerations, or is it more a matter of bureaucratic inertia or low ranking on the scale of priorities?

Third, should Asia's poor record be ascribed to the attitude of the powers from other continents, or is it due to an endemic distrust of all universal treaties?

Despite constant reminders in legal texts and in the treaties themselves that international humanitarian law does not "create" armed conflict and that it has no effect on the belligerents' legal status, it is clear that many countries that find themselves close to ongoing conflicts or involved in

them are reluctant to adhere to the Protocols because of such fears. The community of States Parties should make a much greater effort to counter these interpretations by taking every available opportunity to specify the exact role and true scope of international humanitarian law.

There is a second, more disturbing interpretation regarding the first group of countries, namely that some of them are staying away to avoid being bound by certain humanitarian obligations, or even to be in a position to invoke them as and when they please, or else to use them as bargaining counters. Such arguments should be abandoned once and for all.

The world's great powers undeniably bear a heavy responsibility in this connection. As leaders, they send out signals which are followed by the smaller countries. A strenuous promotion effort should therefore be undertaken by all those who share the belief that the victims of armed conflicts would enjoy better protection if the Protocols enjoyed undisputed universal recognition, without any ambiguities or insinuations. As for any remaining substantive objections, most of these could probably be dealt with by issuing interpretative declarations or reservations.

Law and practice

Despite the various obstacles encountered during the four years of negotiations, at the end of the Diplomatic Conference there was little criticism of the Protocols. Most observers described the texts as positive and realistic. This opinion was even shared by most of those who in the United States some few years later came out against the Protocols, at times vehemently.¹⁷

The great period of criticism, especially French and American, reached its peak in 1987, when President Reagan recommended that the Senate ratify Protocol II, but not Protocol I.¹⁸ True, military experts had drawn up a list of practical and editorial shortcomings, which in their view were as many arguments against ratification. Apart from the sensitive issue of the ban on reprisals, however, the weightiest arguments were mainly of a political and ideological nature. This was true in particular of the claim that incorporating wars of national liberation would legitimize foreign

¹⁷ W. Hays Parks, "The 1977 Protocols to the Geneva Convention of 1949", in *International Law Studies 1995 (Vol. 68), Readings on International Law from the Naval War College Review, 1978-1994*, pp. 467-478.

¹⁸ See "Letter of transmittal from President Ronald Reagan to the Senate of the United States", reprinted in *American Journal of International Law*, Vol. 81, No. 4 (1987), p. 910, and the reaction by Hans-Peter Gasser, "An appeal for ratification by the United States", *ibid.*, pp. 912 ff.

intervention and politicize international humanitarian law, or that granting recognition to guerrilla forces would open the door to terrorism.¹⁹ France's main objection turned out to be the issue of the use of nuclear weapons, as it made clear in a statement sent to the depositary on the occasion of the ratification of Protocol II in 1984.²⁰

At the end of the 1980s, the tide began to turn. This was mainly due to the following three reasons: the gradual decline and subsequent fall of the socialist bloc; requirements and practice in operational zones, particularly during the Gulf war, in Somalia and in the former Yugoslavia; and the rapprochement between Arab countries and Israel. Once those political and strategic obstacles had been removed completely or in part, the real nature and value of the Protocols re-emerged.

Meanwhile, the general staff and legal experts of the main Western armies — in Germany, the United States and the United Kingdom in particular — had, both individually and within the framework of NATO, re-examined the content of the Protocols clause by clause in order to redefine their soundness, their usefulness, the appropriate interpretations or reservations and/or their customary nature.

This paved the way for Germany's ratification of the Protocols in 1991 and the publication of a military manual adapted accordingly,²¹ for the incorporation of most of the clauses in instructions for the United States armed forces²² and the 1995 approval of the Protocols by the government and Parliament of the United Kingdom.²³

¹⁹ See Guy B. Roberts, "The new rules for waging war: the case against ratification of Additional Protocol I", *Virginia Journal of International Law (VJIL)*, Vol. 26, No. 1 (1985), pp. 109-170; see also the reaction by George H. Aldrich, "Progressive development of the laws of war: a reply to criticisms of the 1977 Geneva Protocol I", *VJIL*, Vol. 26, No. 3 (1986), pp. 693-720, and by the same author: "Prospects for United States ratification of additional Protocol I to the 1949 Geneva Conventions", *AJIL*, Vol. 85, No. 1 (1991), pp. 1-20.

²⁰ See Dietrich Schindler and Jiri Toman (eds), *The laws of armed conflicts*, HDI/Nijhoff, Geneva/Dordrecht, 1988, p. 709.

²¹ See *Humanitarian law in armed conflicts: Manual*, edited by the Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, and the commentary thereon, Dieter Fleck (ed.) *et al.*, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995.

²² See *International Law — The conduct of armed conflict and air operations, Air Force Pamphlet (AFP 110-31)*, Department of the Air Force, Washington, D.C., 1976, and *The commander's handbook on the law of naval operations*, NWP 9, Department of the Navy, Office of the Chief of Naval Operations, Washington, D.C., 1989.

²³ Peter Rowe and Michael A. Meyer, "Ratification by the UK of the 1977 Protocols additional to the Geneva Conventions of 1949", *Northern Ireland Legal Quarterly*, Vol. 45, No. 4 (1994), pp. 343-363.

The ICRC's action

In its capacity (conferred upon it by the States) as the institution responsible for promoting and implementing international humanitarian law,²⁴ in recent years the ICRC recalled the main rules of the law and called for their observance whenever a serious internal or international armed conflict broke out. On no occasion did the belligerents refuse to be bound by certain rules invoked by the ICRC, even if they were not party to the Protocols. This tends to confirm that the main rules of the Protocols have acquired a binding force that transcends the texts themselves.

To illustrate this, we think it useful to comment on the following three situations:

- the Gulf war: an international armed conflict;
- conflicts in the former Yugoslavia: mixed conflicts;
- the Angolan conflict: non-international armed conflict.

The main protagonists of the *Gulf war*, in particular Iraq, the United States, France and the United Kingdom, were not party to Protocol I. In view of this, and in order to ensure a common understanding of and respect for the essential rules applicable to the conflict, on 14 December 1990 the ICRC sent a memorandum to all the parties involved. Apart from the provisions regarding the protection of civilians and persons *hors de combat*, the ICRC highlighted the pertinent rules of Protocol I relating to the conduct of hostilities, referring to them as “general rules (...) recognized as binding on any party to an armed conflict”.²⁵

²⁴ See the ICRC's mandate as defined in Article 5 of the Statutes of the International Red Cross and Red Crescent Movement.

²⁵ Extract from the Memorandum of 14 December 1990 on the applicability of international humanitarian law, *IRRC*, No. 280, January-February 1991, pp. 24-25:

- “Conduct of hostilities (...)
- the parties to a conflict do not have an unlimited right to choose methods and means of injuring the enemy;
 - a distinction must be made in all circumstances between combatants and military objectives on the one hand, and civilians and civilian objects on the other. It is forbidden to attack civilian persons or objects or to launch indiscriminate attacks;
 - all feasible precautions must be taken to avoid loss of civilian life or damage to civilian objects, and attacks that would cause incidental loss of life or damage which would be excessive in relation to the direct military advantage anticipated are prohibited.

With regard to the use of certain weapons, the following rules are in particular applicable in an armed conflict:

- the use of chemical or bacteriological weapons is prohibited (1925 Geneva Protocol);

In the case of the *conflicts in the former Yugoslavia*, in the initial stages the ICRC played a very active role in order to establish with the belligerents the body of rules applicable to the different conflictual relations. This was necessary since, although Yugoslavia had been bound by the Protocols since 1979, there was some uncertainty regarding succession to the treaties by the new emerging States and the internal or international nature of the conflicts. It was therefore important to define a "hard core" of rules acceptable to all.

This led to an agreement between the representatives of Croatia and SFRY, signed on 27 November 1991,²⁶ in which reference was made to all four Conventions and to Protocol I. With regard to the latter, specific references were made to provisions on the treatment of persons in the power of a party to the conflict (Articles 72-79), on methods and means of warfare (Articles 35-42), and on the protection of the civilian population (Articles 48-58). Although many of these rules were violated in the course of the conflict, their applicability was never contested by the parties.

The ICRC has been present in *Angola* almost uninterruptedly since the country became independent in 1975. The hostilities taking place there clearly constituted a non-international armed conflict, to which an international dimension was added through the actions of third powers. The provision of international humanitarian law applicable to the relation between government and UNITA forces was therefore Article 3 common to the Conventions, and customary rules relating to civil wars. In the last phase of hostilities, the ICRC thought it useful to remind the parties of the humanitarian rules they should observe (memorandum of 8 June 1994).²⁷

This text is remarkable in that, referring to no other treaties than the Geneva Conventions and their common Article 3, it provides a fairly

— the rules of the law of armed conflict also apply to weapons of mass destruction.

The ICRC invites States which are not party to 1977 Protocol I to respect, in the event of armed conflict, the following articles of the Protocol, which stem from the basic principle of civilian immunity from attack:

— Article 54: protection of objects indispensable to the survival of the civilian population;

— Article 55: protection of the natural environment;

— Article 56: protection of works and installations containing dangerous forces."

²⁶ Reproduced in Michèle Mercier, *Crimes without punishment*, Pluto Press, London/East Haven, Conn., 1995, pp. 195-198.

²⁷ See Annex.

complete list of customary rules derived from the Protocols and applicable to non-international armed conflicts. We are thinking in particular of:

- the prohibition on children under 15 from taking part in combat;
- the prohibition of attacks against civilian persons and objects;
- the prohibition of indiscriminate attacks or attacks causing excessive civilian damage;
- the prohibition on destroying supplies essential to the survival of the civilian population;
- precautions in attack and defence.

It is interesting to note that these rules of conduct, which the ICRC regards as customary, had already been interpreted as such in the San Remo Declaration of 7 April 1990.²⁸

Steady progress

The high number of States which have accepted Protocol I and, to a lesser extent, Protocol II, as well as the undeniable influence which some of their rules have exerted and will continue to exert on the conduct of non-participating States, clearly show that today the essence of these treaties reflects the state of universal customary law. Since there are only a few treaty-based rules applicable to internal conflicts, customary rules cannot be determined by direct reference to pertinent legal provisions. Instead, they must be inferred from a teleological interpretation of general rules and principles and by reference to treaty rules applicable to international armed conflicts. This reveals both the usefulness and the intrinsic precariousness of customary rules.²⁹ This factor of instability is obvious in the case of law applicable to civil wars, but it is also apparent, though to a lesser degree, when it comes to humanitarian law governing international conflicts.

One of the arguments quite justifiably put forward by certain analysts, concerned that the United States has not ratified Protocol I, is that there

²⁸ Declaration on the Rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts, *IRRC*, No. 278, September-October 1990, pp. 404-408.

²⁹ Marco Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht: mit besonderer Betrachtung der Regeln zum Schutze der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten*, Helbing & Lichtenhahn, Basel/Frankfurt, 1990.

is a risk of seeing the establishment of a form of “American” customary law, somewhat different from the treaty-based law adhered to by most of the international community. On the other hand, these authors go on to say, if the United States acceded to the Protocol, it would be able to make whatever interpretative declarations and reservations it considered necessary. In view of the country’s weight on the international scene, these would be instrumental in shaping customary rules for the universal application of treaty-based norms within a single coherent framework, that of the Protocol.³⁰ Theodor Meron goes even further when he says that “by remaining aloof, the United States may be abdicating its historical leadership in the shaping of the law of war”.³¹ His remarks about the United States appear to us equally relevant with regard to some other non-participating powers. These include the United Kingdom, of course, which we hope will soon be depositing instruments of ratification, and especially the major Asian countries, such as India, Indonesia and Japan. If international humanitarian law is to achieve a greater degree of stability and universality, a commitment on their part to the Protocols is a must.

Twenty years on, the Protocols are doing well. They are undoubtedly part of the general positive law; the gist of their rules was put into practice, for instance, by the coalition members during the Gulf war. They are still not universal, however, which is essential if this area of law, which governs a sizeable part of international relations in periods of crisis, is to enjoy full credit and authority.

Looking beyond the Protocols

Most scholars engaged in analysing present-day conflicts or endeavouring to curtail their harmful effects are of the opinion that the rules on conduct and protection as expressed in the basic treaties of international humanitarian law, namely the 1949 Geneva Conventions and the 1977 Additional Protocols, meet the basic needs of individuals and peoples caught up in the maelstrom of today’s wars. We believe that these rules will be just as pertinent in the wars of tomorrow, since the fundamental values which need to be safeguarded are timeless.

³⁰ See George H. Aldrich, “Prospects for United States ratification of additional Protocol I to the 1949 Geneva Conventions”, *AJIL*, Vol. 85, No. 1 (1991), pp. 1-20; Theodor Meron, “The time has come for the United States to ratify Geneva Protocol I”, *AJIL*, Vol. 88, No. 4 (1994), pp. 678-686.

³¹ *Idem*, p. 682.

Why is it then that, despite the existence of appropriate rules, the sum of unbearable suffering is not decreasing? To a large extent, the answer lies in the changing nature and context of armed conflicts.

Contemporary conflicts reflect less and less the traditional objectives of warfare, namely the struggle for political power or territorial conquest. The main causes of violence encountered today are: the weakening of authority and of the State, economic hardship, and the assertion of ethnic identity. Oscillating between the absence of ethics, the disappearance of traditional values and the rise of an ethic of exclusion, these situations are often in themselves a negation of the law. Even international humanitarian law has very little, or no place there at all.

But the fault does not lie with international humanitarian law. The real problem is rather one of a “missing link”, namely some connection between the law and the moral values of the group concerned. In this respect we agree with Alain Papaux and Alain Wyler, for whom the acceptance of a solution indispensable to the stability of a social group depends on it becoming part of the prevailing ethic.³² Therefore, from now on this should be the main focus of the efforts of all those working for the application of and respect for international humanitarian law.

In practical terms, this would entail:

- redefining or reasserting and upholding the moral standards of communities that are adrift;
- finding the right channels of communication and influencing the perpetrators of the new forms of violence;
- putting across the universal values enshrined in international humanitarian law in a way that can be understood by those groups or communities;
- educating or re-educating those concerned.

We would like to believe that violence is not inevitable and that, even if it were, it may be mastered and controlled. This requires an enormous effort of awareness-raising and education, to which the International Red Cross and Red Crescent Movement, and the National Societies in particular, can and should make a greater contribution. This was the message

³² Alain Papaux and Alain Wyler, *L'éthique du droit international*, Collection Que sais-je?, No. 3185, PUF, Paris, 1997, p. 86.

of the main resolutions adopted by the latest International Conference of the Red Cross and Red Crescent, held in 1995.³³

These measures do not require any changes in the law, they go hand in hand with it.

It must be recognized, however, that the existing definitions of the traditional subjects of international humanitarian law, namely authorities and individuals, and the implementing mechanisms offered by international treaties and institutions are no longer appropriate when it comes to the protagonists of new types of conflict — especially unstructured groups — or to the new power bases represented by private economic and financial giants.

Similarly, the field of application of humanitarian treaties is too restrictive to encompass all situations of armed violence. The protection of the individual under international law is therefore uneven and depends on the nature of the violent act concerned.

This brings us to our final remarks and our proposals for action.

The two Protocols of 1977 are an essential complement to the 1949 Conventions. Nowadays, the rules of Geneva and those of The Hague make up an indissociable whole. The essence of these treaties provides an adequate basis for the protection of human beings in time of war. We therefore need to ensure that the Protocols attain the same degree of universality as that enjoyed by the Conventions. If we hope to reach the new perpetrators of violence, one precondition is that all the traditional partners, especially the major States, should at least have made the same profession of faith.

Together, the Conventions and the Protocols make up a consistent set of rules of conduct. In the last 20 years, partly owing to the growing number of States party to the Protocols, and partly owing to the application of their content by States which are not party to them, a body of universal customary rules has emerged, reflecting the treaty-based norms. This customary law offers a measure of security in situations where the treaties do not formally apply.³⁴ Thanks to the Protocols, the fundamental prin-

³³ See Resolutions 1, 2, 4 and 5 of the 26th International Conference of the Red Cross and Red Crescent, *IRRC*, No. 310, January-February 1996, pp. 55-77.

³⁴ Christopher Greenwood, "Customary law status of the 1977 Additional Protocols", in *Humanitarian law of armed conflict: essays in honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht/Boston/Leiden, 1991, pp. 93-144; Theodor Meron, *Human rights and humanitarian norms as customary law*, Clarendon Press, Oxford, 1989.

ciples have been reaffirmed and crystallized. They constitute an intangible basis for the protection of the individual whenever armed force is used.

The gains achieved by the Protocols provide a starting point for further developments in areas where they are still required, such as situations of violence which are not covered by international humanitarian law, implementation mechanisms, or applicability of the law to the new protagonists.

It is true that international humanitarian law, and more particularly the Protocols, did not prevent the massacres in Rwanda or in the former Yugoslavia, in Liberia or Chechnya. But, to paraphrase Geoffrey Best,³⁵ these dramatic cases reflect not so much the failure of international humanitarian law as the failure of civilization. The message of international humanitarian law as developed by the Protocols is that warfare can and must be brought under control.

³⁵ Geoffrey Best, *op. cit.* (note 1), p. 422: "If the failure to moderate war marks the vanishing-point of international humanitarian law, the persistence of immoderate war could mark the vanishing-point of civilization."

International Committee of the Red Cross

Memorandum on respect for international humanitarian law in Angola³⁶

8 June 1994

Since the resumption of hostilities in the last quarter of 1992, the armed conflict in Angola has claimed countless victims, essentially among the civilian population. Hundreds of thousands, if not millions, of people have been killed, wounded, mutilated or displaced, are suffering from hunger or deprived of essential goods and services, or are without news of their families.

The plight of much of the civilian population calls for an increase in impartial humanitarian assistance so as to meet the victims' basic needs as a matter of urgency throughout the country, regardless of the turn of events from the political and military standpoint.

The International Committee of the Red Cross (ICRC) has established that a great many violations of international humanitarian law, mainly of its fundamental rules, are perpetrated regularly across the country.

As the promoter and custodian of international humanitarian law, the ICRC considers it absolutely necessary to recall the basic rules and principles of that law, which the parties to the conflict opposing the government forces and UNITA are bound to observe in all circumstances.

In the event, Article 3 common to the four Geneva Conventions of 1949 and customary rules relating to conflicts not of an international character are applicable to the hostilities in Angola.

The parties to the conflict must take all necessary steps to respect and ensure respect for international humanitarian law, in the following areas in particular.

I. Protection of persons not or no longer taking part in hostilities

Persons not or no longer taking part in hostilities, such as the wounded, the sick, prisoners and civilians, shall be protected and respected in all circumstances, regardless of the party to which they belong:

³⁶ Text not yet published.

- civilians do not constitute a military danger and must be respected and humanely treated; the following acts in particular are prohibited: attacks on civilians' life, on their physical integrity or personal dignity, hostage-taking, summary executions, sentencing without a fair trial, and forced displacements not justified by imperative reasons of security;
- all the wounded and sick, both civilian and military, must be collected and cared for, without distinction; when such persons cannot receive the care needed for their survival on the spot, their evacuation shall be organized and facilitated, insofar as the security situation permits;
- captured combatants and persons who have laid down their arms no longer represent any danger and must be respected; they shall be handed over to the immediate military hierarchical superior; killing such persons constitutes a crime and is absolutely forbidden; subjecting them or threatening to subject them to ill-treatment, particularly acts aimed at forcing them to take up arms against the party to which they belonged prior to capture, is a violation of international humanitarian law at all times;
- persons deprived of their freedom, both civilians and military personnel, must always be treated humanely and shall never be tortured; they must not be detained in the vicinity of combat zones;
- children and adolescents shall be granted favoured treatment at all times; those under the age of 15 shall not be recruited, nor authorized to take a direct or indirect part in hostilities.

II. Conduct of military operations

Military forces do not have an unlimited right regarding the choice of methods and means of warfare; a clear distinction must be made in all circumstances between civilians and civilian objects on the one hand and combatants and military objectives on the other:

- attacks on civilians or civilian objects are prohibited; all acts or threats of violence the main purpose of which is to spread terror among the civilian population are also prohibited;
- all feasible precautions shall be taken to avoid injuries, loss and damage to the civilian population; such precautions shall also concern protection from attacks using mines; civilians must, in particular, be kept out of dangers resulting from military operations and shall never

be used as shields against attacks; their evacuation shall be organized or facilitated, whenever required and insofar as the security situation permits;

- all attacks directed indiscriminately at military and civilian objectives and those which may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated are prohibited;
- it is prohibited to employ weapons, munitions or methods of warfare of a nature to cause unnecessary suffering to persons *hors de combat* or which render their death inevitable; no order shall ever be given that there should be no survivors; in particular, the use of chemical or bacteriological weapons and of poison is prohibited;
- it is prohibited to attack, destroy or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock, drinking water installations and supplies;
- installations containing dangerous forces, such as dams and dykes, shall not be made the object of attack, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

III. Respect for the red cross emblem and medical activities

Medical and religious personnel, hospitals, ambulances and other medical units and means of transport shall be protected and respected; the red cross emblem, which is the symbol of that protection, must be respected in all circumstances:

- hospitals and medical units and means of transport shall not be the object of attack; they shall be used exclusively to give or to facilitate care and shall not be used to prepare or commit hostile acts;
- all Red Cross personnel and medical personnel assisting the civilian population and persons *hors de combat* shall be allowed whatever freedom of movement they require and their security shall be guaranteed;
- all improper use of the red cross emblem is prohibited and must be punished.

IV. Relief operations

The parties to the conflict have a duty to ensure the provision of supplies essential to the survival of the civilian population in the territory under their control and to allow unimpeded passage of assistance for the civilian population in territories under the control of the adverse party:

- if the civilian population is not adequately provided for, relief actions which are exclusively humanitarian and impartial in character and conducted without any adverse distinction, such as those undertaken by the ICRC, shall be authorized, facilitated and respected;
- the personnel, vehicles and premises of relief agencies shall be protected.

V. Dissemination of international humanitarian law

The parties to the conflict must ensure that the members of their armed forces as well as all military and paramilitary forces acting under their responsibility are aware of their obligations under international humanitarian law. To that effect, it is essential that specific instructions to ensure respect for such obligations be issued.

VI. Role of the ICRC

The ICRC, whose primary function is to protect and assist the victims of armed conflicts, reaffirms its willingness to contribute, in agreement with the parties concerned and as far as its means allow, to the implementation of humanitarian rules and to perform the tasks entrusted to it by international humanitarian law.

The 1949 Geneva Conventions stipulate that the parties to a non-international armed conflict should endeavour to bring into force, by means of special agreements, all or part of the other provisions of international humanitarian law which do not formally apply to the situation. In its capacity as a specifically neutral and independent intermediary, the ICRC remains at the disposal of the Government of the Republic of Angola and of UNITA to facilitate the conclusion of such agreements, especially concerning the establishment of medical or neutral zones which can provide shelter from the fighting for the wounded and sick and for part of the civilian population, in particular the most vulnerable persons.

The 1977 Additional Protocols: 20 years on

The Review has invited several persons who took part in the codification process to comment on the 1977 Additional Protocols and their history, including some stumbling blocks which had to be overcome. We have also asked the fateful question: How relevant are the Protocols today?

The articles are published in alphabetical order of their authors' names:

George H. Aldrich

Igor P. Blishchenko

Yoram Dinstein

Dieter Fleck

Konstantin Obradovic

Not every reader may share all the views expressed in the following contributions. That is quite understandable. Indeed, since their origin, certain aspects of the 1977 Additional Protocols have been the object of impassioned discussion and even sharp controversy. The Review would be quite willing to publish comments and remarks on the Protocols, be it in the form of a full-fledged article or a letter to the editor.

Comments on the Geneva Protocols

My views concerning the negotiation of the 1977 Protocols were set forth some 13 years ago in my contribution to the book published in honor of Jean Pictet,¹ and I do not want to repeat them here. But perhaps, from the perspective of the intervening years, there may be a few things I could usefully add.

First, although I referred in that earlier article to the possible effects of the news media, particularly television, in sensitizing at least Western public opinion and, through the public, Western governments to the harsh realities of warfare and the desperate need to improve both the relevant law and compliance with it,² I now believe that I may have understated the power of television. Certainly the television coverage of the terrible recent events in the former Yugoslavia and in several parts of Africa had a major impact on policy-making in the West, both regarding military intervention and the punishment of non-compliance with the law. The creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda would have been inconceivable without the prior, sustained televised coverage of atrocities. The sensitivities thus created have been sufficient even to spur the United Nations to give serious consideration to setting up a permanent criminal tribunal — a development that, when we were negotiating the Protocols, I would have thought would be unlikely for at least another century.

With the cessation of hostilities in the former Yugoslavia and the consequent reduction in both atrocities and television coverage, pressure to make these tribunals successful and to have the most senior and responsible war criminals punished seems sadly to be evaporating completely.

¹ George H. Aldrich, "Some Reflections on the Origins of the 1977 Geneva Protocols", in C. Swinarski (ed), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*, ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1984, pp. 129-137.

² *Ibid.*, p. 131.

Television is a powerful medium, but its effects inevitably fade with the passage of time and the direction of attention to other events.

These reflections give rise to the strange thought that perhaps in the 21st century we may see efforts to improve compliance with international humanitarian law that supplement the past and present emphasis on improving oversight by impartial bodies such as protecting powers and the ICRC. There may also be further demands for the opening of all prisons and other detention facilities to frequent international television coverage during armed conflicts. While the difficulties facing any such proposal appear formidable, one cannot deny that television coverage of such facilities might prove a more effective deterrent to atrocities than the theoretical risk of criminal punishment, and thereby outweigh the consequent intrusion upon the privacy of the prisoners of war and other detainees. Somehow, we need to harness the proven impact of television in order to deter atrocities and other war crimes.³

Twenty years after the adoption of the Protocols by the 1974-1977 Geneva Conference, I remain unshaken in my belief that Protocol I represents a significant and responsible progressive development of international humanitarian law. There are presently 148 States party to the Protocol, and I believe that it largely represents customary international law today. The unfortunate fact that my own government seems unable to ratify it (or almost any multilateral treaty for that matter) may be of less importance than I would have thought twenty years ago. I firmly believe that nothing I have done in the whole of my professional career has been of more lasting importance than the contributions I was able to make to the negotiation of Protocol I.

Looking back from 1997, I deeply regret that 20 years ago I did not press, within the executive branch of my government, for prompt submission of the Protocols to the Senate of the United States for advice and consent for their ratification. All but a very few provisions had been adopted in Geneva with the complete support of both the U.S. State and Defense Departments, and I believe President Carter and Secretary Vance would have endorsed them. I failed to realize that, with the passage of time, those in both Departments who had negotiated and supported the Protocols would be replaced by skeptics and individuals with a different

³ While strict censorship normally accompanies the outbreak of hostilities, there certainly can be exceptions, particularly in areas away from where military operations are being launched. Both Vietnam and the Gulf War of 1990-91 saw much greater press freedom — at least in places — than most earlier wars.

political agenda.⁴ Moreover, my own involvement after late 1977 in the ongoing law of the sea negotiations at the United Nations was, of course, a considerable distraction for me, and led in due course to my assignment by President Reagan in 1981 to the Iran-United States Claims Tribunal and my consequent retirement from the Department of State.

As for Protocol II, I regret that the Diplomatic Conference largely failed. Though of some value, that Protocol has much too high a threshold of application and too little in the way of substantive rules. The Conference allowed this to happen in order not to endanger Protocol I and because of the adverse reaction of many developing countries to the draft Protocol II developed by the three main committees at the Conference. So long as governments worry that they might enhance the status of rebels merely by agreeing to treaties restricting how rebels may be treated, the treaty route may not be the most promising way of developing the law. The International Criminal Tribunals for the former Yugoslavia and Rwanda have mandates that may permit them to do more, and the former has already taken significant steps in that direction.⁵ In view of the fact that most modern armed conflicts appear to be largely or wholly non-international, the humanitarian importance of continuing improvement in the law applicable to such conflicts cannot be stressed too strongly.

George H. Aldrich

George H. Aldrich was the head of the United States delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Geneva, 1974-1977), with the rank of ambassador. Since 1981, he has been a judge on the Iran-United States Claims Tribunal in The Hague, and from 1990 until 1997 he was Red Cross Professor of International Humanitarian Law at Leiden University (Netherlands).

⁴ Clearly the rejection of Protocol I by the Reagan Administration was based primarily upon political, not military, considerations, but the rise to senior rank of those who served as junior officers in Vietnam and chafed at the political restrictions imposed upon them there has increased friction in the process of obtaining the support of the Defense Department for ratification of Protocol I. The loss of some of my most important delegation members — Professor, later Judge Richard R. Baxter and Waldemar Solf to untimely death, and Major Generals George Prugh USA and Walter Reed USAF to retirement — drastically thinned the ranks of those who would have effectively pressed for ratification of the Protocols.

⁵ See, for example, the ICTY's decision on jurisdiction in *Prosecutor v. Tadic*, Case IT-94-1-AR72 (October 2, 1995), in which the Tribunal held that serious violations of international humanitarian law committed in non-international armed conflicts are international crimes. On this question, see also my editorial comment in *90 American Journal of International Law*, January 1996, pp. 64 ss., and Theodor Meron's editorial comment in *ibid.*, April 1996, pp. 238 ss.

Adoption of the 1977 Additional Protocols

The adoption of the 1977 Protocols additional to the 1949 Geneva Conventions for the protection of war victims was an event of great historic significance. In 1977 the States were convinced that developments in weaponry had made it necessary to adopt new rules of conduct in armed conflicts: methods of using conventional weapons were being perfected and the resulting casualty rates were approaching those of weapons mass destruction, affecting everyone without exception and also damaging the environment, and thus threatening the survival of entire nations. This fact persuaded the States to agree upon new rules of conduct in armed conflict.

1. The adoption of Additional Protocol II concerning non-international armed conflicts was the great achievement of the 1974-1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Civil wars tend to be the most cruel and destructive wars, with both parties seeking to gain the upper hand at any cost. Virtually for the first time in the history of international relations, what would seem to be an internal matter became the object of an international agreement and, in principle, both parties to a conflict within the territory of a State were obliged to apply international law. It should be noted though that by that time issues such as respect for human rights and freedoms had ceased to be purely internal questions and had become matters of international concern and subjects of discussion at international forums.

Those engaged in civil war have since had to comply with international humanitarian law, i.e. apply international humanitarian law within the national territory. Depending on the local system of a government, this involves either an international treaty having direct force within the borders of a State that has ratified it, or the transformation of such a treaty by means of its adoption into national law. As regards the Russian Federation, Article 15, para. 4, of its Constitution explicitly states that both

the international treaties ratified by the Federation and the universally recognized principles and rules of international law are *ipso facto* elements of domestic law. Moreover, should the provisions of international treaties to which the Russian Federation is party differ from those of its own law, the international overrides the national. In particular, this means that in cases having an international element covered by an international treaty, Russian courts should apply international treaties. Accordingly, when Chechen civilians sue for damages suffered as a result of the hostilities in Chechnya, compensation must be paid, the court being guided by instruments such as Additional Protocol II on non-international armed conflicts.

2. The situation has naturally changed in many respects since 1977. Firstly, the ongoing technological advances in the field of conventional weapons led to the adoption, in 1980, of the Convention on particularly cruel weapons,¹ with its Protocol on mines² and, 15 years later, of a protocol on laser weapons³ which in itself was a great step forward. Secondly, the political situation has changed, and enormous military blocs no longer oppose one another. Though the character of NATO has not changed, the other bloc — the Warsaw Pact — has dissolved and this has an impact on the whole complex of issues related to development and application of the principles and rules of international humanitarian law.

The Additional Protocols of 1977 were adopted by consensus. This was due not only to the ICRC's high-quality preliminary draft, but also to the fact that the States judged these treaties necessary for the survival of our civilization.

3. In my view, the most burning issue of international humanitarian law today is the problem of effectiveness, i.e. of the law's implementation. This is the most complicated problem and one that concerns the entire body of international law, the effectiveness of which is measured primarily

¹ Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, of 10 October 1980.

² Protocol on prohibitions or restrictions on the use of mines, booby-traps and other devices (Protocol II).

³ Protocol on blinding laser weapons (Protocol IV), adopted on 13 October 1995.

by the degree of voluntary implementation. The situation seems to have reached the point where it is also necessary to consider the questions of collective coercion and responsibility for compliance with international humanitarian law. Although this is already provided for in the law, the existing norms are apparently inadequate.

At the 1974-1977 Diplomatic Conference the question of strengthening implementation procedures was raised during the negotiations, but it was decided to leave it for the time being and to confine the negotiations to the existing general provisions of international law regarding the responsibility of the State and its agencies as well as the individual responsibility of the perpetrator of a crime. There are no statutory limitations for these crimes in international humanitarian law and when, for instance, the Russian Federation's State Duma adopts a law on amnesty, that amnesty does not apply to war criminals, all the more so as Russia, as one of the successors of the USSR, is party to the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity (1968).

Secondly, it should be noted that the drafters of the Additional Protocols implicitly proceeded from the assumption that weapons of mass destruction, above all nuclear weapons, did not fall within their scope. In my personal opinion, however, the use of nuclear weapons would violate all the provisions of the Additional Protocols and it can therefore be concluded by virtue of this fact that the use of nuclear weapons is prohibited. But this is only an interpretation of the provisions of the Additional Protocols, since the prohibition on the use of nuclear weapons as such was never raised during the Diplomatic Conference.

4. In 1989 the Supreme Soviet of the USSR ratified the Additional Protocols, an act preceded by a great deal of preparatory work. The fact that this took place at the beginning of the *perestroika* period no doubt facilitated the process. All the States, including Russia, which are former members of the USSR, have assumed by succession the obligation to apply the Additional Protocols in their territory in the event of an armed conflict. That is why, for example, regardless of the nature of the conflict in the Chechen republic, the provisions of Protocol II and Article 3 common to the 1949 Geneva Conventions are applicable to it. Likewise, the Geneva Conventions of 1949 and their Additional Protocols should also apply to the conflict between Azerbaijan and Armenia.

Finally, it should be recalled that customary rules of international humanitarian law as well as universally recognized principles and rules

of international law are directly applicable in the Russian Federation, on the basis of the Russian Constitution, which declares them part of federal law.

Igor P. Blishchenko

Igor P. Blishchenko is a professor of international law in Moscow. He was a member of the USSR delegation at the 1974-1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

Original: Russian

Comments on Protocol I

Protocol I additional to the Geneva Conventions of 1949 is a product of the mid-1970s. It reflects the then-prevailing *Zeitgeist*: the confrontational mentality of the Cold War; the defiance of the West by a suddenly assertive and temporarily united “Third World”; the tendencies on the part of an entrenched majority in international organizations and forums to show no tolerance for the dissenting voices of a large and influential minority; and the cynical sacrifice of good sense (and good law) on the altar of political expediency.

Many experts in international humanitarian law at the time, having spent a lot of energy hammering out the text of the Protocol both before and during the difficult sessions of the 1974-1977 Diplomatic Conference, were deluding themselves that the law-creating process had been finally concluded and that everybody could live happily with the results. Of course, this was a fairy tale. Fairy tales generally end with the reassuring words that the protagonists lived happily ever after. But real life starts precisely at the point where fairy tales stop. The central issue is how the protagonists manage to live after the festivities. In international relations, the key aspect of treaty-making is implementation. And from the viewpoint of implementation, assessed in the light of 20 years of experience, it is evident that the Protocol has been a failure. It was not applied as such in the Gulf War, and it is openly disregarded by some of the major players in the world arena.

The full significance of this fact must be gauged against the background of the four Geneva Conventions of 1949. On the whole, taking into account not only the half-century since their recasting in their present version, but more than 13 decades of evolution and practice, these Conventions can surely pride themselves on a superb record of implementation. There have obviously been occasional lapses and even flagrant violations in some armed conflicts. But, generally speaking, it is doubtful that there is any multilateral convention on the same scale that has

achieved, within the same space of time, a better overall success rate in terms of actual respect and performance.

Why is 1977 Protocol I so different from the Geneva Conventions? Above all, because the Conventions reflect consensus and shared values, whereas the Protocol contains obvious bones of contention. Granted, possibly about 85% of the provisions of the Protocol are non-controversial. Either they reflect pre-existing customary international law or else, since no country contests their value, they are plausibly going to crystallize as customary international law in the relatively near future. Unfortunately, the remaining 15% or so of the Protocol's stipulations are exceedingly controversial, often owing to their sheer impracticability.

The controversial strictures of Protocol I preclude any chance of its achieving universal acceptance. In the absence of universality, the Protocol *per se* (as distinct from those segments of the text that are declaratory of customary international law) remains virtually irrelevant to any armed conflict in which one or more of the belligerents is not a Contracting State. The irrelevance of the Protocol to non-Contracting States in wartime creates complex problems in peacetime training and exercises for allied nations (for example within the framework of NATO) which are not all subject to the same legal obligations. Moreover, it is my contention and prognosis that some of the Protocol's more fanciful rules will be ignored even in an armed conflict where all the belligerents are Contracting States; for that reason, those thorny clauses are immensely dangerous and counterproductive. They are deplorable not only from the perspective of the Protocol itself, in that they curtail its prospective scope of application, but also from the standpoint of international humanitarian law as a whole, because of their potential detrimental impact on the basic Geneva Conventions.

The point is that, once officers and soldiers in Contracting States become accustomed to overlooking binding provisions of the Protocol because of their unrealistic nature, this will possibly — not to say probably — have a corrosive effect on today's almost automatic readiness to follow the Geneva Conventions themselves. Let me be more specific. Take, by way of illustration, the Protocol's comprehensive prohibition of attacks against civilians by way of reprisals (Article 51, para. 6). This injunction means that if Contracting State A commits atrocities against the civilian population of Contracting State B, the latter is not allowed to retaliate in kind against the civilian population of State A. But what do the framers of the Protocol expect State B to do? Turn the other cheek? That is a religious tenet rather than a serious military or political proposition. Since

the Protocol does not provide State B with any practical alternative response, what is likely to happen is that Article 51, para. 6 will remain a dead letter and — notwithstanding the paragraphs's lucid language — State B will resort to belligerent reprisals against the civilians of State A.

Furthermore, and this is the crux of the matter, the erosion in the standing and authority of international humanitarian law will not necessarily be confined to the Protocol. After all, the Geneva Conventions also prohibit reprisals against protected persons such as prisoners of war. If State A shoots prisoners of war of State B, measures of reprisal by State B against prisoners of war of State A are explicitly proscribed by the last paragraph of Article 13 of the Third Geneva Convention of 1949. Yet, under the Geneva Conventions, State B has a whole gamut of available belligerent reprisals to choose from. By contrast, under the Protocol almost all belligerent reprisals are banned. As indicated previously, I suspect that State B will take little notice of the Protocol's prohibitions in this regard. However, will failure to respect international humanitarian law stop there? Inasmuch as, in engaging in belligerent reprisals, State B will anyway be in breach of international humanitarian law, is there not a risk that it will prefer to execute prisoners of war of State A in violation of the Third Geneva Convention? To put it another way, the strict limitation on belligerent reprisals in the Protocol is apt not only to miss its mark but at the same time to jeopardize the hitherto unquestioned compliance with the 1949 Geneva Conventions.

There are a host of other flaws in the Protocol. The convoluted language of Article 44 apart, this provision virtually eliminates the time-honoured distinction between lawful and unlawful combatants.¹ There are also serious issues relating to mercenaries, siege warfare,² and some of the provisions on grave breaches. One of the more preposterous innovations of the Protocol is that, in accordance with Article 96, para. 3, combined with Article 1, para. 4, a group of terrorists proclaiming itself to be a national liberation movement fighting for the right to self-determination may make a unilateral declaration whereby it assumes

¹ Y. Dinstein, "The new Geneva Protocols: A step forward or backward?", *Year Book of World Affairs*, Vol. 33, 1979, pp. 269-272.

² Y. Dinstein, "Siege warfare and the starvation of civilians", in A.J.M. Delissen and G.J. Tanja (eds), *Humanitarian law of armed conflict: Challenges ahead. Essays in honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1991, pp. 148-152.

all the rights and obligations of a Contracting Party, despite the fact that the terrorists themselves fail to observe the laws of armed conflict.³

This is not to say that the whole of Protocol I is tainted. Indeed, there is little if any interaction between the multifarious parts of which the instrument is composed. When one studies the initial *travaux préparatoires*, it emerges that the Protocol was the result of an artificial amalgam by the ICRC of a cluster of unrelated proposals on a variety of themes.⁴ Measures in favour of children, procedures for identification of medical aircraft, the entitlements of civil defence organizations, or stipulations pertaining to missing and dead have only a tenuous connection with each other. It is a pity that the ICRC rejected at the very outset proposals to deal separately with these discrete matters and preferred to consolidate them in a single draft. In any event, if some clauses were revised or even dropped altogether, such a step would not necessarily have repercussions on other sections of the Protocol.

It goes without saying that no revision of the Protocol can be carried out without a formal amendment. Still, amendments are a respectable tool in the hands of treaty-makers, and there are numerous precedents for taking a fresh look at an international instrument with the advantage of hindsight. Particular reference should be made here to the case of the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS).⁵ This agreement, prompted by a desire to achieve universal participation in an important Convention,⁶ recognized the need to review the legal regime agreed upon earlier and indeed introduced a considerable change in it. Hopefully, this amending agreement will be seen as a precedent to be followed by the parties to the Protocol.

Even prior to the formal adoption of an amending instrument, certain steps can and should be taken, with a view to sorting out which provisions of Protocol I are generally acceptable and which require surgical excision or at least linguistic modification. It is a source of satisfaction that the ICRC is currently sponsoring a general study by a group of experts on

³ Y. Dinstein, "Comments", *American University Law Review*, Vol. 31, 1982, pp. 849-853.

⁴ Y. Dinstein, "Another step in codifying the laws of war", *Year Book of World Affairs*, Vol. 28, 1974, pp. 280-282.

⁵ *International Legal Materials*, Vol. 33, 1994, p. 1309.

⁶ See Preamble, *ibid.*, p. 1311.

the customary rules of international humanitarian law. If successful, such a study could lead to an evaluation of the exact status of the manifold provisions of the Protocol. The stage may then be set for a formal amendment of the instrument, the ultimate goal being to restore the universality of international humanitarian law.

Yoram Dinstein

Yoram Dinstein is Professor of International Law and President of the Tel Aviv University, Israel.

Growth of expertise as a result of treaty-making

The 1977 Protocols additional to the Geneva Conventions of 12 August 1949, adopted after a complex process of preparatory work and negotiations in various fora, have not been formally applicable in many armed conflicts. Yet it would not be appropriate to say that they have not stood the test of reality. One of the most important effects of these instruments on State practice has been to generate a large number of experts on the subject in all regions of the world, sharing knowledge on the interpretation of relevant rules and facing the challenge of their implementation.

As a young lawyer, assigned to take part in the government experts conferences on the reaffirmation and development of international humanitarian law applicable in armed conflicts that were first convened in Geneva in 1971, I was fascinated by the rare prospect of contributing to a treaty-making process on a subject which was highly political in nature and had previously been dealt with prior to two world wars, in 1907. It is true that important humanitarian conventions had been adopted in 1929, 1949 and 1954; but the courageous approach taken at the Hague Peace Conferences in 1899 and 1907 had soon fallen victim to the First World War, and serious efforts to combine “Hague law” and “Geneva law” remained stalled during the Cold War after 1956.

The unique situation of a young participant in the series of conferences held after 1971 must also be described in personal terms. The spirit of Max Huber and Carl Jacob Burkhardt was convincingly represented by senior ICRC delegates, who were able to rely on professional experience dating back to the thirties and forties. The ICRC had also recruited brilliant young jurists for the project with whom it was particularly rewarding to work on a daily basis. The government experts included a remarkable group of international lawyers, and more than two decades later we should pay homage to those participants who are no longer alive, among them Richard Baxter, Rudolf Bindschedler, Erik Castrén, Gerald Draper, Paul de Lapradelle, Stanislaw Nahlik, Karl Josef Partsch, Nagendra Singh,

Waldemar Solf, and Hamed Sultan. One wonders how some of the humanitarian issues outstanding today would have been dealt with had these eminent figures still been among us.

At the series of meetings preparatory to the Diplomatic Conference, which included the 22nd International Conference of the Red Cross (Tehran, 1973), various sessions of the United Nations General Assembly and its Sixth Committee in the early seventies, and indeed at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts itself (Geneva, 1974-1977), the idea of national sovereignty was very strongly voiced. It may seem a paradox in retrospect that the more important humanitarian issues of subsequent years, such as protection against certain methods and means of warfare in non-international armed conflicts, were formally excluded from the texts. Yet there was a consensus to reaffirm the famous *Martens clause* in both Protocols: the commitment to established custom, the principles of humanity and the dictates of public conscience is one of the important results of the law-making process which has also affected other areas of international relations.

I soon had an opportunity to see these principles in action when I left the Ministry of Defence after the first session of the Diplomatic Conference in 1974 and joined the Federal Chancellor's Office in Bonn to deal with intra-German affairs: the reunification of families and traffic across the Iron Curtain became subjects of businesslike cooperation between the two German States. It was encouraging to see humanitarian principles being implemented in daily practice, supported by public opinion, though many obstacles remained.

Protection of the victims in conflict situations is a broad challenge which requires a generalist rather than specialist approach. In addition to armed conflicts, refugee movements prompted by other causes, internal disturbances, terrorism, drug abuse and exploitation by multinational companies require responsible action, which is often lacking. Where legal constraints cannot be enforced and existing rules are not implemented, the power of the State is in jeopardy and people are left unprotected. Indeed, in many parts of the world there have been and still are conflicts that dominate the daily lives of countless people. In too many cases the 1977 Protocols are not formally applicable. Seen in retrospect, certain issues that caused major controversies during the Conference obscured the need to find solutions for pressing problems affecting victims in the field. There was the tragedy in Afghanistan, in which proper implementation of Article 1, para. 4, of Protocol I would have improved the legal protection

of civilians and combatants on both warring sides. And there have been many other armed conflicts without a Protecting Power, without international fact-finding procedures and without humanitarian assistance.

More than ten years later, when I again joined the international law division of the German Defence Ministry and saw the 1977 Geneva Protocols still unratified by my own country, I was not amused. Important developments in international humanitarian law seemed to be in jeopardy in many States despite the indisputable need for clear and well accepted rules for military forces. There was no unanimity on the international level as to the interpretation of certain rules of the Protocols. In these circumstances any attempt to arrive at a convincing decision on the ratification and implementation of the 1977 Protocols and of the 1980 Convention on Certain Conventional Weapons required intensive consultations, which we started within the North Atlantic Alliance and beyond. These efforts were supported by academic publications¹ and by the fact that an increasing number of States were becoming party to the Protocols. As a result of this process, a consensus was reached that it should after all be possible to solve problems of interoperability in joint military operations between States that had ratified, States that had so far decided against ratification and States that had not yet taken a decision on the Protocols. Even more significantly, there was growing support for a policy requiring compliance with the rules on the conduct of military operations established for international armed conflicts also in situations of non-international armed conflict. This policy has now been introduced for US forces² and for the German Bundeswehr.³ It is also recommended in a declaration adopted by the International Institute of Humanitarian Law in San Remo.⁴ It is important to realize that such a policy serves not only humanitarian interests but also operational requirements of professional armed forces.

Germany ratified the two 1977 Additional Protocols in 1990 and, as a result of extensive cooperation at national and international levels, the

¹ M. Bothe, P. Macalister-Smith, T. Kurzidem (eds), *National implementation of international humanitarian law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1990.

² United States Department of Defense, *DoD Directive 5100.77, DoD Law of War Program*, 10 July 1979, para. E-1; see also *The Commander's Handbook on the Law of Naval Operations (NWP9/FMFM 1-10)*, chapter 5.

³ Ministry of Defence of the Federal Republic of Germany, *Humanitarian Law in Armed Conflicts: Manual*, Bonn, 1992, Section 211.

⁴ International Institute of Humanitarian Law, "Declaration on the rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts", *IRRC*, No. 278, September-October 1990, pp. 404-408.

German *Manual on International Humanitarian Law* was issued very soon afterwards.⁵ It was encouraging to see that the *Manual* was well received by the public and its content widely supported in commentaries written by academic experts.⁶

The Protocols may not have been formally applicable in the deplorably large number of armed conflicts that have occurred during the last two decades. But the impact of these instruments on State practice cannot be underestimated. In his Report to Congress on Coalition operations in the Gulf in 1991, General Colin Powell, then Chairman of the US Joint Chiefs of Staff, made it clear that the provisions of Additional Protocol I were, for the most part, applied as if they constituted customary law.⁷ In particular, Article 51 of Protocol I — on the protection of the civilian population against the effects of hostilities — was observed during operations against Iraq.

We may conclude that States and international organizations, members of armed forces and civilians, practising lawyers and academics alike are all influenced today by the Protocols. They are challenged to join in the active efforts being made to promote the treaties' implementation.

Dieter Fleck

Dieter Fleck is Director, International Agreements and Policy, Federal Ministry of Defence, Bonn. The views expressed in this contribution are personal.

⁵ *German Manual*, *op. cit.* (note 3).

⁶ D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995, reviewed in *IRRC*, No. 309, November-December 1995, pp. 679-683.

⁷ United States Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress*, Washington, 1992. See also L.C. Green, *The contemporary law of armed conflict*, Manchester and New York, 1993, p. xv, which is based on the same premise.

The prohibition of reprisals in Protocol I: Greater protection for war victims

It is not without reservations that I am responding to the invitation from the *Review* for 'veterans' of the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts (hereafter the Diplomatic Conference) to commemorate the signing 20 years ago of the Protocols additional to the Geneva Conventions. On 8 June 1977, all of us who contributed in one way or another to the drafting of those texts felt a sense of relief at having finally achieved our task. We also felt a kind of exhilaration at the thought that we had successfully completed an important undertaking that would benefit war victims. The two Protocols represented a major leap forward in the law of armed conflict. It should not be forgotten that practically two-thirds of the international community have now ratified these instruments. Yet compliance with them regrettably remains far from satisfactory. I need hardly recite the tragic litany of conflicts over the past 20 years that bear out this deficiency. The case best known to me is that of the "Yugoslav wars" (1991-1995). They constitute the clearest example of the yawning gap between the law itself and the degree to which it is implemented. What is even more worrying is that all of this is taking place in a world where the demise of "totalitarianism" has left the world with what is, for all practical purposes, a single centre of power. This centre comprises those States which, since the International Peace Conference held in 1899 in The Hague, have been inspired by their democratic traditions and their attachment to human rights and the rule of law to play a leading role in developing, affirming and reaffirming what today constitutes international humanitarian law applicable in armed conflicts. I therefore believe that this divergence between the letter of the law and the conduct of those responsible for implementing it results from a lack of determination on the part of governments to "ensure respect" for that law throughout the world. I am in no doubt whatsoever that they have sufficiently efficacious means at

their disposal to do so. What is missing, unfortunately, is the political will.

The sense of exhilaration that we felt when the Protocols were signed was doubtless justified with regard to the content and even the wording of this new law. For it is good law. I considered it so at the time and my opinion has not changed since. This law is well made, in the first place because, unlike the old law of The Hague, it makes war difficult to wage. Secondly, if, despite that difficulty, war is nevertheless engaged in, the Protocols provide penalties for violations of the rules governing it. Nowadays, anyone who intentionally violates those rules is held directly and personally responsible. How could it be otherwise in an international community that not only outlaws armed conflict but forbids *any* use of armed force, or even the threat thereof? It would be unfair to criticize a body of law so well adapted to its legal environment, reflecting as it does the trend towards establishing international public order where brute force holds sway.

The reservations I expressed at the beginning of this article thus have to do not with the law itself but with its implementation. But let us not forget that it took 40 years for the full value of the Hague Regulations to be appreciated, at Nuremberg. We may therefore reasonably hope that, in time, the political will — currently lacking — to implement this law may yet emerge. We may also hope that the concept of “ensuring respect” will finally be understood and applied in the way that drafters the Article 1 common to the Geneva Conventions intended. The concept was reaffirmed in the first paragraph of Article 1 of Protocol I. However — dare I say it? — this was done in a far different legal context from that of 1949. And that renders the resulting obligation on the part of the participating States much more binding than it was at the time. There can be little doubt, therefore, that the work accomplished between 1974 and 1977 represents a real advance towards better protection for war victims; and it is only right to observe the 20th anniversary of this achievement, despite the reservations mentioned above.

Obviously, like any other human undertaking, the Additional Protocols fall short of being ideal. But it is not my intention here to list their shortcomings. Instead, let us focus on the positive new developments that they contain, in particular that which seems most important to me: the prohibition of reprisals.

When it comes to protection, what is the most critical situation in which anyone can find himself in wartime? Quite obviously, it is finding oneself in enemy hands. The situation will be even more critical if the

captive has the misfortune of “being one of” an enemy that is waging “total war”, or war without mercy (no matter that he may be the most peace-loving person in the world and perhaps even detests his own government). The captive risks being “punished” in reprisal for all the prisoners of war who have been shot, for all the wounded finished off and all the civilians tortured, this despite the fact that the captive may be innocent and have nothing whatsoever to do with these crimes, of which he may well profoundly disapprove. With its well-nigh absolute prohibition of reprisals against all categories of protected persons who fall into enemy hands, Protocol I goes further down the trail blazed in 1949. The underlying considerations are both humanitarian and rational. The history of war — and the Second World War in particular — clearly shows that, apart from being barbarous, unfair and inequitable as they invariably victimize the innocent, reprisals achieve nothing. Even if they are “justified” as a response to enemy violation of the law, they never result in the triumph of the rule of law. Moreover, all the mass executions of the last world war, all the Oradour-sur-Glane¹ of this world have not been enough to dampen people’s determination to resist. Reprisals therefore appear pointless.

The Diplomatic Conference was somewhat less successful in prohibiting reprisals in the actual conduct of hostilities. What is clear is that the indiscriminate bombing of cities by one party to a conflict does not entitle the other to reply in kind, for civilians and non-military objects are protected by humanitarian law under all circumstances. In certain situations, however, it is permissible to respond in like manner to a grave and flagrant violation committed by the enemy on the battlefield. In such a case, however, the reply must be directed at combatants and military targets, and is restricted to certain circumstances. The effectiveness of this type of reprisal is a matter to be judged by military experts. In any case, attacking the civilian population, even as part of “justified” reprisals, achieves nothing. The bombardment of London and other British cities in the early years of the Second World War resulted only in the total destruction of Dresden and Leipzig in 1945. Neither the Allies nor the Axis powers were deterred by such losses and Germany surrendered only when further resistance was effectively impossible. Since 1945, so-called “in-

¹ A few days after the D-Day landings in June 1944, German troops rounded up and executed all 642 inhabitants of the town of Oradour-sur-Glane, in western France, in “reprisal” for the killing of a German officer by resistance fighters in a neighbouring village. — Comment by the translator.

ternal conflicts” have merely served to confirm what we already knew: even “justified” attacks on the civilian population in no way affect the outcome of a war. Their sole consequence is the further spread of barbarity.

It may be argued that Protocol I’s prohibition of reprisals has not spelled the end of such practices. One thinks again of the “Yugoslav wars”. Nevertheless, the relevant provisions are extremely precise and clear, leaving no doubt that reprisals against civilians and civilian targets constitute a grave breach of international humanitarian law. The mere fact that this point is now crystal-clear in the law is a highly significant step forward. At present, any combatant who chooses this course of action must be perfectly aware that he is in flagrant violation of the law and may well one day have to answer for his deeds. In other words, those who order or carry out such acts will no longer be able to claim to a national or international tribunal that they were responding to a similar violation by the enemy. If the aim of humanitarian law is, among other things, to guard against needless cruelty, then that cause is well served by this prohibition. Having been consecrated as a fundamental principle and restated in various provisions of Protocol I in an attempt clearly to define its scope, the prohibition of reprisals against protected persons and objects is unquestionably a bulwark against barbarity.

Konstantin Obradovic

Konstantin Obradovic teaches international law at the University of Belgrade. He took part in the Diplomatic Conference of 1974-1977 as a member of the Yugoslav delegation and was deputy Chairman of Committee I.

Original: French

Persuading States to accept humanitarian treaties

by **Hans-Peter Gasser**

At the close of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (Geneva, 1974-1977), the representatives of the States party to the 1949 Geneva Conventions adopted, on 8 June 1977, two Protocols additional to those Conventions. Following a preparatory period including intense negotiations that lasted for nearly ten years, the new treaties were accepted, despite considerable obstacles, by the plenipotentiaries without a vote and without opposition. Though the solutions adopted for particularly controversial problems could not always suit everyone concerned, the diplomats, legal advisers and military experts who had taken part nevertheless had every reason to return to their capitals with a feeling of satisfaction.

The Diplomatic Conference had barely come to an end, however, before the stage involving signature and ratification of the instruments (or accession to them) by the States had to be undertaken. In other words, the States had to accept in due form the new obligations laid down in the two Additional Protocols, thus committing themselves to respecting them in both peacetime and wartime.

Twelve months after the Final Act of the Diplomatic Conference was signed, on 10 June 1978, 62 States had signed Protocol I¹ and 58 had signed Protocol II.² The two Protocols entered into force on 7 December

Hans-Peter Gasser is Editor-in-chief of the *International Review of the Red Cross*. He was formerly Principal Legal Adviser to the ICRC Directorate for International Law and Principles.

Original : French

¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

1978 for the first two States (Ghana and the Libyan Arab Jamahiriya) that had deposited their instruments of ratification or accession with the depositary.

What follows is an account of the campaign conducted by the ICRC to persuade the States to accept the Additional Protocols.³

Early appeals for ratification

The first international forum to take note of the existence of the Additional Protocols was the 23rd International Conference of the Red Cross (Bucharest, 1977). The International Conference periodically brings together the States party to the Geneva Conventions and the various components of the International Red Cross and Red Crescent Movement to discuss matters relating to the implementation of humanitarian law and Red Cross activities. In a resolution, the Bucharest Conference urged the States to ratify or accede to the two Protocols.⁴ At almost the same time, the United Nations General Assembly took note of a report by the Secretary-General on the results of the Diplomatic Conference and passed a resolution inviting the member States to consider the possibility of becoming party to the Protocols.⁵

A debate on the situation regarding ratification of the Additional Protocols and ways to promote them subsequently became a regular feature on the agenda for the International Conference, and each successive Conference adopted a resolution inviting States to become party to them.⁶ Similarly, the Sixth committee of the United Nations General Assembly holds a debate every other year on the Additional Protocols' status of acceptance.

³ See also, by the same author: "Die Genfer Zusatzprotokolle vom 8. Juni 1977; von der Diplomatischen Konferenz zur Ratifikation durch die Staaten", C. Swinarski (ed.), *Studies and essays on international humanitarian law and on the principles of the Red Cross, in honour of Jean Pictet*, ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1984, pp. 147-165; and "Steps taken to encourage States to accept the 1977 Protocols", *IRRC*, No. 258, May-June 1987, pp. 259-266.

⁴ *IRRC*, No. 201, December 1977, p. 507 et seq.

⁵ UNGA Resolution 32/44 of 8 December 1977.

⁶ Resolution VII of the 24th International Conference (Manila, 1981), *IRRC*, No. 225, November-December 1981, p. 323; Resolution II of the 25th International Conference (Geneva, 1986), *IRRC*, No. 255, November-December 1986, p. 342. In its Resolution I, the 26th International Conference (Geneva, 1995) reaffirmed the appeal to the States by endorsing the Final Declaration of the International Conference for the Protection of War Victims (Geneva, 1993), *IRRC*, No. 310, January-February 1996, p. 58.

The main regional governmental organizations, in particular the Organization of African Unity, the Organization of American States and the Council of Europe, have also invited their members to become party to the 1977 Protocols. Among non-governmental organizations, the Inter-Parliamentary Union has shown interest in the Protocols on several occasions during its periodic conferences. And the National Red Cross and Red Crescent Societies have always had a special role in this regard, for although it is true that responsibility within the Movement for preparing and negotiating instruments of international humanitarian law applicable to armed conflict is assumed by the ICRC,⁷ the National Societies are also involved in such projects, in a twofold capacity. For one thing, they are part of the Movement and subscribe to its objectives (particularly that of striving for better protection of war victims); for another, they "support the public [national] authorities in their humanitarian tasks".⁸ Thus, representatives of several National Societies have, as advisers to their governments, taken an active part in the preparation of texts at the national level. It is therefore not surprising that the resolutions adopted by the International Conference regularly call upon the National Societies to urge their political authorities to ratify certain treaties. Many Red Cross and Red Crescent Societies have taken such action, although it has been impossible to report on these activities for lack of detailed information. Other Societies have not committed themselves, in the belief that such a campaign would be contrary to the apolitical role of the Red Cross in civil society. Both attitudes are understandable and acceptable in a Movement that must allow for the specific conditions in which every National Society works.

The ICRC comes out of its shell

What did the ICRC do following 10 June 1977 to promote the Protocols' acceptance by the States? Initially, when the Diplomatic Conference ended, the Committee opted for a more or less discreet approach, for in one way or another, after nearly ten years of uninterrupted work, it was time for everyone involved to 'catch his breath'. Even those who had been present at the birth of the new law still had to familiarize

⁷ Statutes of the International Red Cross and Red Crescent Movement (1986), Article 5, para. 2 (g).

⁸ *Ibid.*, Article 3, para. 1.

themselves with all its aspects. The ICRC's legal advisers, for their part, started to draft a commentary on the texts.⁹

By the end of 1980, however, there was no overlooking the fact that only 17 States had become bound by the Protocols. Two years later, of the 152 States party to the 1949 Conventions, only 27 had ratified Protocol I and 23 Protocol II. No great powers, no regional powers and no States possessing nuclear weapons were among them. The rate of ratification then gradually declined. Were the Protocols falling into oblivion, about to end a short life in the graveyard of good intentions?

The ICRC resolved to take a more active approach and to strengthen its commitment to securing acceptance of the Protocols. The aim was simple: ensure that all the States party to the Geneva Conventions also become party to the 1977 Protocols and that those instruments become universal, like the 1949 Conventions. Early in 1983, an ICRC legal expert was appointed special adviser and given the task of launching and coordinating a campaign to achieve this aim. He carried out these duties for thirteen years, until the end of 1995 when the ICRC Advisory Service on international humanitarian law was charged with continuing the campaign.¹⁰

As a result, between 1 January 1983 and 31 December 1995, 116 States became bound by Protocol I and 111 by Protocol II, which brought the total number of participating States to 143 and 134 respectively. Among them are two permanent members of the Security Council (China and the Russian Federation), nearly all members of NATO, all the countries of Central and Eastern Europe, nearly all African and Latin American States and a large number of Asian countries. The entire group comprises as many States from the North as from the South.

Since 1 January 1996, when the special campaign ended, only five new accessions to Protocol I and six to Protocol II have been registered.¹¹

⁹ Sandoz/Swinarski/Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1986.

¹⁰ See Paul Berman, "The ICRC's Advisory Service on International Humanitarian Law: the challenge of national implementation", *IRRC*, No. 312, May-June 1996, pp. 338-347.

¹¹ As at 31 October 1997.

Specific ICRC action

The ICRC used all available means of communicating with government representatives in order to persuade the States to take a positive decision. These included:

- letters from the ICRC President to Heads of State and Ministers of Foreign Affairs;
- personal and written representations by the ICRC President to senior government officials in national capitals and in Geneva;
- contacts made locally by ICRC delegates in the various ministries concerned;
- in-depth discussions between the special legal adviser and government officials both at permanent missions in Geneva and in national capitals;
- contacts with government representatives at various meetings, in particular the United Nations General Assembly.

Discussions were held at both the political level and with the responsible diplomatic, legal and military services. This approach proved to be effective, since without the impetus given by decision-makers, civil servants tend not to draw up the necessary documents, and without the necessary documents, political bodies will not take decisions. If concrete results are to be obtained, such prompting is essential at both levels in every ministry involved in the final decision on ratification. Decision-makers and working level must act in concert.

The personal involvement in the campaign of two ICRC Presidents — the late Alexandre Hay and, after him, Cornelio Sommaruga — played a key role, for their appeals persuaded many ministers to study the question and take a favourable decision.

A great deal of work has been done by ICRC delegates in the field, particularly in the regional delegations. Their personal commitment has ensured assiduous contact with the authorities and has produced some impressive results. It has been they who have asked the same questions over and over in the Ministries of Foreign Affairs and Defence: “And how are you getting on with the Protocols?” “Do you need any further information?” “Will your country’s name soon be added to the list of participating States?”.

The ICRC legal adviser heading the campaign travelled to some 70 capitals, often several times over, to meet with political representatives

and other officials, mostly from the Ministries of Foreign Affairs, Defence and Justice. Direct contact with the armed forces and their legal services often proved particularly useful. In addition, contacts were always made with the National Society in order to inform it of the representations and to explore with them possibilities for the Society's practical involvement in the ratification process. Finally, he advised ICRC delegates in the field on their own dealings with the authorities and determined what should be done from Geneva to follow up those approaches.

Reminiscences of "Protocol missions"

I ask the reader to allow me a few reminiscences of my activity to promote the ratification of the Protocols.

During the 1980s, I met a young legal adviser and a still younger trainee lawyer at the law department of Burkina Faso's Ministry of Foreign Affairs in Ougadougou. Those two were alone responsible for dealing with all legal questions of an international nature, whether bilateral or multilateral. They carried out this task in one single room, which served them as office, library and documentation centre. I would like to stress the warm welcome they gave me and their interest in the ICRC's message, in particular the introductory course on international humanitarian law. Shortly afterwards, Burkina Faso became party to the two Protocols. What a different atmosphere between that and the legal services of a great power! The US State Department in Washington, with its endless corridors and hundreds of legal experts — all perfectly familiar with the details of the two texts — is a veritable beehive of activity. The arguments for and against ratification had already been worked out and set down on paper when I went there. Yet now, twenty years later, the United States has still not ratified the two Protocols.

Recalling the different visits that stick in my mind, I cannot fail to mention my contacts in the Vatican. The Holy See is party to the Geneva Conventions and its representatives played an active role at the Diplomatic Conference of 1974-1977. But its ratification of the two treaties was delayed, the second Protocol being deemed unsatisfactory. The problem therefore lay in convincing the Secretary of State not only of the intrinsic value of Protocol II (admittedly weak in substance, but important as a symbol) while at the same time emphasizing the favourable effect that ratification by the Holy See would undoubtedly have in a number of capital cities, particularly in Latin America. Greeted by a Swiss guard who allowed me to exchange the din of St Peter's Square

for the silence of the Vatican Palace, I ascended one of the majestic staircases and found myself facing a Deputy Secretary of State in a splendid meeting room. Only a telephone struck a jarring note in those Renaissance surroundings. Shortly after our exchange of views, the Holy See became bound by both treaties, and issued a solemn declaration regarding Protocol II.

Another mission took me and the ICRC's regional delegate based in Jakarta to a very different but no less dazzling place: the palace of the Sultan of Brunei Darussalam, in Bandar Seri Begawan. That impressive residence is so vast that we lost our way, until a Gurkha member of the palace guard found us in front of one of the enormous portals carved out of precious wood and led us to the office of the ruler's chief counsellor. Brunei later acceded to the two Protocols.

In the 1980s, the chances of the Protocols being accepted by the nuclear powers were quite remote, if not non-existent (though China was already bound by both). Protocol I had been made part of the confrontation between the superpowers owing to the "nuclear question": were the international rules governing the use of nuclear weapons amended by the new law of 1977 or were they not? It was not until the end of the Cold War that positions became more flexible. Indeed, it is said that the first two treaties signed by Gorbachev at the outset of *perestroika* were the Additional Protocols.

The dissolution of the Soviet Union and the emergence of a large number of new States in Eastern Europe and Central Asia also put the ICRC on the alert. It was necessary to act quickly to ensure that the new republics became bound by the Geneva Conventions and their Additional Protocols (to which the USSR was already party at the time of the events of 1991). The international rules on State succession were well known, but how were the new governments going to behave in practice? The ICRC decided to send representatives to the capitals of the new republics and the Baltic States. Except in the Russian Federation, the Ukraine and Belarus, which were already bound by the Conventions and the Protocols through earlier ratification, the message of the ICRC delegates was the same everywhere: the new authorities were urged to confirm their countries' status of party to the Conventions and the Protocols by means of an official declaration, with a view to clarifying, confirming or creating a legal situation devoid of all ambiguity.

I met with the authorities of most of the countries that emerged from the former USSR. In record time, these new States followed the ICRC's

advice and submitted declarations to the depositary. All declared themselves to be bound by the 1949 Conventions and their Protocols.¹²

Many contacts among the armed forces of various countries taught me a great deal about the way in which international humanitarian law is viewed by the military. One of the lessons I learned was not automatically to conclude that military legal advisers are more open-minded than soldiers in the field: common sense and prejudice are to be found on both sides. And working with the military also forced me to learn a completely new language. The concept of “interoperability” is one example. It refers to ensuring the peaceful coexistence of armed forces within an alliance or any other form of collaboration in the event that one side is bound by Protocol I and the other is not. I began to understand that in a military alliance this concept enables States party to Protocol I to impose, or practically so, the new law on States non-party.

Perhaps the most gratifying moment came when a high-ranking officer of a military power not party to the Protocols said emphatically that Protocol I is “a very useful check-list for military commanders”. This Protocol today effectively serves as a frame of reference for general military staffs throughout the world, its status transcending the political controversies which sometimes obscure the true purpose of international humanitarian law, i.e. to limit the use of force to what is strictly necessary, to direct attacks solely against military objectives and to protect those not taking part in the hostilities, particularly the civilian population and persons deprived of their freedom.

And tomorrow?

In resolving to take action to bring about acceptance of the two Additional Protocols of 1977 by all States, the ICRC in the early 1980s embarked upon a major awareness-raising campaign. Its purpose was no more and no less than to persuade governments, in particular their Ministries of Foreign Affairs and the political and military officials responsible for national defence, to commit themselves to respecting and ensuring respect for certain rules in times of armed conflict. The priority targets for the campaign were always individuals, whether civilian or military, with government responsibilities. They formed a specific group with

¹² With the exception of Azerbaijan: 1949 Conventions only.

well-defined characteristics; the message was not intended for the general public.

The results achieved over the years have justified the ICRC's initiative to make the Additional Protocols as universally accepted as the Geneva Conventions. The task today is to persuade States which have not yet done so to become bound by these instruments. The torch has been passed to the ICRC Advisory Service on international humanitarian law, whose tasks include promoting the ratification of humanitarian treaties.

It should not be forgotten, however, that acceptance of an international treaty is but the first step down the long path to full compliance with their obligations by the States, by armed forces — whether “official” or not — and by all those who exercise *de facto* authority over men bearing arms. But a start has to be made somewhere.

In its September-October 1992 issue, the Review published an article by Sergio Moratiel Villa entitled "The Spanish School of the new law of nations"¹ which describes in three sections entitled "Las Casas, a man of prayer and action", "Vitoria: the gentle rebel" and "Suárez hands on the torch to Grotius" the extremely important contribution of Spanish theologians-cum-philosophers-cum-jurists to the development of modern international law. The last section of the 1992 article sets the stage for further research by the author into the history and philosophy of international law.

The philosophy of international law: Suárez, Grotius and epigones

by Sergio Moratiel Villa

Francisco Suárez, "the prince of modern jurists", was accused by some of being a great anti-monarchist, even the first regicide, because he was the first "convinced and avowed republican".

He incorporated Platonist, Aristotelian, Augustinian and Thomist ontology, metaphysics and theodicy within a legal framework; in jurisprudence, he introduced the world of ideas into the material world; his discourse on law is valid for his own day and for all time. In dealing with abstract questions, he developed a philosophy of law that is applicable to concrete situations.

Sergio Moratiel Villa studied in Spain, Italy, Switzerland and the United States and holds a doctorate in philology. He has taught mainly philology and comparative literature in schools in Madrid and at the University of Lausanne. He has written articles for periodicals and journals and published three books, mainly of literary criticism, in Spain. He has worked as a translator-reviser at the ICRC since 1971.

Original: Spanish

¹ *IRRC*, No. 290, September-October 1992, pp. 416-433.

In the lecture hall and in his writings, he taught that law must be the science of liberty, an inexact science, since it straddles individuality (*ego*) and community (*ens sociabilis*), which is not to be confused either with personal morality or public opinion. Every normal human being has an innate sense of what is right: individuals are equal in metaphysical terms but not in practice; equal quality obtains greater or lesser — i.e. disproportionate — quantity. The law stipulates what is right and proper, it is the rule of reason and truth, even though it is always rooted in the subjective judgement of someone as prone to error as any other human.

All men share a series of conditions which make it possible for the individual's free will to co-exist with the free will of others, in accordance with a general law of freedom. The law is applied without prejudice to anyone; justice is done and everyone receives his just deserts. Law, justice and order do not stem, in either material or moral terms, from equality but from proportionality; they are based on the internal and external prerequisites for the development of the rational and social life of the individual and of mankind.

Just as freedom is inconceivable without intelligence, so also duties are inconceivable without rights, both the former and the latter being innate. Duty is the application of the normative faculty of intelligence to freedom; right is the guarantee and endorsement demanded by freedom. Duty impels us towards a goal; right offers us the means to achieve it. Each individual has physical and intellectual capacities conducive to self-preservation and personal development. The application of his powers of reasoning to external freedom is the source of right, which is therefore innate and based on personality in relation to others. As human beings are creative, free "second" causes, and as the effects they have are an extension of their personalities, they all possess rights by virtue of their faculties. It is the task of (an equitable and distributive) justice to recognize this nature, which is common to all human beings, to solve the equation and to achieve the requisite equity.

Individual liberty is not restricted through association but develops in the process. Law does not prohibit the use of liberty but its abuse. States, like individuals, have certain inherent natural rights: life, self-preservation, development, independence, equality, defence and so forth. These are fundamental rights. The States also have rights acquired through usage and custom, treaties, international legislation, etc. For purposes of self-preservation, the State needs institutions that are consistent with its social goal. For example, the fundamental right to

self-preservation must go hand in hand with the right to development, since in the absence of the latter the former would be difficult to sustain.

Suárez's contributions to international law, following Vitoria's preliminary analytical treatise, consist in the elucidation and systematic compilation of general and specific types of law, their origin and nature and their various forms and categories: the different manifestations of natural law and the law of States as international standard-setting, that is to say the law of nations.² He drew a clearer distinction than his predecessors between *jus gentium* as international law and the earlier *jus gentium* derived from Roman jurisprudence; the modern version is "the law that different peoples and nations must observe in their mutual relations". He viewed the law of nations as a category of law endowed with a "rational basis" consisting in the fact that the human race is divided into many different peoples and realms but still preserves a certain moral and political unity imposed by the natural precept of mutual love and mercy. In his book *De legibus*, published in 1612, he explains that there is a natural law with which human beings are familiar, not through subjective moral awareness but through the harmony that exists between human structure and the divine plan. Although the rights of the individual are those which should prevail, society as a whole has a separate existence from the sum of its individual members. The social goal consists in individuals' free decision to provide mutual assistance and to form a political community; sovereignty is ultimately vested in the people. Authority comes into being with the establishment of society, but it can be disobeyed and overthrown if it fails to fulfil its task. In some cases, the objective social structure cannot be recognized and there may be different interpretations, habits and customs, the ordering of which is the responsibility of the law of nations. The ordering of relations between nations devolves on international law and "the global community".

For Suárez, the existence of a human society clearly transcends State boundaries, the need for norms in such a society, the inability of reason to provide all the norms required with apodictic force, and the right of human society to remedy that shortcoming through the application of custom as law, when such custom is in conformity with nature. He concluded that international law comes into play at the point where natural

² See my article, "The Spanish School of the new law of nations", in *IRRC*, No. 290, September-October 1992, in which I wrote (p. 431), "Vitoria and Suárez were the founders of the philosophy underlying all law, Vitoria for one branch of law, Suárez for law in general".

law and civil law intersect: international relations must occur on the basis of the criteria contained in international law inasmuch as the latter stems from “the shared needs of peoples”. It is therefore founded on the community of nations: States cannot exist in isolation. He invokes the concept of interdependence as a pillar of international law and a basis for ensuring peace, justice, freedom, progress and co-existence.

The modern law of nations is predicated on the existence in the world of groups that exercise territorial sovereignty and form a community of nations, each with its own internal or municipal law and with authority which is subject only to such restrictions as are stipulated in the law of nations. This law must be applied, individually or collectively, not by virtue of a supreme authority but by the will of the members of the community of nations. International law is thus the public legislation of the community of groups exercising their respective territorial sovereignty and authority.

Vitoria and Suárez arrived by different routes at a common goal: the need for a single and universal norm to govern the relations of individuals within a State, and of States among themselves and in the global community made up of individuals and States.

When the Romans called their fetial law a law of nations, they did not mean that it constituted positive law established by mutual consent of the different known peoples; non-Romans remained outside the scope of Roman fetial jurisdiction. As the Romans saw it, “*jus gentium*” was the law — both public and private — of civilized peoples; in a narrower sense, it was Roman law applied to foreign peoples (barbarians).

Suárez’s writings abound in quotations from Vitoria. They were both eminent theologians, but likewise jurists and philosophers, men of the Spanish renaissance, for at the time theology was viewed as an all-embracing science that studied the overall behaviour of every individual. In their view, the duties and functions of theologians covered a wide area: no argument, topic or text was alien to the purpose and practice of theology. They had more breadth of vision, a clearer perception of progress and a more marked inclination to deal with legal topics than professional jurists themselves. They even placed themselves at considerable risk, opposing the ambitions of the church hierarchy for secular authority, advocating limits to the authority held by lay sovereigns and formulating principles that circumvented divine and canon law.

The teachings of Suárez show a manifest and unusually modern interest in the safeguarding and promotion of human rights. Freedom,

justice, development and peace lack a solid basis and are seriously jeopardized unless the dignity and the equal and inalienable rights of the members of the universal family are recognized. States must guarantee absolute respect for fundamental rights and freedoms.

For Suárez, natural law incorporates the human dimension in the global plan of creation. His interest in the applicability of the general and abstract to the particular and concrete, coupled with his critical attitude, make him an integral part of the most modern philosophy. In his view, objective morality consists in the conformity or lack of conformity of the objects of human acts, by virtue of their essence, with rational nature. Subjective morality is rooted in instinct. Human nature is inseparably linked to the three enemies of the soul (the world, the flesh and the devil) and the seven deadly sins. With few exceptions, action is not determined by ideas but by feelings. Natural inclinations, passions and desires are the great motivators and regulators of life. He adds, however, that ideas are often closely related to powerful feelings, to strong drives and proclivities which motivate their implementation. Virtues are determined by education, voluntarily concluded agreements and the interest of society. Laws have secured increasingly wide acceptance. Law, according to Suárez, is “a just and stable precept that is sufficiently well promulgated”. It is based on eternal law in the Augustinian sense. Natural law is preceptive divine law and positive divine law, as laid down in both Testaments. In its moral dimension it is simply a gradual clarification of natural law. He even states that Christian law adds no positive moral precept to natural law.

His social doctrine may still be of interest today: society is a community based on natural law; it follows that civil authority — as distinct from the authority of kinship — has its remote origins in God, but its immediate subject is the “association” as such. Explicit or tacit popular consent is required to establish civil society and the corresponding sovereignty of the people must be transferred to a specific type of political regime. Suárez’s consensus is radically different from Rousseau’s “contract” in terms of its philosophical and theological premises. Once a specific type of political regime has been established, the community cannot arbitrarily withdraw the authority conferred. It may do so only in extreme cases of tyranny or social anarchy. The goal of civil society, which is the temporal common good, in itself inherently restricts the authority of the State. An uprising against the tyrant, even if it leads to his death, is therefore legitimate since he can be deposed by the representatives of the community that vested him with authority.

Supranational unity is the source of the law of nations which, as Suárez sees it, is not that part of natural law which governs the association of

peoples, but a positive law, primarily of a customary and consensual nature, accepted by all peoples as the basis for their mutual relations. The just war falls within the scope of the law of nations.

It has been said — perhaps rightly — that international law is based solely on opinions generally accepted by civilized nations, and that the resulting obligations are fulfilled solely through the application of moral sanctions: fear of public opinion, reluctance of the authorities to provoke general hostility and to suffer serious ill-consequences if they violate generally observed norms. And the system works, albeit not always.

Suárez developed this basic idea of the law of nations according to Vitoria: the sovereignty of the individual State is limited by the fact that it forms part of a community of nations linked by solidarity and mutual obligations.

Just as Vitoria defended “*jus soli*”, the principle of nationality by place of birth (one’s native country and the world are not incompatible), Suárez defended the equal rights of men and women. One cannot fail to be struck by the modernity of this view, given that women still feel subject to discrimination in so many places today. The world community had and still has its customs and legal practices but the applicability of legislation still leaves much to be desired — examples abound.

The rich heritage of Grotius

Rousseau and Voltaire criticized Grotius: Rousseau, in the early chapters of the *Social Contract*, branded him as an erudite anthologizer, a collector of quotations and authorities; Voltaire labelled him an extravagant compiler of quotations in the guise of arguments.

The debate concerning Grotius as the founder of international law dates back at least to the beginning of the twentieth century, when Frederick Pollock said of Grotius that he had laid the foundations of modern international law through his reformulation of the theory of natural law. Today, many writers belittle Grotius’s role as a modernist of the lay school. In a nutshell, his contribution to the theory of natural law is now increasingly interpreted as that of an eclectic transmitter of doctrine, whose synthetic work is cast in a more theological than lay mould. In the first place, Grotius was, in form and substance, an erudite Dutchman firmly rooted in an age of solid and conflicting theological convictions.

He has been heavily criticized for placing undue emphasis on natural law and neglecting the law of nations. Generations of statesmen and

diplomats, particularly Protestants, have supported Grotius's work, citing certain passages, not always his own, *ad nauseam*. His views were consulted, for example, by the "founding fathers" of the great American republic: John Adams, Thomas Jefferson, James Madison, James Wilson and John Marshall.

In effect, much of Grotius's work is merely a repetitive echo of principles that had already been commonplace for generations in Spain, and which are to be found not only in voluminous incunabula and dusty tomes of the fifteenth, sixteenth and seventeenth centuries, but also in manuals, dating from the same centuries, for the troops, such as that of Ayala. In practice, they were also used in the battlefield, and legal, religious and military advisers to the army in Spain consulted them frequently in connection with military operations. The law of nations and the law of war were no mere academic terms but meticulously applied regulations throughout the great Spanish empire. Spanish military operations were conducted in consultation with a "jurist", often a simple missionary but somebody who was familiar with the principles of war necessary for the restoration of peace, justice and order (when force wielded in the name of the law is victorious, it may impose the law). Ayala, from whose manual Grotius, by his own admission, drew considerable inspiration, was an officer and legal adviser to the army of Philip II in Flanders. He wrote a manual for use by the army. Belli, whose work also influenced Grotius, was a military judge in the armies of Charles V and Philip II. There can be no doubt that the entire military command was familiar with and discussed humanitarian issues and questions of international law which were already a traditional field of inquiry in Spain: the fifth book of the *Etimologías* of Saint Isidore of Seville, Saint Raymond of Peñafort, the *Siete Partidas* of Alfonso X the Wise, Alfonso Tostado, Gonzalo de Villadiego, Juan López (also cited by Grotius as Johannes Lupus), Francisco Arias de Valderas, Alonso Cano, Domingo de Soto and many other exponents of the law of nations.

Grotius said of Suárez that it was difficult to find his match in terms of acumen among philosophers and theologians. He admitted that Suárez had been the first to assert that international law consisted not only of mere principles of justice applicable to relations among States but also of longstanding customs observed in such relations by the Europeans and hence termed customary law.

Those who are familiar with Suárez's fine achievements have always been surprised by Grotius's attitude towards him. For example, Sir Robert Phillimore, more than a century and a half ago, was surprised that Grotius

had been unaware of Suárez's extremely clever dissertations on natural, public and international law.

For all too long it has been customary for writers, mostly Protestants, to treat Grotius as the "singlehanded founder" of modern international law or to view him as a shining luminary in the shadowy realm of jurisprudence, followed perhaps, but at some distance, by a few minor satellites scarcely worth considering. Grotius has certainly had enormous influence. This is universally known and ceaselessly reiterated. A fact that is sometimes overlooked, however, is that his great work owes much to a long list of notable precursors: Imerius, Bartolus, Baldus, Tertullian, Saint Augustine, Saint Isidore, Saint Thomas, Legnano, Bonet, Martinus Laudensis, Henricus de Gorkum, Juan López, Wilhelm Matthaei, Francisco Arias, Vitoria, Soto, Vázquez de Menchaca, Suárez, Pierino Belli, Baltasar Ayala, Alberico Gentili and many more. The fact is that, since the Reformation, the prejudice of both Protestants and Catholics has been such that it has prevented them from forming an impartial opinion, although some — though very few, including Grotius — have been familiar with the work of the other camp. It may be said that, while Grotius's work is virtually bereft of originality, it contains everything of value that existed at the time of its author. His *De jure belli ac pacis* brings together a great deal of material that is not and has never been relevant to the field of international law — the author was also a theologian, businessman, legal consultant, historian, statesman and patriot who was exiled and escaped from prison, leaving his wife in his place. The book contains almost the whole of international law as it existed in 1625 (between 1680 and 1780, it ran to thirty editions in Latin, nine in French, four in German and three in English; a Spanish edition was unnecessary — his sources were sufficient).

Many years ago, something very important came to light in connection with the long-lost commentary on the treatise *De jure praedae* by Grotius, the manuscript of which was discovered and published four years later by G. Hamaker. Professor Jan Kosters, examining a gloss it contains, was the first to show that it is actually a summary of Suárez's now famous distinction between the traditional law of nations, positive law and customary law. But Grotius wrote his commentary in 1604 and Suárez only published his *De legibus* in 1612. But how can a "summary" contain the distinction that was made in a later work? Hamaker and subsequently Kosters examined the "summary" more closely and found in facsimile — as many of us have since done — that one page was marked as though for insertion in a particular place. It becomes clear on comparing the texts that the insertion, although handwritten by Grotius, differs from the rest

of the manuscript (smaller writing, firmer strokes). The obvious conclusion is that the page thus inserted was not written in 1604 but much later...

Grotius quotes Vitoria in the Prolegomena to his magnum opus *De jure belli ac pacis*; also in *Mare Liberum* (1609), which is in reality a chapter of a work written, as we have seen, in 1604, *De jure praedae*, in which Grotius's references to the professor from Salamanca relate in particular to the question of the characteristics of a political community, which must have its own counsel and authority. Although Grotius did not publish *De jure praedae* (except for chapter 12, extracted and published as *Mare Liberum* in 1609), he doubtless considered for some time developing it into a treatise on the law of nations. We now know that he incorporated a good deal of both the spirit and letter of the work in his famous *De jure belli ac pacis* (1625). When Suárez's *De legibus* appeared in 1612, Grotius must certainly have read it with interest and summarized the author's important distinction, inserting the gist of it at the appropriate point in his as yet unpublished manuscript. But, that being the case, why did Grotius fail to acknowledge his debt to Suárez, as he had done in the Prolegomena where he was indebted to other authors? He makes only four passing references to Suárez in as many notes. Internal evidence shows beyond a doubt that Suárez influenced not only the formulation of the law of nations but also Grotius's arguments concerning natural law. Grotius was in England and was received in audience more than once by James I. When he published his *De jure belli ac pacis*, he was living in exile in Paris, depending on the hospitality of Louis XIII and on a somewhat irregular allowance from the royal treasury. In his straitened circumstances as a protégé, he avoided referring to "controversies of our time", and it is quite possible that, on those grounds, he felt it would be unwise to cite Suárez at greater length, since his "political" writings had kindled the wrath of reigning monarchs (James I, Louis XIII, Maria de Medici). However that may be, Grotius was well acquainted with *De legibus*, since otherwise he would not have cited it. Given the similarity of concepts in the writings of the two authors, it is difficult to avoid the conclusion that Grotius drew liberally on those of Suárez.

As to Ayala, clearly Grotius either had not read him or was lying, for he is utterly mistaken when he says that Ayala did not address the issue of the just and unjust war (chapter 2 of Ayala's *Manual* devotes 34 pages to the subject).

The law of nations began to take on modern attributes with the writers of the Spanish school. They added to the older idea of a law shared by many peoples the new concept of law applied between different States.

The theory of the natural equality of human beings was familiar but still awaited the daring innovator who would reflect its implications in the field of international law. The task fell to Vitoria. Grotius dealt less comprehensively with natural law than his predecessor Suárez or his successor Pufendorf. His main aim was to establish rules for international society, the grand system applicable to the cluster of communities (many norms were deduced from municipal law, from a comparison of society with the human organism and from regulations governing duelling in many places).

In the works of Vitoria, Suárez, Vázquez de Menchaca and Ayala — the best known juriconsults of the Spanish School — there are explicit statements to the effect that States have equal rights based on norms stipulated by nations in treaties. But they did not unquestioningly accept the common concept of natural law. This is particularly clear in the writings of Las Casas. Vitoria refers to natural law based on reason: “in the beginning, everything was common to all”. These authors differentiate between the ideal *jus naturale* and the positive *jus gentium* in accordance with the general tradition (Saint Thomas). Suárez made a broadly similar distinction and was then able to adapt the immutable *jus naturale* to the practical life of mankind. Grotius quite simply followed suit. A new application was found for this concept (equality of States) after the Reformation; the old theory of a higher common good had fallen into abeyance owing to the inability of both the emperor and the pope to command universal obedience. The notion of a society of States had ousted that of the universal empire. It was the task of pioneering publicists to come up with an analysis of such a society, its members and its legislation.

There has since arisen considerable confusion (and a measure of abuse) in respect of “equality of States”, inasmuch as some held themselves to be “more equal” than others. Grotius denounced the excesses and outrages perpetrated throughout Christianity by the warlords, “abuses that would have put even the barbaric nations to shame”; they took up arms for futile reasons and often without cause. All the respect due to divine and human law was flouted, as though the contestants were authorized to commit any manner of crime without restraint. Grotius, the most influential of all writers on the law of nations in Central Europe, the “miracle of Holland” as he was dubbed by Henry IV of France, saw how “his” main principles were applied in 1648 with the signing of the Peace of Westphalia, which did away with the medieval theory of international relations and set the stage, according to many Protestant authors, for the modern State system. The ideas transmitted by Grotius changed Central European ideology; however, large parts of the world remained outside the Grotian system: Russia (until Peter the Great), Turkey, Asia, Africa,

Spain, Portugal, Latin America and Oceania. Furthermore, some 200 States in a Europe dominated by bishops and minor Protestant princes had espoused the hallowed principle of "*cujus regio ejus religio*". Yet almost two centuries previously, the modern system of the society of nations had taken shape when a socially modern State came in contact and entered into conflict with non-Christian peoples, "infidels", and the lawfulness and justification of war became a pressing issue. Grotius's Spanish precursors had already proclaimed the absolute equality of sovereign States before the law. The equality of States is an irrefutable corollary of their concept of the equal sovereignty of the King of Spain and the local chieftains in America, and also of territorial independence. As recently as 1937, Mussolini said that the law of war was not applicable to the conflict in Ethiopia "because the Ethiopians are outside Christianity".

Presenting theories and opinions that differ from those printed and propagated in the West, especially parts of the West with Protestant majorities, is an arduous task that still runs up against prejudice which is firmly rooted in the muddy waters of a certain type of "black legend". Unfortunately, the requisite concerted effort has not yet been made to analyse theories and opinions concerning various aspects of international law formerly and currently prevalent in less developed countries. The United Nations now has some 200 Member States. International law should be developed in line with the growth of the "family of nations", broadening its perspectives and enhancing the scope of its application. With that end in view, the International Law Commission was established as a subsidiary organ of the United Nations General Assembly in 1947.

The school of Spanish theologians, philosophers and jurists of late fifteenth century and the early sixteenth and seventeenth centuries must be credited with the explicit definition of a law of nations based at once on recognition of the independence of nations — as opposed to imperialism and theocracy — and on the guarantee of individual freedoms. A general law of human beings, higher than that of States, brings together and interlinks individuals through the agency of the State. The chief merit of Vitoria and Suárez lies in the fact that they emphatically asserted — sooner and more effectively than Grotius — that nations are bound by natural law, which is independent of God and based on human nature itself. Grotius is to be credited with having employed the term "natural law" in a legal dissertation, as a subtitle to be precise: "*libri tres, in quibus naturae et gentium item juris publici praecipua explicantur*". It will be noted that three types of law are involved: natural, international and public. Let it not be said that he was thereby breaking new ground, that of rationalist natural law along the lines of Descartes and Kant, following

a path that runs parallel to that taken by the intellectualist law of the Spanish School influenced by Saint Augustine and Saint Thomas: Vitoria, who takes considerable account of historical circumstances, is as rationalist as Kant and Hobbes are intellectualist, since they took little or no account of the circumstances prevailing in their day. The purpose of Grotius's work, like that of Kant and Hobbes, was to develop a law of nations, which its originators recognized as very much ahead of its time and which Pufendorf, Wolff and De Vattel were to develop further without claiming to elaborate a separate international law. All three, as it happened, paid tribute to Suárez as a pioneer of "the history of political theory".

Neither international law based solely on the law of nature (naturalists) nor international law based solely on custom and conventions (positivists) contains the whole legal truth. Consent does not form the basis of all international law. The recognition in Article 38 of the Statute of the International Court of Justice that it must apply general principles of law and take account of the teachings of eminent publicists shows that customs and conventions are not the exclusive source of international law. The Charter of the United Nations is also perceptibly influenced by the naturalists (Vitoria, Suárez, Grotius) since the equality of nations and the inherent right of legitimate self-defence are recognized.

All contemporary international humanitarian law, whether from The Hague, Geneva or the United Nations, can fit in the moulds shaped by the group of (Catholic) authors of the so-called Spanish School of International Law. Grotius (though not a Catholic) is one of them...

Epilogue

Rousseau viewed his Utopian contemporary, the Abbé de Saint-Pierre, as a moth attracted by light: "This rare man, an ornament to his age and to his kind — the only man, perhaps, in all the history of the human race whose only passion was the passion for reason — nevertheless only progressed from error to error (...), because he wished to make all men like him instead of taking them as they are and will continue to be."³

It is good to have treaties, conventions, legislation, usage and customs; but they are of little use unless applied in practice. We inherited a very

³ *Confessions*, Book IX.

imperfect law of nations from the Chaldean, Persian and Hebrew tribes (inviolability of emissaries, *lex talionis*), the Greeks (burial of the dead), the Romans (*jus gentium*, fetial law, *vae victis*), the Hindus (inaccessible writings from 4000 B.C., the Vedic period, inter-tribal relations, due respect for emissaries, castes, minor kingdoms, prohibition on causing undue damage, proper treatment of prisoners of war, truces), the popes and monarchs of the Middle Ages, Machiavelli, etc. But the Hebrews (like the Tatars), for example, flouted virtually all norms of human behaviour: conquest was the prelude to the burning of towns, the killing or enslavement of women and children, and the deportation of men, justified in all cases by reference to the Law of Moses, the Psalms and the Prophets; the Greeks were barbaric towards the “barbarians”, although in their case we find some humane principles (ransom as an alternative to slavery or death). The Roman *jus gentium* was a form of civil law applicable only, with considerable discrimination, to Italian tribes; *jus gentium*, natural law and fetial law (applied to declarations of war, the signing of peace and negotiations in general) were extremely confused. When the Arabs waged holy war, they sometimes engaged in acts that fell short of holiness. Machiavelli’s diplomacy was inspired by the horrors perpetrated by the “paragon of princes”, Cesare Borgia. Among Catholics and Protestants, crimes such as those committed by Catherine de Medici in France, the inquisitors in Spain, the Duke of Alba in Flanders, and Tilly and Wallenstein in Germany are prime examples of “do as I say, but not as I do”.

Grotius wrote his treatise “*Jus praedae*” in justification of the war in the Indies. His assertions in “*Mare Liberum*” are much more explicit (and more militaristic) than anything set down in *De jure belli ac pacis* (a title copied from Cicero, *Oratio pro Balbo*, chapter 6: “*universum denique jus belli ac pacis*”⁴), in whose pages the material relating to international law and humanitarian law is, as it were, buried beneath the great mound of detail accumulated through his amazing erudition. He apparently said, shortly before dying in a shipwreck: “By dint of undertaking much, I have achieved little”.

Before Grotius, three Italians also examined the question of “war and peace”: Giovanni da Legnano, Pierino Belli and Alberico Gentili. But should anyone happen to assert that an old “Italian school” of international

⁴ Cicero was also the first to refer to “*jus bellicum, fidesque jurisjurandi*”, in *De Officiis*, Book III, chapter XXIX, a locution related to “*pacta sunt servanda*”.

law exists, they can easily be refuted by pointing out that the writers in question are heavily overshadowed by the prominent figures of the “modern” Spanish School of International Law.

The road to hell, as we know, is paved with good intentions. Legislation, proclamations, notices and treaties failed to serve at the Battle of Solferino. It was there that Dunant rejuvenated the age-old ideals of humanitarianism, proposing not long afterwards in his book “Memory of Solferino” principles and norms that were to be incorporated in the *international humanitarian law* of the Geneva Conventions, their Additional Protocols and the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (the historical concept of “human rights” is civilization’s response to the eternal problem of human dignity). How astonishing and superb was the trajectory of (modern) international law and humanitarian law or of international humanitarian law, which within scarcely three generations — Father Montesinos, Father Vitoria, Father Suárez — made more progress than in all previous centuries, came to maturity and has been leading its adult life ever since!

Origin of the twin terms *jus ad bellum/jus in bello*

by Robert Kolb

The august solemnity of Latin confers on the terms *jus ad bellum* and *jus in bello*¹ the misleading appearance of being centuries old. In fact, these expressions were only coined at the time of the League of Nations and were rarely used in doctrine or practice until after the Second World War, in the late 1940s to be precise. This article seeks to chart their emergence.

The doctrine of just war

The terms *jus ad bellum* and *jus in bello* did not exist in the Romanist and scholastic traditions. They were unknown to the canon and civil lawyers of the Middle Ages (glossarists, counsellors, ultramontanes, doctors *juris utriusque*, etc.), as they were to the classical authorities on international law (the School of Salamanca, Ayala, Belli, Gentili, Grotius, etc.). In neither period, moreover, was there a separation between two sets of rules — one *ad bellum*, the other *in bello*.²

Robert Kolb is preparing a doctorate in international law at the Graduate Institute for International Studies in Geneva; his thesis is entitled *La bonne foi en droit international public* (Good faith in public international law).

Original: French

¹ *Jus ad bellum* refers to the conditions under which one may resort to war or to force in general; *jus in bello* governs the conduct of belligerents during a war, and in a broader sense comprises the rights and obligations of neutral parties as well.

² P. Hagenmacher, *Grotius et la doctrine de la guerre juste*, Paris, 1983, pp. 250 ff. and 597 ff., and "Mutations du concept de guerre juste de Grotius à Kant", *Cahiers de philosophie politique et juridique*, No. 10, 1986, pp. 117-122.

From earliest times, the Western tradition sought to place war in a legal framework by formulating a doctrine of just war.³ The aim was to reconcile might and right, *Sein* and *Sollen*, by making the former serve the latter, or by curtailing might with right. On the basis of those premises, war was seen as a just response to unprovoked aggression, and more generally as the ultimate means for restoring a right that had been violated (*consecutio juris*)⁴ or for punishing the offender.⁵ The material causes for which a just war could be waged fell into four categories: defence, recuperation of property, recovery of debts and punishment. An act of war was considered lawful if it was just; and it was considered just if it met the conditions enumerated above.

In the doctrine of *bellum iustum*, therefore, legal analysis bore exclusively on the act of resorting to war, and more particularly on the causes pursued. War was viewed from the subjective angle as a concrete act carried out by a specific belligerent for specific reasons, and such an act

³ There is an abundant literature on the concept of just war.

For the Graeco-Roman period in particular, see S. Clavadetscher-Thürlemann, *Polemos dikaios und bellum iustum: Versuch einer Ideengeschichte*, Zurich, 1985; M. Mantovani, *Bellum iustum: Die Idee des gerechten Krieges in der römischen Kaiserzeit*, Bern/Frankfurt am Main, 1990; S. Albert, *Bellum iustum: Die Theorie des gerechten Krieges und ihre praktische Bedeutung für die auswärtigen Auseinandersetzungen Roms in republikanischer Zeit*, Lasselben, 1980; H. Hausmaninger, "Bellum iustum und iusta causa belli in älteren römischen Recht", *Oesterreichische Zeitschrift für öffentliches Recht*, 1961, Vol. 11, pp. 335 ff.

For the Middle Ages in particular, see F.H. Russell, *The just war in the Middle Ages*, Cambridge/London, 1975; G. Hubrecht, "La guerre juste dans la doctrine chrétienne, des origines au milieu du XVI^e siècle", *Recueil de la Société Jean Bodin*, 1961, Vol. 15, pp. 107 ff.; J. Salvioli, *Le concept de la guerre juste d'après les écrivains antérieurs à Grotius*, 2nd ed., Paris, 1918; A. Vanderpol, *La doctrine scolastique du droit de la guerre*, Paris, 1925, p. 28 ff., and *Le droit de la guerre d'après les théologiens et les canonistes du Moyen Age*, Paris/Brussels, 1911; G. Beesterm-Iler, *Thomas von Aquin und der gerechte Krieg: Friedensethik im theologischen Kontext der Summa Theologica*, Cologne, 1990.

On the notion of just war in general, see Hagggenmacher, *Grotius, op. cit.*; J.B. Elshtain, *The just war theory*, Oxford/Cambridge (Mass.), 1992; R. Regout, *La doctrine de la guerre juste de Saint Augustin à nos jours*, Paris, 1935; D. Beaufort, *La guerre comme instrument de secours ou de punition*, La Haye, 1933; M. Walzer, *Just and unjust wars: A moral argument with historical illustrations*, 2nd ed., New York, 1992; Y. de la Brière, *Le droit de juste guerre*, Paris, 1938; G.I.A.D. Draper, "The just war doctrine", *Yale Law Journal*, Vol. 86, 1978, pp. 370 ff.; K. Szetelnicki, *Bellum iustum in der katholischen Tradition*, Fribourg, 1992.

On the relationship with the Muslim doctrine of war, see J.T. Johnson, *Just war and Jihad: Historical and theoretical perspectives on war and peace in Western and Islamic tradition*, New York/London, 1991; R. Steinweg, *Der gerechte Krieg: Christentum, Islam, Marxismus*, Frankfurt am Main, 1980.

⁴ Hagggenmacher, *Grotius, op. cit.*, pp. 457 ff., and "Mutations", *art. cit.*, pp. 108-109.

⁵ Grotius, *De iure belli ac pacis* (1625), Book II, chap. I, 2, 1. See Hagggenmacher, *Grotius, op. cit.*, pp. 549 ff.

brought into being a legal regime that reflected the validity of the causes invoked or, so to speak, the belligerent's right to resort to force. This meant that war was not seen as a *de facto* situation to which the same set of rules applied in all cases. In other words, there was no general *jus in bello*; the rights and obligations of belligerents were unequal and depended exclusively on the causes which they claimed to be pursuing and on the material justness of those causes.⁶

Thus, for example, Grotius's *temperamenta belli* (restrictions on warfare), which it is tempting to equate with contemporary *jus in bello*, applied only to belligerents resorting to war for a just cause;⁷ they broadened the concept of just war while defining its limits. Here, too, everything revolved around the notion of just cause. A belligerent without a just cause had no rights; he was simply a criminal who might be executed. Consequently, no legal restraints could be imposed on his behaviour.

For these reasons, there was no room for *jus in bello* as we understand it today, that is, a body of independent, objective and suprapersonal rules applying to all belligerents alike and governing the conduct of hostilities in a *de facto* situation.⁸ This explains why both the term *jus in bello* and the concept to which it refers are absent from the classical texts.

As for the term *jus ad bellum*, its absence is more surprising. However, the simple right to wage war that was vested in public authorities was also irrelevant in the doctrine of *bellum justum*.⁹ Legal analysis looked deeper, focusing instead on causes and hence on the lawfulness of resorting to war. Moreover, the predominance of *ad bellum* considerations in general over the *in bello* aspect made it impossible even to conceive of such terms, whose existence would have implied a more extensive, evenly balanced and fully articulated development of two mutually exclusive branches of the law.¹⁰ We are reminded of the early philosophers' theory whereby a

⁶ Haggemacher, *Grotius, op. cit.*, pp. 457 ff., 547 ff., and 568 ff., and "Mutations", *art. cit.*, pp. 110-113.

⁷ Grotius, *op. cit.*, Book III, chaps. XI-XVI (see Haggemacher, *Grotius, op. cit.*, pp. 600 ff.).

⁸ Haggemacher, *Grotius, op. cit.*, pp. 600 ff.

⁹ The rule limiting the competence to wage war to the public authorities (i.e. the sovereign) is affirmed in an oft-quoted passage of St Thomas Aquinas which sets out the three prerequisites for such competence: *auctoritas principis, justa causa* and *recta intentio* (*Summa theologiae*, II, II, 40, 1). See O. Schilling, *Das Völkerrecht nach Thomas von Aquin*, Freiburg im Breisgau/Berlin, 1919. On *recta intentio*, see Haggemacher, *Grotius, op. cit.*, pp. 401 ff.

¹⁰ See below.

term or a concept can come into existence only in relation to its absolute opposite. They claimed, for example, that ugliness existed only in relation to beauty; it could not be conceived of except in contrast to beauty.

Although the time was clearly not ripe for the emergence of the terms that concern us here, they sometimes crept in, used in a non-technical sense far removed from their modern meaning. Grotius, for instance, wrote that he was “fully convinced (...) that there is a law common to all nations governing both recourse to war and the conduct of warfare...”¹¹ This *law ad bella* and *in bellis* obviously remained subordinate to the doctrine of just war.¹²

To sum up, the subjective notion of the right to wage war in pursuit of certain causes precluded the emergence of an independent *jus in bello*; at the same time, however, the doctrine of lawful causes for waging war inhibited the affirmation of the simple right to make war (*jus ad bellum*). In such a system, both concepts lay outside the scope of the law, which was concerned with antecedent issues.

War as a de facto situation

Throughout the seventeenth and eighteenth centuries, the doctrine of just war lost ground to the idea that States had discretionary powers to wage war and that those powers could be used as a means of pursuing national policy. That was the era of *raison d'Etat*. This concept of war became permanently entrenched in the nineteenth century, in parallel with the erosion of the concept of war as a just act. War was now seen as a *de facto* and intellectually neutral situation.¹³ Quite logically, the result was a major shift in the legal emphasis from the subjective lawfulness of resorting to war to the rights and duties relating to hostilities as such, in other words to rights and duties *durante bello*.¹⁴ This new edifice appears

¹¹ Grotius, *op. cit.*, prolegomena, para. 28: “Ego cum ob eas, quas jam dixi, rationes, compertissimum haberem, esse aliquod inter populos ius commune, quod & ad bella & in bellis valeret...”. See also Book I, chap. I, 3, 1: “De iure belli cum inscribimus hanc tractationem, primum hoc ipsum intelligimus, quod dictum jam est, sitne bellum aliquod iustum, & deinde quid in bellum iustum sit”. (In giving our treatise the title *The law of war*, we first wish to examine, as we have said, whether war can be just and what is just in war. — ICRC translation.)

¹² Haggemacher, *Grotius, op. cit.*, p. 601.

¹³ Haggemacher, “Mutations”, *art. cit.*, pp. 113-117.

¹⁴ Haggemacher, *Grotius, op. cit.*, pp. 599 and 605 ff., and “Mutations”, *art. cit.*, pp. 117 ff.

to be a mirror image of the previous one. A system based on the material lawfulness of war (war as a sanction) gave way to a system focusing on its formal regulation (rules pertaining to the opening of hostilities and the effects of war).¹⁵ To quote an eminent specialist on the subject: “Now that the field of vision had been restricted, greater attention could be paid to the conduct of hostilities: for owing to this indifference [to the causes of war], armed violence came to be seen first and foremost as a process to be regulated in itself, regardless of its causes, motives and ends.”¹⁶

This opened the door to *jus in bello* as it is understood today. The distinction which Vitoria had already begun to make between lawful reasons for resorting to war and just limits in the law of war¹⁷ was upheld by Wolff, the first to see rights and duties *durante bello* as being independent of the underlying causes of war,¹⁸ and was later firmly established by Vattel, who incorporated into the law of nations a series of rules setting legal restrictions on means of warfare.¹⁹ Kant made an explicit and modern distinction between the two branches of the law (*Recht zum Krieg* and *Recht im Kriege*),²⁰ but neither he nor any of the other authors mentioned used the terms *jus ad bellum* and *jus in bello*.

The explanation for this lies in the lack of any doctrinal need to draw a conceptual distinction between the two branches of the law rather than in random developments of terminology or the decline of Latin. The fact is that for reasons that were different in nature but identical as to their effect, the mere competence to resort to war (*jus ad bellum*) aroused no more legal interest than it had previously. As one of the sovereign’s absolute and discretionary powers,²¹ it was seen as the cornerstone of the rules of law relating to war, their logical *prius*, and thus basically remained an implicit dogma. Legal endeavours had focused entirely on the formal-

¹⁵ On this dichotomy, see Haggemacher, “Mutations”, *art. cit.*, pp. 107-108.

¹⁶ Haggemacher, *Grotius, op. cit.*, p. 599.

¹⁷ *De iure belli relectiones*, Nos. 15 ff. (lawful motives for war) and Nos. 34 ff. (just limits in the law of war). See Haggemacher, *Grotius, op. cit.*, pp. 171-172 and 611.

¹⁸ *Jus gentium methodo scientifica pertractatum* (1749), paras. 888 ff. See Haggemacher, *Grotius, op. cit.*, pp. 607-608, and “Mutations”, *art. cit.*, pp. 118-189.

¹⁹ *Le droit des gens* (1758), Vol. III, chap. VIII. See Haggemacher, *Grotius, op. cit.*, pp. 609-610, and “Mutations”, *art. cit.*, p. 119.

²⁰ *Metaphysik der Sitten, Rechtslehre*, para. 53.

²¹ As N. Politis puts it with his usual elegance in *Les nouvelles tendances du droit international* (Paris, 1927, pp. 100-101): “Sovereignty killed the theory of *justum bellum*. The States’ assertion that they did not have to account for their deeds led them to claim the right to use the force at their disposal as they saw fit” — ICRC translation).

ties to be observed in initiating hostilities and on the respective rights and obligations of belligerents, that is to say on matters subsequent to the subjective right to resort to war. Yet the term *jus in bello* was still not used. The lack of any opposition or equivalence between the two branches of the law prevented the emergence of such a term, which could only come into existence when the two aspects of war assumed approximately equal importance and it became necessary to underline the distinction between them.

It was at the time of the League of Nations that the two branches came to be considered on an equal footing and found their place in positive law. In the expression of the time, the aim was to “outlaw war”.²² The former absolute power to resort to war was replaced by the rules of *jus contra bellum*. From then on, the problem of recourse to force was at the centre of legal concerns, standing in opposition to law *in bello*. The theoretical distinction between laws aimed at preventing war and the laws and customs of warfare was thus clearly established. All that remained to be done was to find appropriate terminological expression for this distinction, which had finally crystallized under the pressure of history.

The terminological aspect

Neither in the Middle Ages nor in the Age of Enlightenment did the law lack terms for what is now known as *jus in bello*. At least certain analogies can be drawn providing the conceptual differences outlined above are taken into account. Many texts from these periods contain terms such as *jus belli*,²³ *usus in bello*,²⁴ *mos et consuetudo bellorum*,²⁵ *modus belli gerendi*,²⁶ *forma belli gerendi*,²⁷ *quid quantumque in bello liceat et*

²² H. Wehberg, *The outlawry of war*, New York, 1931, and “La mise de la guerre hors la loi”, *Recueil des Cours de l'Académie de droit international de La Haye (RCADI)*, 1928-IV, Vol. 24, pp. 146 ff.; C.C. Morrison, *The outlawry of war: A constructive policy for world peace*, Chicago, 1927; and Q. Wright, “The outlawry of war”, *American Journal of International Law (AJIL)*, 1925, Vol. 19, pp. 76 ff.

²³ See for example Saint Augustine, *De civitate Dei*, I, 1, and *Epistula CXXXVI*.

²⁴ Saint Augustine, *De civitate Dei*, I, 1; I, 6; XIX, 23.

²⁵ *Ibid.*

²⁶ Grotius, *De iure praedae*, chap. VII, art. III-IV.

²⁷ *Ibid.*

quibus modis,²⁸ *jus armorum*,²⁹ *lex armorum*,³⁰ *jus militare*,³¹ *jura et usus armorum*,³² *droiz de guerre*,³³ *droit d'armes*,³⁴ *drois, usaiges et coustumes d'armes*,³⁵ *usance de guerre*,³⁶ *droit et usage d'armes*,³⁷ *Kriegsmanier*,³⁸ etc.³⁹ Not all these terms pertain to public international law as we understand it today: they did not apply only to armies set up under public authority. *Jus armorum* was the professional code for warriors⁴⁰ — knights, for example — and constitutes *jus gentium*.⁴¹

²⁸ Grotius, *De iure belli ac pacis*, Book III, chap. I, 1.

²⁹ P.C. Timbal (ed.), *La guerre de Cent Ans vue à travers les registres du Parlement (1337-1369)*, Paris, 1961, p. 541.

³⁰ H. Knighton, *Chronicle*, Vol. II, London, 1985, p. 111. Also see the note of Edward III concerning the Ivo de Kerembars affair, in M.H. Keen, *The laws of war in the Middle Ages*, London/Toronto, 1965, p. 29, note 1.

³¹ G. Baker of Swinbrook, *Chronicon*, Oxford, 1889, pp. 86, 96 and 154.

³² M.H. Keen, "Treason trials under the law of arms", *Transactions of the Royal Historical Society*, 5th series, 1962, Vol. 12, p. 96. See also the letter from N. Rishdon to the Duke of Burgundy, in Keen, *The laws of war*, *op. cit.*, p. 17.

³³ M. Hayez, "Un exemple de culture historique au XVe siècle: la Geste des nobles français", *Mélanges d'archéologie et d'histoire de l'École française de Rome*, 1963, Vol. 75, p. 162; Keen, *The laws of war*, *op. cit.*, p. 1.

³⁴ See the cases of David Margnies vs Prévôt de Paris (Parlement de Paris, ca 1420) and of Jean de Melun vs Henry Pomfret (Parlement de Paris, 1365), in Keen, *The laws of war*, *op. cit.*, pp. 18 and 260.

³⁵ S. Luce, *Histoire de Bertrand du Guesclin et de son époque. La jeunesse de Bertrand du Guesclin, 1320-1364*, Paris, 1876, pp. 600-603.

³⁶ J. de Bueil, *Le Jouvencel*, Vol. II, Paris, 1889, p. 91.

³⁷ P. Contamine, *Guerre, état et société à la fin du Moyen Age. Etudes sur les armées des rois de France, 1337-1494*, Paris/The Hague, 1972, p. 187.

³⁸ G.F. de Martens, *Précis du droit des gens moderne de l'Europe*, 3rd ed., Gottingen, 1821, p. 462, quoting an author writing in 1745; C. Lüder, in F. Holtzendorff (ed.), *Handbuch des Völkerrechts*, Vol. IV, Hamburg, 1889, p. 254.

³⁹ For all these examples and others, see Contamine, *Guerre, état et société*, *op. cit.*, pp. 187 ff.; Keen, *The laws of war*, *op. cit.*, pp. 1 ff.; E. Audinet, "Les lois et coutumes de la guerre à l'époque de la guerre de Cent Ans", *Mémoires de la Société des Antiquaires de l'Ouest*, 1917, Vol. 9.

⁴⁰ Keen, *The laws of war*, *op. cit.*, pp. 7-22. It was only in the sixteenth century, at the time of the School of Salamanca, that *jus belli* took on the meaning that it has today in public law. See Haggenmacher, *Grotius*, *op. cit.*, p. 283.

⁴¹ Keen, *The laws of war*, *op. cit.*, p. 10 ff. On the concept of *jus gentium*, see *inter alia* M. Voigt, *Das ius naturale, aequum et bonum und ius gentium der Römer*, 4 vol., Aalen, reprint, 1966 (1st ed., Leipzig, 1856-1875); G. Lombardi, *Sul concetto di ius gentium*, Milan, 1974; M. Kaser, *Ius gentium*, Cologne/Weimar, 1993; M. Lauria, "Ius gentium", *Mélanges P. Koschaker*, Vol. I, Weimar, 1939, pp. 258 ff.; P. Frezza, "Ius gentium", *Revue internationale des droits de l'Antiquité*, 1949, Vol. 2, pp. 259 ff.; Haggenmacher, *Grotius*, *op. cit.*, pp. 313 ff.

One important expression in the context of public international law is *jura belli*, which can be traced back to Livy.⁴² In the nineteenth century it was sometimes used to mean *jus in bello* in the modern sense (Heffter used it this way in his influential handbook).⁴³ The Latin terms *jura belli* and *jus belli* both seem to have been derived from the Greek expression “oi tou poleμου nomoi” used by Polybius.⁴⁴ The English expression “laws of war” is also quite old. During the reign of Charles I, the Earl of Essex decreed the *Laws and ordinances of war* governing the conduct of the parliamentary forces during the civil war that brought Cromwell to power.⁴⁵ The term can be found in the literature as well.⁴⁶ In French, the expression *lois de la guerre* rapidly gained acceptance.⁴⁷

It is extremely rare to find the terms *jus ad bellum* and *jus in bello* used before 1930. Neither was mentioned during the 1899 and 1907 Peace Conferences, among whose aims was codification of the law of war.⁴⁸ Enriques used the term *jus ad bellum* in 1928, having apparently invented it on the spot to serve a specific need.⁴⁹ Keydel drew a clear distinction between the two branches of the law in a well-researched thesis on recourse to war published in 1931 in a scholarly review edited by Professor Strupp, but did not use the terms in question.⁵⁰ Keydel, like Strupp himself,⁵¹ diligently enumerated all the Latin words and expressions relating to the matter. It may be concluded, therefore, that up to the early 1930s

⁴² *History of Rome*, Book II, 12, and Book XXXI, 30: “Esse enim quaedam belli jura, quae ut facere ita pati sit fas”.

⁴³ A.G. Heffter, *Le droit international de l'Europe*, 4th ed., Berlin/Paris, 1883, p. 260.

⁴⁴ *Histories*, Book V, 9, 11.

⁴⁵ E. Nys, *Les origines du droit international*, Bruxelles/Paris, 1894, p. 208.

⁴⁶ See for example R. Ward, *An enquiry into the foundations and history of the law of nations in Europe*, Vol. II, London, 1795, p. 165; and R. Phillimore, *Commentaries upon international law*, Vol. II, London, 1857, p. 141.

⁴⁷ See for example de Martens, *Précis du droit, op. cit.*, p. 461, para. 270, “Loix de la guerre”.

⁴⁸ See *Actes et documents relatifs au programme de la Conférence de la Paix*, The Hague, 1899; and *Actes et documents: Deuxième Conférence internationale de la Paix, La Haye, 15 juin-18 octobre 1907*, 3 vol., The Hague, 1907.

⁴⁹ G. Enriques, “Considerazioni sulla teoria della guerra nel diritto internazionale”, *Rivista di diritto internazionale*, 1928, Vol. 20, p. 172.

⁵⁰ H. Keydel, *Das Recht zum Kriege im Völkerrecht, Frankfurter Abhandlungen zum moderne Völkerrecht*, No. 24, Leipzig, 1931, p. 27.

⁵¹ K. Strupp, “Les règles générales du droit de la paix”, *RCADI*, 1934-I, Vol. 47, p. 263 ff.

the terms *jus ad bellum* and *jus in bello* had no currency. They began to gain recognition towards the middle of the decade, in particular, it would seem, at the prompting of the School of Vienna.⁵²

Among the first to use these terms was Josef Kunz, who may well be the one who coined them. Kunz had a gift for formulating precise concepts and giving them incisive Latin names (he later came up with the term *bellum legale*);⁵³ the phrases we are concerned with appear in an article⁵⁴ he published in 1934 and a book that followed in 1935.⁵⁵ Two years later, Alfred Verdross used the term *jus in bello* in exactly the same way as Kunz, placing it in parentheses after the word *Kriegsrecht* in his handbook on public international law.⁵⁶ The chapter on recourse to force was published only in the second edition, and here the term *jus ad bellum* appeared.⁵⁷ Around the same time, R. Regout made frequent use of both terms in his book on the doctrine of just war,⁵⁸ making it clear from the outset that they reflected a fundamental distinction, and W. Ballis followed suit.⁵⁹ It is impossible to say whether these were independent developments or otherwise.

Interestingly enough, neither term can be found in the texts produced by other major publicists during the interwar years, nor, according to our investigations, were they used in the courses on war and peace given at the The Hague Academy of International Law or in any other courses. The breakthrough occurred only after the Second World War, when Paul Guggenheim, another disciple of the School of Vienna, drew the terminological distinction in one of the first major international law treatises of the postwar era.⁶⁰ A number of monographs subsequently took up the

⁵² On the Vienna neopositivist school of philosophy, see V. Kraft, *Der Wiener Kreis: Der Ursprung des Neopositivismus*, 2nd ed., Vienna/New York, 1968. On the legal school of Vienna, see J. Kunz, *The changing law of nations*, Toledo, 1968, pp. 59 ff.; and J. Stone, *The province and function of law*, Cambridge (Mass.), 1950, pp. 91 ff.

⁵³ "Bellum justum and bellum legale", *AJIL*, 1951, Vol. 45, pp. 528 ff.

⁵⁴ "Plus de lois de guerre?", *Revue générale de droit international public (RGDIP)*, Vol. 41, 1934, p. 22.

⁵⁵ *Kriegsrecht und Neutralitätsrecht*, Vienna, 1935, pp. 1-2.

⁵⁶ *Völkerrecht*, Berlin, 1937, p. 289.

⁵⁷ *Völkerrecht*, 2nd ed., Berlin, 1950, p. 337.

⁵⁸ *La doctrine de la guerre juste de saint Augustin à nos jours*, Paris, 1935, pp. 15 ff.

⁵⁹ *The legal position of war: Changes in its practice and theory from Plato to Vattel*, The Hague, 1937, p. 2.

⁶⁰ P. Guggenheim, *Lehrbuch des Völkerrechts*, Vol. II, Basel, 1949, p. 778.

terms,⁶¹ which soon gained widespread acceptance and were launched on their exceptionally successful career. In a thesis written under Guggenheim's supervision and published in 1956, Kotsch gave them pride of place, treating them in the manner to which we have grown accustomed and which we now take for granted.⁶²

This article, the product of the author's curiosity and of research carried out for another study,⁶³ does not claim to provide a complete overview of the emergence of the terms *jus ad bellum* and *jus in bello*. Indeed, there would be a lot more to say: many omissions would need to be remedied, and many imprecise points clarified. The purpose here is simply to shed some light on the origin of those terms and to dispel the general illusion that they have been used since earliest times. This false impression and the fact that so little is known on the subject, even by specialists, make this a fascinating field of research that yields surprising results.

⁶¹ See for example F. Grob, *The relativity of war and peace*, New Haven, 1949, pp. 161 and 183-185.

⁶² *The concept of war in contemporary history and international law*, Geneva, 1956, pp. 84 ff.

⁶³ A contribution to the new edition of the *Dictionnaire de droit international*, edited by Jean Salmon and Eric David.

Reports and Documents

The Diplomatic Conference on an international total ban on anti-personnel land mines (Oslo, 1-18 September 1997) has adopted on 18 September 1997 the Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction. The treaty will be open for signature from 3-4 December 1997 in Ottawa and thereafter at the United Nations Headquarters in New York.

Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction

Preamble

The States Parties,

Determined to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, and have other severe consequences for years after emplacement,

Believing it necessary to do their utmost to contribute in an efficient and coordinated manner to face the challenge of removing anti-personnel mines placed throughout the world, and to assure their destruction,

Wishing to do their utmost in providing assistance for the care and rehabilitation, including the social and economic reintegration of mine victims,

Recognizing that a total ban of anti-personnel mines would also be an important confidence-building measure,

Welcoming the adoption of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and calling for the early ratification of this Protocol by all States which have not yet done so,

Welcoming also United Nations General Assembly Resolution 51/45 S of 10 December 1996 urging all States to pursue vigorously an effective, legally-binding international agreement to ban the use, stockpiling, production and transfer of anti-personnel landmines,

Welcoming furthermore the measures taken over the past years, both unilaterally and multilaterally, aiming at prohibiting, restricting or suspending the use, stockpiling, production and transfer of anti-personnel mines,

Stressing the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines and recognizing the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines and numerous other non-governmental organizations around the world,

Recalling the Ottawa Declaration of 5 October 1996 and the Brussels Declaration of 27 June 1997 urging the international community to negotiate an international and legally binding agreement prohibiting the use, stockpiling, production and transfer of anti-personnel mines,

Emphasizing the desirability of attracting the adherence of all States to this Convention, and determined to work strenuously towards the promotion of its universalization in all relevant fora including, inter alia, the United Nations, the Conference on Disarmament, regional organizations, and groupings, and review conferences of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects,

Basing themselves on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, on the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary

suffering and on the principle that a distinction must be made between civilians and combatants,

Have agreed as follows:

Article 1 — General obligations

1. Each State Party undertakes never under any circumstances:
 - a) To use anti-personnel mines;
 - b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;
 - c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.
2. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.

Article 2 — Definitions

1. “Anti-personnel mine” means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.
2. “Mine” means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle.
3. “Anti-handling device” means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.
4. “Transfer” involves, in addition to the physical movement of anti-personnel mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced anti-personnel mines.
5. “Mined area” means an area which is dangerous due to the presence or suspected presence of mines.

Article 3 — Exceptions

1. Notwithstanding the general obligations under Article 1, the retention or transfer of a number of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques is permitted. The amount of such mines shall not exceed the minimum number absolutely necessary for the above-mentioned purposes.
2. The transfer of anti-personnel mines for the purpose of destruction is permitted.

Article 4 — Destruction of stockpiled anti-personnel mines

Except as provided for in Article 3, each State Party undertakes to destroy or ensure the destruction of all stockpiled anti-personnel mines it owns or possesses, or that are under its jurisdiction or control, as soon as possible but not later than four years after the entry into force of this Convention for that State Party.

Article 5 — Destruction of anti-personnel mines in mined areas

1. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party.
2. Each State Party shall make every effort to identify all areas under its jurisdiction or control in which anti-personnel mines are known or suspected to be emplaced and shall ensure as soon as possible that all anti-personnel mines in mined areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means, to ensure the effective exclusion of civilians, until all anti-personnel mines contained therein have been destroyed. The marking shall at least be to the standards set out in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.
3. If a State Party believes that it will be unable to destroy or ensure the destruction of all anti-personnel mines referred to in paragraph 1 within that time period, it may submit a request to a Meeting of the States Parties

or a Review Conference for an extension of the deadline for completing the destruction of such anti-personnel mines, for a period of up to ten years.

4. Each request shall contain:

- a) The duration of the proposed extension;
- b) A detailed explanation of the reasons for the proposed extension, including:
 - (i) The preparation and status of work conducted under national demining programs;
 - (ii) The financial and technical means available to the State Party for the destruction of all the anti-personnel mines; and
 - (iii) Circumstances which impede the ability of the State Party to destroy all the anti-personnel mines in mined areas;
- c) The humanitarian, social, economic, and environmental implications of the extension; and
- d) Any other information relevant to the request for the proposed extension.

5. The Meeting of the States Parties or the Review Conference shall, taking into consideration the factors contained in paragraph 4, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension period.

6. Such an extension may be renewed upon the submission of a new request in accordance with paragraphs 3, 4 and 5 of this Article. In requesting a further extension period a State Party shall submit relevant additional information on what has been undertaken in the previous extension period pursuant to this Article.

Article 6 — International cooperation and assistance

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance, where feasible, from other States Parties to the extent possible.

2. Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on

the provision of mine clearance equipment and related technological information for humanitarian purposes.

3. Each State Party in a position to do so shall provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims and for mine awareness programs. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organizations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organizations, or on a bilateral basis.

4. Each State Party in a position to do so shall provide assistance for mine clearance and related activities. Such assistance may be provided, *inter alia*, through the United Nations system, international or regional organizations or institutions, non-governmental organizations or institutions, or on a bilateral basis, or by contributing to the United Nations Voluntary Trust Fund for Assistance in Mine Clearance, or other regional funds that deal with demining.

5. Each State Party in a position to do so shall provide assistance for the destruction of stockpiled anti-personnel mines.

6. Each State Party undertakes to provide information to the database on mine clearance established within the United Nations system, especially information concerning various means and technologies of mine clearance, and lists of experts, expert agencies or national points of contact on mine clearance.

7. States Parties may request the United Nations, regional organizations, other States Parties or other competent intergovernmental or non-governmental fora to assist its authorities in the elaboration of a national demining program to determine, *inter alia*:

- a) The extent and scope of the anti-personnel mine problem;
- b) The financial, technological and human resources that are required for the implementation of the program;
- c) The estimated number of years necessary to destroy all anti-personnel mines in mined areas under the jurisdiction or control of the concerned State Party;
- d) Mine awareness activities to reduce the incidence of mine-related injuries or deaths;
- e) Assistance to mine victims;

- f) The relationship between the Government of the concerned State Party and the relevant governmental, inter-governmental or non-governmental entities that will work in the implementation of the program.
8. Each State Party giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programs.

Article 7 — Transparency measures

1. Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party on:
- a) The national implementation measures referred to in Article 9;
 - b) The total of all stockpiled anti-personnel mines owned or possessed by it, or under its jurisdiction or control, to include a breakdown of the type, quantity and, if possible, lot numbers of each type of anti-personnel mine stockpiled;
 - c) To the extent possible, the location of all mined areas that contain, or are suspected to contain, anti-personnel mines under its jurisdiction or control, to include as much detail as possible regarding the type and quantity of each type of anti-personnel mine in each mined area and when they were emplaced;
 - d) The types, quantities and, if possible, lot numbers of all anti-personnel mines retained or transferred for the development of and training in mine detection, mine clearance or mine destruction techniques, or transferred for the purpose of destruction, as well as the institutions authorized by a State Party to retain or transfer anti-personnel mines, in accordance with Article 3;
 - e) The status of programs for the conversion or de-commissioning of anti-personnel mine production facilities;
 - f) The status of programs for the destruction of anti-personnel mines in accordance with Articles 4 and 5, including details of the methods which will be used in destruction, the location of all destruction sites and the applicable safety and environmental standards to be observed;
 - g) The types and quantities of all anti-personnel mines destroyed after the entry into force of this Convention for that State Party, to include

a breakdown of the quantity of each type of anti-personnel mine destroyed, in accordance with Articles 4 and 5, respectively, along with, if possible, the lot numbers of each type of anti-personnel mine in the case of destruction in accordance with Article 4;

- h) The technical characteristics of each type of anti-personnel mine produced, to the extent known, and those currently owned or possessed by a State Party, giving, where reasonably possible, such categories of information as may facilitate identification and clearance of anti-personnel mines; at a minimum, this information shall include the dimensions, fusing, explosive content, metallic content, colour photographs and other information which may facilitate mine clearance; and
- i) The measures taken to provide an immediate and effective warning to the population in relation to all areas identified under paragraph 2 of Article 5.

2. The information provided in accordance with this Article shall be updated by the States Parties annually, covering the last calendar year, and reported to the Secretary-General of the United Nations not later than 30 April of each year.

3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.

Article 8 — Facilitation and clarification of compliance

1. The States Parties agree to consult and cooperate with each other regarding the implementation of the provisions of this Convention, and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations under this Convention.

2. If one or more States Parties wish to clarify and seek to resolve questions relating to compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information which would assist in clarifying this matter.

3. If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of the States Parties. The Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond.
4. Pending the convening of any meeting of the States Parties, any of the States Parties concerned may request the Secretary-General of the United Nations to exercise his or her good offices to facilitate the clarification requested.
5. The requesting State Party may propose through the Secretary-General of the United Nations the convening of a Special Meeting of the States Parties to consider the matter. The Secretary-General of the United Nations shall thereupon communicate this proposal and all information submitted by the States Parties concerned, to all States Parties with a request that they indicate whether they favour a Special Meeting of the States Parties, for the purpose of considering the matter. In the event that within 14 days from the date of such communication, at least one-third of the States Parties favours such a Special Meeting, the Secretary-General of the United Nations shall convene this Special Meeting of the States Parties within a further 14 days. A quorum for this Meeting shall consist of a majority of States Parties.
6. The Meeting of the States Parties or the Special Meeting of the States Parties, as the case may be, shall first determine whether to consider the matter further, taking into account all information submitted by the States Parties concerned. The Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach a decision by consensus. If despite all efforts to that end no agreement has been reached, it shall take this decision by a majority of States Parties present and voting.
7. All States Parties shall cooperate fully with the Meeting of the States Parties or the Special Meeting of the States Parties in the fulfilment of its review of the matter, including any fact-finding missions that are authorized in accordance with paragraph 8.
8. If further clarification is required, the Meeting of the States Parties or the Special Meeting of the States Parties shall authorize a fact-finding

mission and decide on its mandate by a majority of States Parties present and voting. At any time the requested State Party may invite a fact-finding mission to its territory. Such a mission shall take place without a decision by a Meeting of the States Parties or a Special Meeting of the States Parties to authorize such a mission. The mission, consisting of up to 9 experts, designated and approved in accordance with paragraphs 9 and 10, may collect additional information on the spot or in other places directly related to the alleged compliance issue under the jurisdiction or control of the requested State Party.

9. The Secretary-General of the United Nations shall prepare and update a list of the names, nationalities and other relevant data of qualified experts provided by States Parties and communicate it to all States Parties. Any expert included on this list shall be regarded as designated for all fact-finding missions unless a State Party declares its non-acceptance in writing. In the event of non-acceptance, the expert shall not participate in fact-finding missions on the territory or any other place under the jurisdiction or control of the objecting State Party, if the non-acceptance was declared prior to the appointment of the expert to such missions.

10. Upon receiving a request from the Meeting of the States Parties or a Special Meeting of the States Parties, the Secretary-General of the United Nations shall, after consultations with the requested State Party, appoint the members of the mission, including its leader. Nationals of States Parties requesting the fact-finding mission or directly affected by it shall not be appointed to the mission. The members of the fact-finding mission shall enjoy privileges and immunities under Article VI of the Convention on the Privileges and Immunities of the United Nations, adopted on 13 February 1946.

11. Upon at least 72 hours notice, the members of the fact-finding mission shall arrive in the territory of the requested State Party at the earliest opportunity. The requested State Party shall take the necessary administrative measures to receive, transport and accommodate the mission, and shall be responsible for ensuring the security of the mission to the maximum extent possible while they are on territory under its control.

12. Without prejudice to the sovereignty of the requested State Party, the fact-finding mission may bring into the territory of the requested State Party the necessary equipment which shall be used exclusively for gathering information on the alleged compliance issue. Prior to its arrival, the mission will advise the requested State Party of the equipment that it intends to utilize in the course of its fact-finding mission.

13. The requested State Party shall make all efforts to ensure that the fact-finding mission is given the opportunity to speak with all relevant persons who may be able to provide information related to the alleged compliance issue.

14. The requested State Party shall grant access for the fact-finding mission to all areas and installations under its control where facts relevant to the compliance issue could be expected to be collected. This shall be subject to any arrangements that the requested State Party considers necessary for:

- a) The protection of sensitive equipment, information and areas;
- b) The protection of any constitutional obligations the requested State Party may have with regard to proprietary rights, searches and seizures, or other constitutional rights; or
- c) The physical protection and safety of the members of the fact-finding mission.

In the event that the requested State Party makes such arrangements, it shall make every reasonable effort to demonstrate through alternative means its compliance with this Convention.

15. The fact-finding mission may remain in the territory of the State Party concerned for no more than 14 days, and at any particular site no more than 7 days, unless otherwise agreed.

16. All information provided in confidence and not related to the subject matter of the fact-finding mission shall be treated on a confidential basis.

17. The fact-finding mission shall report, through the Secretary-General of the United Nations, to the Meeting of the States Parties or the Special Meeting of the States Parties the results of its findings.

18. The Meeting of the States Parties or the Special Meeting of the States Parties shall consider all relevant information, including the report submitted by the fact-finding mission, and may request the requested State Party to take measures to address the compliance issue within a specified period of time. The requested State Party shall report on all measures taken in response to this request.

19. The Meeting of the States Parties or the Special Meeting of the States Parties may suggest to the States Parties concerned ways and means to further clarify or resolve the matter under consideration, including the

initiation of appropriate procedures in conformity with international law. In circumstances where the issue at hand is determined to be due to circumstances beyond the control of the requested State Party, the Meeting of the States Parties or the Special Meeting of the States Parties may recommend appropriate measures, including the use of cooperative measures referred to in Article 6.

20. The Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach its decisions referred to in paragraphs 18 and 19 by consensus, otherwise by a two-thirds majority of States Parties present and voting.

Article 9 — National implementation measures

Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

Article 10 — Settlement of disputes

1. The States Parties shall consult and cooperate with each other to settle any dispute that may arise with regard to the application or the interpretation of this Convention. Each State Party may bring any such dispute before the Meeting of the States Parties.

2. The Meeting of the States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States parties to a dispute to start the settlement procedure of their choice and recommending a time-limit for any agreed procedure.

3. This Article is without prejudice to the provisions of this Convention on facilitation and clarification of compliance.

Article 11 — Meetings of the States Parties

1. The States Parties shall meet regularly in order to consider any matter with regard to the application or implementation of this Convention, including:

a) The operation and status of this Convention;

- b) Matters arising from the reports submitted under the provisions of this Convention;
 - c) International cooperation and assistance in accordance with Article 6;
 - d) The development of technologies to clear anti-personnel mines;
 - e) Submissions of States Parties under Article 8; and
 - f) Decisions relating to submissions of States Parties as provided for in Article 5.
2. The First Meeting of the States Parties shall be convened by the Secretary-General of the United Nations within one year after the entry into force of this Convention. The subsequent meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.
3. Under the conditions set out in Article 8, the Secretary-General of the United Nations shall convene a Special Meeting of the States Parties.
4. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend these meetings as observers in accordance with the agreed Rules of Procedure.

Article 12 — Review Conferences

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.
2. The purpose of the Review Conference shall be:
- a) To review the operation and status of this Convention;
 - b) To consider the need for and the interval between further Meetings of the States Parties referred to in paragraph 2 of Article 11;
 - c) To take decisions on submissions of States Parties as provided for in Article 5; and

d) To adopt, if necessary, in its final report conclusions related to the implementation of this Convention.

3. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Review Conference as observers in accordance with the agreed Rules of Procedure.

Article 13 — Amendments

1. At any time after the entry into force of this Convention any State Party may propose amendments to this Convention. Any proposal for an amendment shall be communicated to the Depositary, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the Depositary no later than 30 days after its circulation that they support further consideration of the proposal, the Depositary shall convene an Amendment Conference to which all States Parties shall be invited.

2. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Amendment Conference as observers in accordance with the agreed Rules of Procedure.

3. The Amendment Conference shall be held immediately following a Meeting of the States Parties or a Review Conference unless a majority of the States Parties request that it be held earlier.

4. Any amendment to this Convention shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to the States Parties.

5. An amendment to this Convention shall enter into force for all States Parties to this Convention which have accepted it, upon the deposit with the Depositary of instruments of acceptance by a majority of States Parties. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

Article 14 — Costs

1. The costs of the Meetings of the States Parties, the Special Meetings of the States Parties, the Review Conférences and the Amendment Conférences shall be borne by the States Parties and States not parties to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately.
2. The costs incurred by the Secretary-General of the United Nations under Articles 7 and 8 and the costs of any fact-finding mission shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.

Article 15 — Signature

This Convention, done at Oslo, Norway, on 18 September 1997, shall be open for signature at Ottawa, Canada, by all States from 3 December 1997 until 4 December 1997, and at the United Nations Headquarters in New York from 5 December 1997 until its entry into force.

Article 16 — Ratification, acceptance, approval or accession

1. This Convention is subject to ratification, acceptance or approval of the Signatories.
2. It shall be open for accession by any State which has not signed the Convention.
3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depository.

Article 17 — Entry into force

1. This Convention shall enter into force on the first day of the sixth month after the month in which the 40th instrument of ratification, acceptance, approval or accession has been deposited.
2. For any State which deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the 40th instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the sixth month after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

Article 18 — Provisional application

Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally paragraph 1 of Article 1 of this Convention pending its entry into force.

Article 19 — Reservations

The Articles of this Convention shall not be subject to reservations.

Article 20 — Duration and withdrawal

1. This Convention shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating this withdrawal.
3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.
4. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law.

Article 21 — Depositary

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.

Article 22 — Authentic texts

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

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The Review

Geneva Conventions and Additional Protocols

Accession to the Additional Protocols by the Lebanese Republic

The Lebanese Republic acceded on 23 July 1997, without making any declaration or reservations, to the Protocols additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Non-International Armed Conflicts (Protocol II), adopted in Geneva on 8 June 1977.

Pursuant to their provisions, the Protocols will come into force for the Lebanese Republic on 23 January 1998.

This accession brings to 148 the number of States party to Protocol I and to 140 those party to Protocol II.

Tajikistan: Declaration in accordance with Article 90 of Protocol I

On 10 September 1997 the Republic of Tajikistan made a declaration accepting the competence of the International Fact-Finding Commission, in accordance with Article 90, paragraph 2 (a), of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). It thereby recognizes *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission to enquire into allegations by such other Party.

The Republic of Tajikistan is the 50th State to recognize the competence of the Fact-Finding Commission.

Implementation of international humanitarian law by Denmark

Report by the International Law Committee
of the Danish Red Cross

Introduction¹

The report of the International Law Committee of the Danish Red Cross focuses on implementation of international humanitarian law by Denmark in peacetime. After a thorough investigation of the present situation, the report outlines possible improvements by putting forward 23 recommendations. The expected outcome is a broad debate which, it is hoped, will provide the impetus for improved implementation of Denmark's obligations under international humanitarian law.

The report is divided into four parts. The first part contains an historical overview of international humanitarian law and a brief examination of implementation measures taken in six different States: Sweden, Norway, Belgium, the Netherlands, Germany and the United States. The report focuses on the following five areas: the prosecution of war crimes, the definition of combatants, protection of the civilian population, methods and means of warfare and dissemination of international humanitarian law. The second part contains information on the Danish implementation process and the specific measures of implementation. The third part of the report contains the conclusions and recommendations, a summary in English and a glossary. The fourth part contains various annexes, supplementing the text of the first three parts.

The International Law Committee was established by the Danish Red Cross in the spring of 1995 for the purpose of promoting international

¹ Introduction by **Lina Bertelsen**, legal adviser of the Danish Red Cross and secretary of its International Law Committee.

humanitarian law. The Committee consists of eight members, five with a legal and three with a medical background. It is complementary to the Governmental Red Cross Committee, which is the Danish interministerial committee responsible for coordinating measures to implement international humanitarian law.

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Report on international humanitarian law in Denmark (English summary)²

Despite the intentions of conventions and resolutions aimed at protecting victims of armed conflicts, respect for human life has not increased. The need to respect international humanitarian law and meet the obligations of the 1949 Geneva Conventions must be seen as a major task for all States, individuals and organizations. In order to ensure respect for its provisions during armed conflicts, the law contains certain obligations with regard to implementation which should be fulfilled in peacetime. International humanitarian law contains, for example, an obligation to adopt effective penal sanctions for the repression of breaches and to disseminate knowledge of its rules.

It was stressed during the 26th International Conference of the Red Cross and Red Crescent (Geneva, 3-7 December 1995) that the repression of breaches of international humanitarian law is a precondition for respect for the rules. The International Law Committee of the Danish Red Cross subsequently decided to draw up the present report on the implementation of international humanitarian law in Denmark. The purpose of the report is to evaluate the degree of implementation, by Denmark, of its obligations and to put forward recommendations.

Before the ratification by Denmark in 1951 of the Geneva Conventions of 12 August 1949 a number of suggestions were made: (a) to conduct a study of the impact of the Conventions; (b) to set up a committee to coordinate measures of implementation; (c) to undertake a commentary on the Geneva Conventions; and (d) to engage in close cooperation with the other Nordic countries. Most of these suggestions were never realized.

² Edited and abridged by the *Review*.

When the 1977 Additional Protocols were ratified in 1982, the authorities concluded that Danish legislation was almost entirely consistent with the Protocols. Thus only administrative measures for their implementation were envisaged. However, a proposal was put forward to create an interministerial committee responsible for coordination of implementation measures. The Governmental Red Cross Committee was established in 1982 for this purpose.

Generally, Denmark complies with the provisions of international humanitarian law. However, the present report has revealed some problematic aspects in the above-mentioned areas which call for further improvement. In some respects the level of implementation could and should be higher.

Recommendations by the Committee

1. The *Governmental Red Cross Committee*, which was an innovation in the international context at the time, has a very broad composition, with representatives of the Ministries of Justice, Foreign Affairs, Health, Education, the Interior and Defence, the civil defence authorities, the Judge Advocate General and the Danish Red Cross. The Committee has played a coordinating role. Due to a lack of resources, however, it has been unable to take independent initiatives, such as to undertaking inquiries on the need for further measures of implementation. Government and Parliament should take steps to develop and strengthen the Committee by giving a legal basis and providing it with its own budget and secretariat.

2. Criminal prosecution of aliens for *war crimes* committed abroad is limited in terms of jurisdiction and applicable Danish criminal law.

Article 8, Section 5, of the Danish Penal Code establishes the jurisdiction of Danish courts for grave breaches of the Geneva Conventions and their Additional Protocols. In this respect Denmark complies fully with international humanitarian law.

According to international law, a State has the right to punish the crime of genocide, crimes against humanity and violations of the Hague Conventions, in pursuance of the principle of universal jurisdiction. For these crimes, however, there is no obligation to prosecute. Article 8, Section 6, of the Penal Code establishes jurisdiction for these crimes, depending on three conditions: *primo*, another State must have requested the extradition of the person in question; *secundo*, extradition must have been

denied by the Danish authorities; and *tertio*, the alleged behaviour must be a crime under Danish law. It appears that the decision to assume jurisdiction could be influenced by political considerations, such as relations with other States. However, the Minister of Justice, who has to take the decision whether to prosecute or not, is bound by obligations of international law.

When the Danish Penal Code was drafted, no consideration was given to international humanitarian law. This may cause problems when the legal basis necessary for the prosecution of some types of war crimes must be established. Maximum and minimum penalties, for example, are the same in wartime as in peacetime. Furthermore, the Code has no provision for a number of war crimes, and as a result these crimes cannot be prosecuted in Denmark.

Thus it can be concluded that the obligation to adopt efficient penal sanctions for the repression of grave breaches (war crimes) is insufficiently implemented in Denmark. A study should be made to consider, *inter alia*, the possibility of adopting a specific law on war crimes, as is the case in Belgium, or whether special provisions could be added to the Penal Code, as is the case in Sweden, or whether specific maximum and minimum penalties for crimes committed during an armed conflict should be adopted. The simplest way to ensure satisfactory implementation of international humanitarian law is to incorporate the relevant provisions into domestic law, as was done with the European Convention on Human Rights.

3. The conclusions to be drawn from the new definition of who is a *combatant* have not yet been applied to the Danish context. The various groups of personnel and associated staff members within the defence forces have not yet been categorized as either combatants, civilians or civilians accompanying the armed forces. Although there is no international obligation to do so, a study on the status of the different groups should be undertaken. Furthermore, the Defence Personnel Act should be amended by incorporating a prohibition on involving anyone under the age of 18 years in armed conflict.

4. The Geneva Conventions and Additional Protocol I provide for the establishment of hospital zones and safety zones for the *protection of civilians*. Denmark has not established such zones, nor have other States mentioned in the present report done so. It could be argued that the establishment of safety zones is largely irrelevant, but the authorities must take an explicit decision on this matter.

Denmark has not established a *national information bureau*. Such a bureau could contribute to fundamental humanitarian tasks in peacetime, and should therefore be established within the Danish Red Cross and given the necessary resources.

Protection of and respect for the *Red Cross emblem* is inadequate. A legal basis should be established which would ensure proper use of the Red Cross emblem, according to the provisions of international humanitarian law.

5. As for *means and methods of warfare*, the Danish government, in a statement of 23 May 1996, has renounced the use of *anti-personnel landmines*. This commitment should be worded in an unequivocal and legally binding way.

In order to ensure that *new weapons* comply with the requirements of international humanitarian law, a specialized commission should be set up and put in charge of this assessment. This commission should be composed of persons with expertise in international humanitarian law, medicine and military equipment. The assessment of new weapons should take place prior to their purchase. Furthermore, the commission should be able to assess weapons already purchased by the Danish government, if their compatibility with international humanitarian law is doubtful.

At the international level, Denmark should promote the establishment of an international *Weapons Inspection and Screening Agency* for the monitoring of present and future prohibitions of conventional weapons and other weapons not covered by existing supervision mechanisms.

6. As for *dissemination of international humanitarian law*, many sectors of the population do not receive any kind of information. They comprise the civilian population in general, including essential groups such as teachers, journalists, doctors, nurses, politicians and the police. Although the Geneva Conventions only require States Parties to encourage the study of international humanitarian law by the civilian population, dissemination of international humanitarian law among the various sectors of the civilian population should be given a higher priority in the years to come.

It is commendable that dissemination of international humanitarian law among the defence forces has been given higher priority in recent years. This primarily takes the form of education. It is questionable whether international humanitarian law is properly incorporated in military exercises, regulations, and instructions. It is essential that military personnel do not consider international humanitarian law to be merely

theoretical and therefore irrelevant. A practical starting point must be chosen and emphasis placed on exercises which simulate conflict situations. The preparation of military manuals should be given high priority.

It is essential that commanding officers of the armed forces receive adequate education in international humanitarian law. It should be ensured that this group receives the necessary follow-up courses on international humanitarian law.

It is acknowledged that military legal advisers have been employed by the Danish armed forces to help commanding officers take due account of international humanitarian law in the decisions they take. This need is increasing in line with the new tasks faced by the armed forces, especially when units are deployed on UN or NATO missions.

Dissemination of international humanitarian law is carried out by different military and civilian authorities, and there is no coordination of the various dissemination activities. One way to achieve such coordination would be to establish a *Centre for international humanitarian law* which could deal with documentation, research and education. The Centre could be the result of a joint effort on the part of the military authorities, the civilian authorities and the Danish Red Cross. It could also strengthen major Danish initiatives with regard to international peacekeeping.

(...)

On the basis of the present study, the International Law Committee of the Danish Red Cross presents the following *recommendations*:

1. *Governmental Red Cross Committee*

Parliament and Government are encouraged to take steps to strengthen the Governmental Red Cross Committee. The Committee should be provided with a legal basis and the necessary resources. The legal basis should specify the Committee's right of initiative and its tasks, including the obligation to present a report to the Parliament on a yearly basis.

The Danish Red Cross is encouraged to upgrade its efforts within the Governmental Red Cross Committee and to increase the resources hereof.

2. *Prosecution of war crimes*

When the legislation is revised it should be made clear that only objective considerations are relevant to the decision whether to prosecute in cases concerning breaches of international humanitarian law.

A study should be carried out on the possibilities for more efficient prosecution of breaches of international humanitarian law.

A study should be conducted on the legal position of Danish soldiers on UN or NATO missions.

Article 9 of the Military Penal Code should be rephrased so that actions contrary to international humanitarian law performed by subordinates obeying an order incur penal responsibility.

3. Definition of combatants

The status under international humanitarian law of individuals and groups within the defence forces should be clarified.

The Defence Personnel Act should be rephrased so that it is no longer possible to recruit and train anyone under the age of 18 years for service during armed conflict.

4. Protection of civilians

The necessary steps should be taken to set up a national information bureau within the Danish Red Cross.

Safety zones should be established and marked on military operational maps.

Specific legislation should be adopted concerning the use and protection of the red cross emblem.

5. Methods and means of warfare

A permanent and transparent procedure should be established, if necessary by law, to assess the compatibility of new and existing weapons with the requirements of international humanitarian law. Medical considerations should also be taken into account.

The prohibition on anti-personnel landmines should be worded in an unequivocal and legally binding way.

Studies should continue to be conducted on the projectiles used in the Danish defence forces. These studies should include the fragmenting effects of the projectiles, and should be made public.

Denmark is encouraged to promote the establishment of an international *Weapons Inspection and Screening Agency* for the enforcement of existing and future prohibitions and restrictions on conventional weapons

and other weapons not covered by existing international supervision mechanisms.

Denmark is encouraged to proceed with ratification of the Convention for the protection of cultural property in the event of armed conflict.

6. Dissemination of international humanitarian law

International humanitarian law should be introduced into the curriculum from the 8th to the 10th grade and at university entrance level.

International humanitarian law should be introduced into the curriculum of the Faculties of Law and Medicine and the Danish School of Journalism.

Dissemination of international humanitarian law among medical personnel should continue to be given high priority.

Dissemination of international humanitarian law among the defence forces should be given higher priority. International humanitarian law should be properly incorporated in all regulations and military exercises. The preparation of a military manual and other up-to-date educational material should continue to be given high priority.

Follow-up courses on international humanitarian law should be introduced for commanders in the Danish defence forces.

The depositary and the ICRC should be notified of the list of "qualified persons".

A centre for international humanitarian law should be established, with tasks such as documentation, research, dissemination and international cooperation.

Training seminars for university teachers on international humanitarian law

The International Committee of the Red Cross (ICRC), assisted by a generous grant from the Hauser Foundation, will hold two training seminars on international humanitarian law for full-time university teachers already teaching public international law or human rights law and who are ready to make a commitment to teach international humanitarian law in their universities.

The first seminar, held jointly with the Graduate Institute of International Studies (Geneva), will take place in Geneva from 10 to 15 August 1998 (arrival 9 August, departure 16 August).

The second seminar, held jointly with the New York University Law School, will take place in New York City during the summer of 1999.

Professor Theodor Meron of New York University Law School will be the academic director of the seminars. The language of instruction will be English. Instructors will be experts from the academic world, the ICRC and practice. The seminars will cover international humanitarian law and relevant aspects of human rights law applicable in international and internal armed conflicts (including historical developments, types of conflict, law of Geneva and The Hague (on the conduct of hostilities), prisoners of war, occupation, humanitarian assistance, customary law, war crimes and responsibility), the place of international humanitarian law in general international law, and teaching methods. Each participant will be provided with a coursebook to assist his/her future teaching.

Applications for the 1998 seminar in Geneva - including a full CV, a list of publications, a statement explaining the candidate's interest and plans for teaching international humanitarian law, and two recommendations — must reach

Mrs Isabelle Gerardi
Graduate Institute of International Studies
132 Rue de Lausanne
P.O. Box 36
1211 Geneva 21, Switzerland

by 31 January 1998. Places are limited to thirty participants. Applicants will be notified by the end of March 1998 of the result of their application. The organizers will provide the participants with APEX type airfare to Geneva and living expenses in Geneva.

International Committee of the Red Cross

International Review of the Red Cross

Table of contents 1988-1995

Geneva, 1997

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The *International Review of the Red Cross* invites readers to submit articles relating to the various activities of the International Red Cross and Red Crescent Movement or to international humanitarian law. These will be considered for publication on the basis of merit and relevance to the topics covered by the *Review*.

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Footnotes should be numbered superscript in the main text. They should be typed, double-spaced, and grouped at the end of the article.

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EDITOR: Hans-Peter Gasser, Doctor of Laws, editor-in-chief

ADDRESS: International Review of the Red Cross

19, avenue de la Paix

1202 Geneva, Switzerland

Tel. (++4122) 734 60 01

Fax (++4122) 733 20 57

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