

## *Synopsis I*

### **Protecting Power**

**by J. de Preux**

*Following the technical notes it has previously published, International Review of the Red Cross is now starting a series of synopses on various current topics in the field of international humanitarian law. The following is the first of such summaries, entitled "Protecting Power".*

#### **Foreword**

In order to give the reader an overview of the whole of existing law, this document refers to both the 1949 Geneva Conventions and their 1977 Protocol I. It therefore extends slightly beyond the law currently in force, as there are to date <sup>1</sup> only 48 countries party to Protocol I, whereas 161 are party to the Geneva Conventions. The texts with the reference "P.I" must therefore be read with this in mind. This is not to say, however, that they are automatically not applicable to or by those countries that are not party to Protocol I; in many cases, they simply confirm that which is implicit in the Conventions.

#### **Definition**

The Protecting Power is a State not party to a conflict whose duty it is to safeguard the interests of the parties to the conflict (C. I-IV, Articles 8, 8, 8, 9; P. I, Article 5). To this end, the Conventions and the Protocol are applied with the co-operation and under the scrutiny of the Protecting Power (C. I-IV, Articles, 8, 8, 8, 9).

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## **Designation**

The Protecting Power is designated by agreement between the parties to the conflict, on the one hand, and the State invited to act as such, on the other hand.

The agreement may stipulate that the same Protecting Power shall operate on both sides.

In the absence of such an agreement, the ICRC may ask each party to the conflict to provide it with two lists of at least five States which that party considers acceptable:

1. as Protecting Power of the adverse party;
2. to act as Protecting Power on its behalf in relation to the adverse party.

The ICRC shall compare the lists and seek the agreement of any proposed State named on both lists (P. I, Article 5).

## **Substitute**

The parties to a conflict may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers (C. I-IV, articles 10, 10, 10, 11).

If the procedure for appointment of a Protecting Power fails, the parties to the conflict shall accept an offer which may be made by the ICRC or by any other organization which offers all guarantees of impartiality and efficacy to act as a substitute within the framework of the consultations that have taken place (P. I, Article 5).

## **Diplomatic relations**

The maintenance of diplomatic relations between the parties to the conflict is no obstacle to the designation of Protecting Powers for the purpose of applying the Conventions and the Protocol (P. I, Article 5).

## **Legal effect**

The designation and acceptance of Protecting Powers for the purpose of applying the Conventions and the Protocol does not affect the legal status of the parties to the conflict or of any territory, including occupied territory (P. I, Article 5).

## **Tasks**

Under the terms of the Conventions and the Protocol, co-operation in application means the exercise of good offices, provided for explicitly or implicitly, and the role of intermediary. Scrutiny means either actual supervisory measures or stipulations intended to facilitate supervision.

The functioning of a substitute is subject to the consent of the parties to the conflict (P. I, Article 5).

The situations requiring the intervention of the Protecting Power and the prerogatives assigned to it to this effect are described below.

## **Facilities**

The parties to the conflict must facilitate, to the greatest extent possible, the task of the delegates of the Protecting Power or of its substitute (C I-IV, Articles 8, 8, 8, 9; P. I, Article 5).

## **Personnel**

The Protecting Powers may appoint, apart from their own diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers (C. I-IV, Articles 8, 8, 8, 9).

Such personnel may be trained with the assistance of National Red Cross Societies (P. I, Article 6).

## **Good offices**

The good offices of the Protecting Power are particularly mentioned as part of the general role assigned to it to co-operate in the application of the Conventions and the Protocol. These good offices consist solely in establishing contact between the parties to the conflict, without any participation in discussion or negotiation.

They are expressly provided for, in the Conventions, so as to facilitate the settlement of any disagreement regarding the application of the Conventions, and now also of the Protocol (C. I-IV, Articles 11, 11, 11, 12). They are also provided for to facilitate the institution and recognition of hospital zones and localities (C. I, Article 23).

But, in point of fact, recourse may be had to these good offices under any circumstances requiring the parties to the conflict to reach an agreement, unless the Protecting Power has been empowered to negotiate.

There are numerous contingencies in which such agreements may be required:

### **Agreements concerning the combat zone**

**On land**, the parties to the conflict may have to conclude arrangements to permit the removal, exchange and transport of the wounded left on the battlefield, the evacuation or exchange of wounded and sick from a besieged or encircled area, and the passage of medical and religious personnel and medical equipment on their way to such areas (C. I, Article 15, C. IV, Article 17). If necessary, these arrangements may allow for this evacuation and passage to take place by sea (C. II, Article 18).

**At sea**, the parties to the conflict may, by particular agreement, agree to put on board their hospital ships neutral observers who shall verify the strict observation of the provisions contained in the Second Convention (C. II, Article 31).

**In the air**, protection for medical aircraft in and over contact zones or other such zones cannot be fully effective unless there is prior agreement between the parties to the conflict (P. I, Article 26). Medical aircraft overflying areas controlled by the adverse party are protected only if prior agreement to such flights has been obtained from that party (P. I, Article 27). Except by prior agreement with the adverse party, the use of medical aircraft to search for the wounded, sick and shipwrecked is prohibited (P. I, Article 28). Any party to the conflict which receives such requests for prior agreement must rapidly notify the requesting party of its agreement or its refusal, or must present reasonable alternative proposals (P. I, Article 29).

### **Agreements relative to protected zones and localities**

Having recourse to the good offices of the Protecting Power for the recognition of hospital zones and localities has already been mentioned (C. I, Article 23). The same procedure may be used for the recognition of hospital and safety zones and localities (C. IV, Article 14) or neutralized or demilitarized zones (C. IV, Article 15;

P. I, Article 60), to establish non-defended localities which do not fulfil all the conditions normally required for such protection (P. I, Article 59) or to confer additional protection on installations containing dangerous forces (P. I, Article 56).

### **Agreements on the enquiry procedure in the event of breaches**

If Article 90 of Protocol I (International Fact-Finding Commission) is not applicable, the Conventions provide for agreement between the interested parties on the enquiry relative to any alleged violation (C. I, Article 52, C. II, Article 53, C. III, Article 132, C. IV, Article 149).

### **Agreements on distinctive signs and signals**

Non-defended localities and demilitarized zones must be marked by signs agreed upon with the adverse party (P. I, Articles 59, 60). Similar agreements may be concluded to mark prisoner-of-war camps (C. III, Article 23) or on the use of distinctive signs and signals for the purpose of identifying civil defence services (P. I, Article 66).

### **Agreements relative to relief**

By agreement amongst the parties to the conflict, neutral observers may be placed on board ships chartered to transport medical equipment (C. II, Article 38).

Subject to the provisions laid down in the Conventions and which remain mandatory, special agreements may be concluded between the Powers concerned on the conditions for the sending, receipt and distribution of individual or collective relief shipments (C. III, Articles 72, 73). Similarly, agreements may be concluded on the apportionment of costs occasioned by the use of special means of transport for the conveyance of such relief shipments (C. III, Article 75), and on relief shipments for the civilian population in occupied territories (C. IV, Article 61) and for civilian internees (C. IV, Articles 108, 109, 111). Finally, agreement on the conditions for sending relief consignments to the civilian population of any territory under the control of a party to the conflict, other than occupied territory, may also require the intervention of the Protecting Power (P. I, Article 70).

### **Agreements on retaining and relieving personnel**

From the outbreak of hostilities, parties to the conflict may determine by special agreement (see model agreements drawn up by the ICRC, *International Review of the Red Cross*, January 1955 (p. 7-31) (in French), the percentage of medical and religious personnel to be retained in proportion to the number of prisoners, and the distribution of the said personnel in the camps (C. I, Article 31). Similarly, during hostilities, the parties to the conflict are required to agree concerning the possible relief of retained personnel (C. III, Article 33).

### **Agreements on repatriation and internment in a neutral country**

Special agreements may be concluded, throughout the duration of hostilities, with a view to the direct repatriation of seriously wounded and seriously sick prisoners and of prisoners who have undergone a long period of captivity (C. III, Articles 110 and 109). The same goes for the possible internment of prisoners of war in a neutral country (C. III, Article III). The intervention of the Protecting Power may also be sought concerning the release and repatriation of prisoners at the close of hostilities if the Parties to the conflict have not established direct contact (C. III, Article 118). The same procedure is applicable to the repatriation of civilians (C. IV, Articles 36, 132).

## **Scrutiny**

The term "scrutiny" will be used here as equivalent to the French term "contrôle", which is used frequently in the Conventions and Protocols and is translated variously in the English version, according to context, as scrutiny, control, direction, verification, supervision, etc. It should be understood here as monitoring the way in which the Conventions and Protocol are applied, and implies the right to take note of any breaches which might occur, to protest against such breaches, to present observations and make suggestions.

### **Scrutiny of conditions in the camps and places of internment**

The Conventions and Protocol provide for measures of scrutiny by the Protecting Power first and foremost in the camps and places

of internment of prisoners of war and civilian internees. From this follows the right to visit (C. III, Article 126; C. IV, Article 143), to examine the lists of labour detachments (C. III, Article 56; C. IV, Article 96), to receive complaints and requests from prisoners of war and civilian internees (C. III, Article 78; C. IV, Article 101), to communicate with prisoners' representatives and internee committees and investigate the grounds for their dismissal (C. III, Articles 79, 81; C. IV, Articles 102, 104), to examine the record of disciplinary punishments (C. III, Article 96; C. IV, Article 123), and to receive notice of enquiries in case of deaths or serious injuries (C. III, Article 121, C. IV, Article 131).

### **Scrutiny with regard to relief for prisoners of war and civilian internees**

Alongside the aforesaid prerogatives, the Protecting Power is entitled to intervene with regard to relief consignments by organizing special transport to ensure their conveyance (C. III, Article 75; C. IV, Article 111), by determining the limits, if any, to be imposed, solely in the prisoners' interest, on such shipments (C. III, Article 72), and by supervising their distribution (C. III, Article 73, and Annex III, Article 9; C. IV, Article 109, and Annex II, Article 8).

Similarly, the Protecting Power can oppose the imposition of excessive limitations on the correspondence of prisoners of war (C. III, Article 71) and intervene with regard to the financial resources of prisoners of war (C. III, Articles 58, 60, 65) and of civilian internees (C. IV, Article 98).

### **Scrutiny of the situation in occupied territory**

The authorization by the parties concerned of relief schemes in occupied territory may be conditional on supervision by the Protecting Power (C. IV, Article 59). The latter is furthermore empowered to supervise the distribution of relief consignments, which cannot be diverted from the purpose for which they are intended except with its consent (C. IV, Articles 60, 61). The Protecting Power also has the right to verify the state of supplies in such territories (C. IV, Article 55). It must be informed of any transfers and evacuations of the population as soon as they have taken place (C. IV, Article 49). All protected persons must have the necessary facilities for making application to the Protecting Power (C. IV, Article 30), in particular workers (C. IV, Article 52).

## **Scrutiny in the territory of parties to the conflict**

In the territories of parties to the conflict, the question of scrutiny has two aspects. It can concern the manner in which the hostilities are conducted but, in this respect, the Conventions and the Protocol do not expressly confer any competence on the Protecting Power, which "shall have the duty of safeguarding the interests of the Parties to the conflict" (P. I, Article 5). Reference may also be made, on this subject, to the "International Fact-Finding Commission" (P. I, Article 90).

The other aspect concerns relief supplies for and the protection of aliens in the territories of parties to the conflict.

With regard to relief consignments, the authorization of the parties to the conflict or the party which allows passage may be made conditional on the distribution of assistance being carried out under the local supervision of a Protecting Power (C. IV, Article 23; P. I, Article 70). The said supervision is also required in the event of the evacuation of children (P. I, Article 78).

On behalf of aliens, the Protecting Power may be entitled to be informed of the reasons for refusal of their wish to leave the country (C. IV, Article 35), and to be given the names of persons who have been interned, subjected to assigned residence or freed (C. IV, Article 43). Finally, protected persons must have the necessary facilities for making application to the Protecting Powers (C. IV, Article 30).

## **Activity in the judicial field**

The Protecting Power must receive the list of offences which are punishable by the death sentence when they are committed by prisoners of war (C. III, Article 100). In the event of a death sentence pronounced on a prisoner of war or a protected person in occupied territory, notification of the sentence must be received by the Protecting Power six months before the execution (C. III, Article 101; C. IV, Article 75). The notification of judicial proceedings against a prisoner of war must be received by the Protecting Power at least three weeks before the opening of the trial (C. III, Article 104). The Protecting Power must also be informed of judicial proceedings instituted in occupied territory by the Occupying Power (C. IV, Article 71). It is moreover the task of the Protecting Power to provide legal assistance for prisoners of war (C. III, Article 105), for other persons who have taken part in hostilities and whose status is not yet settled (P. I, Article 45), and for

protected persons in occupied territories (C. IV, Articles 72, 74). Finally, the Protecting Power must be informed of any judgement pronounced upon a prisoner of war and of the latter's rights of appeal (C. III, Article 107).

## **Intermediary**

As all relations between the belligerents are generally broken off, one of the essential roles of the Protecting Power is to serve as their intermediary. In this function, a distinction is made between notifications and the simple transmission of information.

### **Notifications**

A notification is an official legally binding communication of which the addressee must acknowledge receipt.

The notifications which will normally require the assistance of a Protecting Power, if they are made in time of conflict, and for which provision is specifically made in the Conventions and Protocol I, are concerned with the following points:

- the location of fixed medical units; the names of recognized aid societies (P. I, Article 12; C. I, Articles 26, 27);
- hospital ships and coastal rescue craft (C. II, Articles 22, 24, 25; P. I, Article 23);
- medical aircraft (P. I, Article 25, 29);
- non-defended localities (P. I, Article 59);
- judicial and disciplinary proceedings:
  - with regard to prisoners of war (C. III, Articles 104, 105, 107);
  - with regard to protected persons in occupied territory (C. IV, Articles 71, 74, 75);
- conditions for the release of prisoners of war on parole, escape (C. III, Articles 21, 94);
- relations of prisoners of war and civilian internees with the exterior (C. III, Article 69; C. IV, Article 105);
- promotions in rank of prisoners of war (C. III, Article 43);
- decisions regarding the internment of protected persons (C. IV, Articles 42, 43);
- limitation of relief consignments (C. IV, Article 108).

Furthermore, should prisoners of war or protected persons be transferred by the Power responsible for their capture to a third Power, any important failure by the latter to fulfil its obligations must be notified by the Protecting Power to the captor (C. III, Article 12; C. IV, Article 45).

### **Transmission of information**

This function consists mainly of the communication to the Power of origin or the adverse parties of information concerning:

- the wounded, sick, shipwrecked and dead (C. I, Article 16; C. II, Article 19);
- the location of camps and places of internment (C. III, Article 23; C. IV, Article 83);
- the identity of protected persons (C. III, Article 122; C. IV, Article 137);
- measures concerning relations with the exterior and relief consignments (C. III, Article 69; C. IV, Article 105);
- the financial resources of prisoners of war (C. III, Articles 62, 63, 66, 68).

It may also involve the transmission of legal documents (C. III, Article 77; C. IV, Article 113) and death certificates (C. III, Article 120; C. IV, Article 129).

Finally, the Protecting Power may also be requested, during hostilities, to transmit translations of the Conventions, the Protocol and the laws and regulations adopted to ensure their application (C. I, Article 48; C. II, Article 49; C. III, Article 128; C. IV, Article 145).

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