The implementation of international humanitarian law at the national level

Issues in the protection of the wounded and sick

by Dr. Michael Bothe and Karin Janssen *

1. INTRODUCTION

The Protocols additional to the Geneva Conventions, adopted in 1977, broaden the protection afforded by international law to wounded, sick and shipwrecked members of armed forces and to medical personnel, medical units and military medical transports in certain circumstances. Their main purpose, however, is to extend to civilians, civilian medical personnel etc. the protection which hitherto was enjoyed only by military personnel. Thanks to the Additional Protocols, military personnel and civilians today enjoy equal protection.

The following text is intended:

— first, to summarize the provisions of the Conventions and the Protocols relating to the protection of the wounded and sick and,

— second, to examine what measures should be taken at the national level to ensure the effective implementation of these rules.

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The principal question which arises is that of the types of national measures necessary to ensure the application of the rules pertaining to protection in the Conventions and the two Additional Protocols.

2. RULES FOR THE PROTECTION OF PERSONS

Each of the four Geneva Conventions and two Additional Protocols requires that the victims of an armed conflict (sometimes all of the victims, sometimes certain categories of protected persons) be treated humanely in all circumstances. Some of the rules in the Conventions and Protocols are more precise than the general obligation referred to above. The most important requires that all wounded, sick and shipwrecked persons should be respected and protected and that they should "receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition". This rule constitutes the basic principle for the protection of medical personnel, units and transports which we will examine below.

Meeting this general obligation to ensure the protection of the wounded and sick means allocating funds for the establishment of the necessary medical services (military and/or civilian) and the training of personnel. These tasks cannot be accomplished through improvisation once armed conflict has broken out. Preparations must be made in peacetime, especially in the allocation of financial resources.

These preparations, financial and otherwise, are the duty of *all* the States party to the Conventions and Protocols (and must be carried out in peacetime) in accordance with Protocol I, Article 80, paragraph 1. As an example for other States, the documents prepared in Switzerland and Sweden on the occasion of the Protocols' ratification may be cited (in Switzerland, the "Message" submitting the Protocols to the Federal Council, in Sweden, the very detailed report by a commission of experts). These two documents carefully examine the financial consequences of adequately preparing the implementation of the Protocols.

Certain closely related provisions are worthy of attention in that they are the object of peacetime national directives. Let us take, for example, Protocol 1, Article 11, dealing with the protection of persons.

Whereas paragraphs 1 and 2 restate traditional principles, the provisions concerning the removal of tissue (in particular blood)

and the donation of organs represent something new. The procedures prescribed there should be meticulously transformed into government regulations on a national scale. This applies particularly to the keeping of medical records prescribed in paragraph 6. One cannot expect these records to be improvised on the battlefield or even in field hospitals behind the lines. The application of such a provision must be well prepared through detailed administrative regulations.

3. THE PROTECTION OF MEDICAL SERVICES

The protection of medical units (including personnel and transports) presents two separate aspects: protection against attack and protection of the exercise of their medical activities.

1. **Protection against attack**

Whereas there is a provision expressly prohibiting attacks on military medical units, the prohibition of attacks on civilian military units derives from the principle that civilians should not be the object of attack, a principle which has long served as law and is today set out in Protocol I, Article 51.

However, a glance at Article 51 is enough to indicate that its prohibition of attacks on the civilian population does not prevent the latter, in all circumstances, from being affected by attacks on military objectives. In other words, there is no absolute protection against indirect or incidental damage, that is, extensive damage caused by attacks on military objectives. An attack is illegal if foreseeable civilian losses are "excessive in relation to the concrete and direct military advantage anticipated" (the proportionality principle). The extent to which the proportionality principle prevents indirect damage depends on the assessment of, on the one hand, the military advantage to be gained and, on the other, the damage that can be foreseen to the civilian population.

Nowhere do the Protocols or the Conventions expressly state that the proportionality principle also applies to medical units, personnel and transports. Nevertheless, certain provisions can only be explained by recognition of the fact that medical units are perfectly able to be affected by attack (see, for example, Protocol I, Article 12, par. 4, final sentence). If medical and civil-defence units are included in the assessment of military advantage and losses to medical services, their special importance for victims of the con-

flicts as well as their protected status must be taken into account.

In order to reduce incidental damage to a minimum, the parties to the conflict should ensure, in accordance with Protocol I, Article 12, that medical units are so sited that attacks against military objectives do not imperil their safety. This obligation to take precautions against incidental damage applies analogously to the protection of the civilian population: the civilian population must, as far as possible, be removed from the vicinity of military objectives. In addition, locating military objectives within or near densely populated areas must be avoided (Prot. I, Art. 58).

It is understood that taking precautions against the effects of attacks in order to avoid incidental harm to the civilian population and civilian objects, although technically applicable only in times of armed conflict, implies certain measures which must already be taken in peacetime. It would be surprising or even absurd if States were to be authorized to take, in peacetime, measures which would render them incapable of meeting their obligations in wartime. It is also understood that Article 58 adds to the stringency of Article 18, par. 5 of the Fourth Convention, in which it is merely "recommended" that civilian hospitals "be situated as far as possible from (military) objectives". To take an example, if decisions concerning the siting of fixed military installations, on the one hand, and medical establishments such as hospitals, on the other, are taken in peacetime, the obligation of separating them in wartime must be taken into account when the decision is made. If they are set up near to one another it will be impossible to separate them once war breaks out. As far as the subject of our paper (methods of application at the national level) is concerned, this would essentially involve national legislation with regard to zoning and urban and rural planning.

There is a zoning law in the Federal Republic of Germany (*Bundesbaugesetz*) which should be interpreted as prescribing that due allowance be made for the constraints imposed by international humanitarian law.

2. Protection of the work performed by medical and humanitarian personnel

The obligation of protecting the functioning of medical and civil-defence units, which applies equally to the units of friend and foe, is formulated in various ways by the relevant provisions of the

Conventions and Protocols. As we have seen, the basic provisions are those requiring that medical personnel, units and transports should be "protected" (Prot. I, Art. 12, 15 and 21; First Conv., Art. 19, 24 and 35; Second Conv., Art. 22; Fourth Conv., Art. 20 and 21). The United States and British military manuals both state that in order to protect the services performed by these entities (personnel, units and transport), they must not be prevented, unless absolutely necessary, from fulfilling their proper functions.

In occupied territories, one particular aspect of this obligation not to prevent medical units and civil defence organizations from performing their tasks is the severe restriction on the Occupying Power's authority to requisition these units or the buildings and *matériel* belonging to or used by civil defence organizations (Prot. I, Art. 15 and 63; Fourth Conv., Art. 57). In addition, the Occupying Power may not hinder the activities of the National Red Cross or Red Crescent Society of the occupied country (Fourth Conv., Art. 63) nor those of other voluntary relief societies or organizations of a non-military character established for the purpose of ensuring the living conditions of the civilian population by the maintenance of the essential public utility services, by the distribution of relief and by the organization of rescues (Fourth Conv., Art. 63, par. 2). This last obligation is expanded and developed by Protocol I, Art. 63, par. 1. The Occupying Power may not force the personnel of civil defence organizations to carry out activities which could interfere with the efficient performance of their mission. Neither may the Occupying Power change the structure or personnel of such organizations in any way which might jeopardize the efficient performance of their mission.

All of these prohibitions may be described as negative obligations which impose the duty not to interfere with the activities of organizations lending assistance to the wounded and sick and performing civil defence functions. But this is not all: there is also the positive obligation to provide assistance. Protocol I, Art. 15 states this obligation as it relates to civilian medical personnel : "If needed, all available help shall be afforded to civilian medical personnel in an area where civilian medical services are disrupted by reason of combat activity". The Occupying Power is also required to lend assistance to civilian medical personnel to allow them to perform their humanitarian function. It must also provide civil defence organizations with the facilities necessary for the performance of their tasks (Prot. I, Art. 63). Moreover, the general obligation to provide the population with the necessary food and

medical supplies may be construed as an obligation to provide facilities to existing relief societies.

With regard to Red Cross and Red Crescent organizations, special obligations are imposed on States by Protocol I, Art. 81. Paragraphs 2 and 3 of this Article are of particular importance to national Red Cross and Red Crescent organizations. It will be noted that the Article assumes that such an organization exists within each State party to the Conventions. However, there are more than 20 States party to the Conventions in which there are no recognized National Societies. The difficulties in applying the Conventions and Protocols which could result cannot be examined here. "The Parties to the conflict shall grant to their respective Red Cross (and Red Crescent) organizations", where they exist, "the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict". This provision applies to the relationship between the State and the Red Cross or Red Crescent Society within it. Though applicable in times of armed conflict, it should be observed that the granting of such facilities requires preparation in peacetime.

Paragraph 3 of the same Article applies both in times of peace and armed conflict as it concerns "the High Contracting Parties and the Parties to the conflict". They "shall facilitate in every possible way the assistance which Red Cross (or Red Crescent) organizations and the League of Red Cross Societies extend to the victims of conflicts ...". This provision is thus also addressed to States which are not themselves engaged in an armed conflict.

This obligation, to extend assistance to Red Cross and Red Crescent organizations, applies to activities carried out "in accordance with the provisions of the Conventions and (Protocol I) and with the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross". The fundamental principles include impartiality, neutrality and independence. We will come back to this subject. At this stage, it should be emphasized that all of these matters are affected by questions of application at the national level: support for the National Society and legislation and/or administrative regulations to define and guarantee its functions in accordance with applicable norms.

4. CONDITIONS FOR PROTECTION

Protection of medical personnel and members of civil defence organizations is not accorded to every person who performs tasks

in the two fields in question. The definitions provided in Protocol I, Art. 8 and 12 mean that certain acts by the State (recognition, authorization and assignment) and verification by the authorities constitute prerequisites for the right to protection.

Protected "medical personnel" means persons *assigned* by a Party to the conflict exclusively to medical purposes or to the administration of medical units.

In particular, this personnel includes:

— the medical personnel of a Party to the conflict, whether military or civilian;
— the medical personnel of National Red Cross and Red Crescent Societies and other national voluntary aid societies duly *recognized* and *authorized* by a Party to the conflict;
— the medical personnel of medical units or medical transports *made available* by a third Party (Art. 8, par. c).

The protection of medical units (Prot. I, Art. 12) applies to units which:

— belong to one of the Parties to the conflict;
— are *recognized* and *authorized* by the competent authority of one of the Parties to the conflict; or
— are *authorized* by a third Party in certain circumstances (Prot. I, Art. 9, par. 2; First Conv., Art. 27) which means, among other things, that they must be placed *under the control* of a Party to the conflict.

In addition, civilian hospitals must be in possession of a certificate provided by the State showing that they are civilian hospitals (Fourth Conv., Art. 18, par. 2).

Protected "civil defence organizations" are those establishments and other units which are *organized* or *authorized* by the competent authorities of a Party to the conflict to perform civil defence tasks and which are *assigned* and *devoted* exclusively to such tasks (Prot. I, Art. 61).

Protected "medical transports" are means of transportation *assigned* exclusively to medical transportation and *under the control* of a competent authority of a Party to the conflict (Art. 8, par. g). Thus, the protection is conditional upon the medical or civil-defence activity being sanctioned by, or at least based on, an act of State.

The reason why no particular act of State is necessary for assigning the staff of Red Cross and Red Crescent National So-

cieties to medical activities is that these organizations have already been authorized and recognized by the State. Thus, protection of the medical staff of National Societies is also related to an act of State.

As for civilian units, each must be *recognized* and *authorized* (Art. 12, par. 2(b)). However, this rule does not exclude the possibility of authorizing units *en masse*; it is perfectly possible for a State to authorize the National Society to form medical units.

The necessary "assignment" of medical transports to medical tasks can also be delegated by the State to the National Red Cross or Red Crescent Society and to voluntary relief societies. It would not be reasonable to have to grant special administrative authorization to each individual Red Cross or Red Crescent ambulance for it to enjoy the status of protected unit. Medical transports must nevertheless be under the control of a competent authority of a Party to the conflict. The obvious reason for this rule is that the protected status of medical vehicles and aircraft can be abused on the battlefield, and verification by the State of such vehicles' movements becomes necessary (as a result, the State also assumes responsibility for the way in which they are used). In addition, it can happen that, in the course of heavy fighting, communications are disrupted. In such cases, it can be desirable for small units to operate independently. To preserve the independence of National Societies, the necessary control by the State can and must be exercised in conjunction with the National Societies.

The legal conditions for acquiring the protected status described above make it essential to have certain means of implementing international humanitarian law at a national level. We have just seen that there can be no protection unless certain steps are taken by the State. These steps cannot be improvised in wartime, especially as the system is somewhat complicated. They must be the object of serious preparation in peacetime. Two things must be done in order to ensure that appropriate measures are taken in good time.

In view of these difficulties, the movement of medical transports in times of armed conflict must be effectively controlled and verified by a person whose powers are conferred by an act of State. Without this, the transports are not protected because they are not "under the control" of a Party to the conflict. It could be said that this constitutes a certain restriction on the independence of the National Societies, but it is a restriction expressly provided for in the Conventions and Protocols.

Legislative and administrative regulations must be created to determine, above all, which authorities are to grant authorizations and assign medical units etc., which organizations and persons may receive those authorizations and which authorities are to exercise the necessary control etc. For example, in the Federal Republic of Germany, the Federal Ministry of Youth, Family Affairs and Health has put out "Directives for the Application of Articles 18 to 20 of the Fourth Geneva Convention" dealing with the details for recognition of the protected status of civilian hospitals, including the right to use the protective emblem and the document which we have already discussed. In addition, several *Länder* in the Federal Republic have created administrative regulations of a similar kind since it is *their* administrations and *their* authorities which will be responsible for the necessary formalities. These regulations are simple administrative directives and are not binding on every citizen. It should be pointed out, however, that, at least for some of the government measures which we are examining, legislative authorization would be appropriate if not, as in certain countries, required by the Constitution.

The conditions for protection are somewhat complicated and the second necessary preparatory measure results from this complexity. That is why those involved should be well informed about all these questions. If appropriate steps were taken, the subject would become less complex. For example, the German Red Cross in the Federal Republic of Germany has drawn up a sort of checklist for hospital administrations, which sets out in details everything concerning the protection of hospitals.

5. IDENTIFICATION

It is essential for medical personnel, units and transports that they be clearly identifiable as such. To this end, the Conventions and Protocol I, Art. 18 contain provisions for the use of the distinctive emblem and distinctive signals. The latter are particularly important for medical aircraft. Annex I to Protocol I contains detailed regulations concerning identification.

The use of the distinctive emblem and distinctive signals is also to some extent controlled by the State. Article 39 of the First Convention states that the emblem must be displayed "under the direction of the competent military authority". Civilian hospitals, according to the provisions of Article 18 of the Fourth Convention,

may be marked by means of the emblem "only if so authorized by the State".

In accordance with the provisions of Protocol I, Art. 18, par. 4, medical units and transports should be marked by the distinctive emblem "with the consent of the competent authority".

Another means of identifying medical personnel is the identity card, which should be issued by a competent authority (Annex I, Art. 1, par. 1(g)).

Identification, like protection, requires a legislative act. Here too, regulations at a national level are essential for ensuring that the competent authorities take the necessary steps. This can be called the legislative aspect of implementation on a national scale. In addition, there is an aspect involving physical or material preparation. Marking equipment must be manufactured and stocked, paint distributed, armbands prepared and identity cards held in reserve. These preparations cannot suddenly be made when a conflict breaks out; they must be made in peacetime. They involve considerable cost. This is one concern which was expressed by developing countries at the Diplomatic Conference. Adequate marking and other means of identification—and their preparation—are costly, but not excessively so. The members of Commission II of the Diplomatic Conference still remember the Mongolian delegate who strongly protested that the provisions were too strict concerning material resources and were therefore suitable only for the industrialized countries. This is certainly an exaggeration, at least where the less complicated means of identification are concerned (identity cards, armbands, smocks, painted red crosses or red crescents). The cost aspect is, however, important and the States should give it serious thought.

Thus far we have been discussing one of the two possible uses of the red cross or the red crescent: protection. However, the red cross or the red crescent can also be used by National Red Cross and Red Crescent Societies purely for identification purposes, even when they are carrying out activities other than medical activities protected by the Conventions and Protocols. Under the First Conv., Art. 44, par. 2, this indicatory use of the emblem must be based on "national legislation". Here again, it is a matter of taking measures for implementation at a national level.

One essential aspect of regulating the use of the red cross (or red crescent) is the exclusive character of the emblem—it must not be used for purposes other than those authorized by the Conventions and Protocols. Enforcing this prohibition of illegal use and misuse

of the emblem is also a matter for national legislation. The provisions of the First Conv., Art. 54, and the Second Conv., Art. 45, require States to repress illegal use of the distinctive emblem through national legislation. This obligation applies both to the indicatory and protective use of the emblem. Prot. I, Art. 38 also prohibits the improper use of the distinctive signs and signals.

The "perfidious" use of the distinctive signs and signals, as defined in Prot. I, Art. 37, and the acts described in Art. 85, par. 3, constitutes a "grave breach" which must be punished by the State party to the Conventions in accordance with the provisions of the First Conv., Art. 49 (and the second, Third and the Fourth Conventions, Art. 50, 129 and 146 respectively). This is probably the States' main legislative obligation concerning the use of the distinctive signs and signals.

6. FINAL REMARKS

A summary of the foregoing should first stress that a large number of measures must be taken by the State in the area of domestic law in order to ensure the effective implementation of the Geneva Conventions and the two Additional Protocols. Assignment, authorization, recognition and verification—the prerequistites for protection—must be provided for by law, whether legislative or administrative. Steps should be taken to ensure that the necessary authorizations are issued and orders given. Under certain types of constitution, a law for the implementation of the Conventions and Protocols is necessary, or at least useful. National legislation is also necessary to repress misuse of the red cross or the red crescent.

Second, a certain number of practical and organizational measures must be taken if the protection is to be effective. For example, the necessary identity cards must be issued or prepared, marking equipment stocked etc. National parliaments must take part in these tasks, if only by making budgetary provision for the funds necessary to carry them out.

National authorities thus have wide-ranging duties in the creation of the proper conditions for implementing the Geneva Conventions and the Additional Protocols relating to the protection of the wounded and sick.

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