The Protocols additional to the Geneva Conventions

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 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The Hague (law relative to the conduct of hostilities and the administration of occupied territories) is artificial and outdated.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 asymetric conflicts setting regular armed forces against guerrilla fighters), it suffices for guerrilla fighters to distinguish themselves from the civilian population by carying 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 dis-

qualification 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 hostilities, 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.

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