

Steps taken to encourage States to accept the 1977 Protocols

by Hans-Peter Gasser

It is not enough simply to draw up a new international treaty—the States must also agree to respect it. A State demonstrates its willingness to respect new obligations first and foremost by ratifying or acceding to a treaty.¹

On 8 June 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974-1977) adopted the two Protocols additional to the Geneva Conventions and then, on 10 June, the conference ended. During the 10 years that have since passed, the Red Cross made considerable efforts to have the two Protocols accepted. The purpose of this article is to relate what the International Committee of the Red Cross (ICRC) has done to promote the Protocols. Several other articles describe the activities of certain National Societies to this end. Questions concerning the interpretation of the Protocols will not be dealt with in this text.²

Before a treaty can be fully effective, the draft must have passed through different stages:

Stage 1 — preparatory work is done (for example, consulting experts, drawing up preliminary drafts);

¹ A State which signs a treaty must then *ratify* it whereas a State which has not signed the treaty must *accede* to it. The legal effect is the same—in both cases the State *becomes party* to the treaty.

² See Sandoz/Swinarski/Zimmermann (editors), “Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949”, International Committee of the Red Cross and Martinus Nijhoff Publishers, Geneva, 1987.

- Stage 2 — the treaty is negotiated at a diplomatic conference;
- Stage 3 — the diplomatic conference adopts the treaty;
- Stage 4 — the States sign the treaty;
- Stage 5 — the States ratify (or accede to) the treaty;
- Stage 6 — each State party enacts national regulations to implement the treaty's provisions;
- Stage 7 — knowledge of the treaty's provisions is disseminated.

It is necessary to pass through all these stages in order to ensure that obligations under the treaty are met and that sanctions are applied when violations are committed. A new body of law is created with the ultimate aim of its *provisions* being *respected*; it therefore goes without saying that the various steps which make this respect possible are of prime importance.

When the Diplomatic Conference ended on 10 June 1977, the ICRC immediately got down to its task, as was its mandate under the 1952 Statutes of the International Red Cross (Article VI.7) which require it to work for the "continual improvement and diffusion of the Geneva Conventions".³ This mandate surely covers all promotional activities; only treaties *adopted* by the States could be said to constitute an 'improvement' of international humanitarian law because only they are binding instruments of that law.

From the beginning, the ICRC adopted a two-pronged approach, on the one hand, inviting the National Red Cross and Red Crescent Societies to launch promotional activities in their respective countries and, on the other, making its own contacts with the governments. A great many National Societies took this commitment very seriously and their contribution to the ratification of the Protocols was all the more effective for their detailed knowledge of how the wheels of state turn, whom to contact and what to do on the national level. The National Societies were also an asset to the ICRC in its own approaches to governments.

³ The (new) Statutes of the International Red Cross and Red Crescent Movement, adopted in October 1986, use different words to describe the same task (Art. 5[2/g]). See the *International Review of the Red Cross (IRRC)*, No. 256, January-February 1987, starting on p. 25.

ICRC activities to promote ratification of the Protocols

After the Diplomatic Conference ended on 10 June 1977, the Additional Protocols were submitted for the consideration of the *Twenty-third International Conference of the Red Cross* (Bucharest, 1977). The favourable discussions held in Bucharest were particularly important for the future of the Protocols in that representatives of the governments were present. The Conference adopted by consensus a resolution strongly urging the States to ratify the Protocols.⁴ It may be recalled the ICRC's report to the Conference went into such detail in describing the improvements represented by the two Protocols that it was used as an initial commentary on them.⁵

The state of ratification of the Protocols was also discussed at the *Twenty-fourth Conference* in Manila in 1981. The resolution adopted by that Conference is very similar to the Bucharest resolution.⁶

The Protocols were naturally also dealt with by the *Twenty-fifth International Conference of the Red Cross* held in 1986 in Geneva. For the first time, there was a note of discord when some government delegates announced that their governments had decided not to ratify one of the Protocols, referring to the 1977 instruments in less than flattering terms. The text of the Conference resolution naturally reflected their reservations. In the end, after difficult negotiations conducted mainly by the delegate of the Danish government, the Conference adopted by consensus a text less forceful than previous resolutions but still positive in its wording,⁷ and this resolution will be useful in promoting the Protocols.

To complete this survey of measures taken by the Red Cross, it should be pointed out that the *Council of Delegates* also turned its attention to the Protocols on several occasions.⁸

⁴ Resolution III of the Twenty-third International Conference of the Red Cross, *IRRC*, No. 201, December 1977, p. 508.

⁵ Report on the Diplomatic Conference, Twenty-third International Conference of the Red Cross, CPA/III/I.

⁶ Resolution VII of the Twenty-fourth International Conference of the Red Cross, *IRRC*, No. 225, November-December 1981, p. 323.

⁷ Resolution II of the Twenty-fifth International Conference of the Red Cross, *IRRC*, No. 255, November-December 1986, p. 342.

⁸ Resolution 2 of the Council of Delegates (1979), *IRRC*, No. 213, November-December 1979, p. 330 and the Resolution of the Council of Delegates (1985), *IRRC*, No. 250, January-February 1986, p. 11.

Almost simultaneously with the Twenty-third International Conference, the *General Assembly of the United Nations* took note of the new humanitarian treaties at its 32nd session in 1977. It expressed its satisfaction at the positive outcome of the Diplomatic Conference and invited its member States to ratify the Protocols.⁹ Since then, the General Assembly has from time to time examined the extent to which the Protocols have been accepted, notably in 1979,¹⁰ 1982,¹¹ 1984¹² and 1986.¹³ Each time, the UN Secretary-General prepared a brief report containing information on the state of ratifications made, and submitted it to the General Assembly's 6th Committee, the Legal Committee. Several delegates to that Committee then took the floor to describe their government's intentions concerning ratification. As is the custom at the United Nations, the discussion ended with a resolution. Draft resolutions have regularly been proposed by Nordic countries (Scandinavian countries and Finland) and on each occasion they have succeeded in having them adopted by consensus, first by the Committee itself and then by the General Assembly in plenary session. The various resolutions adopted by the United Nations are very similar. They are all quite uncoercive in tone, inviting the States to examine the possibility of ratifying the Protocols.

The ICRC, which has consultative status in the UN Economic and Social Council, has been represented in the debates of the 6th Commission either by a staff member from its New York office or by its legal advisor responsible for co-ordinating promotion of the Protocols. By courtesy of the Commission's chairman, the ICRC representative had the privilege of directly addressing the members of the Commission with an appeal for ratification.

In addition to the United Nations and the International Conference of the Red Cross, both worldwide organizations, several regional governmental organizations have done much to promote the Protocols. The advantage of promotion by such organizations is that they take into account the conditions specific to their region. For this reason, it is important that they should take an interest in humanitarian law. For example, the resolution on ICRC activities adopted by the Council of Ministers of the *Organization of African*

⁹ Resolution 32/44 of 8.12.1977.

¹⁰ Resolution 34/51 of 23.11.1979.

¹¹ Resolution 37/116 of 16.12.1982.

¹² Resolution 39/77 of 13.12.1984.

¹³ Resolution 41/72 of 3.12.1986.

Unity (OAU) in July 1986¹⁴ among other things invites the OAU member States to ratify the Protocols. In the same spirit, the *Parliamentary Assembly of the Council of Europe* recommended that the Protocols be ratified.¹⁵ Within the Red Cross and Red Crescent Movement itself, the *Conference of Arab Red Crescent and Red Cross Societies* has regularly sent appeals to member Societies urging them to take up the question with their respective governments.

The *non-governmental organizations (NGOs)* have become indispensable to the smooth conduct of international relations. Some of them, such as the Inter-Parliamentary Union¹⁶ and the World Veterans Federation, have taken an interest in the development of international humanitarian law. However, it is not easy to obtain support from non-governmental organizations for projects such as the promotion of the Protocols. This is understandable as each NGO has its own area of activity which is often quite specialized and it tends to concentrate on its own objectives.

Although all the above-mentioned contributions are the work of organizations other than the ICRC, our institution has in many cases done much to bring them about. In some cases the ICRC came in at the start, suggesting that the organization deal with the ratification issue. It has often provided the information necessary to draw up a report or resolution and extremely useful working relationships have been established between ICRC representatives and various organizations.

Let us now consider *measures taken by the ICRC itself*. After the Diplomatic Conference, the ICRC initially adopted a fairly discreet approach. Indeed, after almost ten years of uninterrupted work it was necessary for all concerned to 'catch their breath' and take stock. It was above all necessary to become familiar with the new body of law as it had been adopted—even for those who had been present at its birth. Meanwhile, ICRC legal experts began writing a commentary on the Protocols¹⁷ which was modelled on the famous "Pictet Commentary" on the 1949 Conventions. It was

¹⁴ CM/Res. 1059 (XLIV).

¹⁵ Recommendation 945 (1982); see also Recommendation 823 (1984) concerning the ICRC's activities in general.

¹⁶ See the resolution adopted by the Seventy-sixth Inter-Parliamentary Conference (Buenos Aires, 1986), *IRRC*, No. 255, November-December 1986, pp. 410-411.

¹⁷ See above Note 2.

not until the beginning of this decade that the ICRC embarked on major activities to promote the Protocols' ratification.

The decision to grant a breathing space to the governments—and to the ICRC itself—was perhaps a mistake. One now wonders whether it would not have been better to strike the iron while it was hot; whether there would not have been a greater number of ratifications if the ICRC had mobilized all its forces immediately. But how was it possible to talk about the ratification issue with ministries which in many cases no longer had the qualified people together in one team? Indeed, many of the diplomats and legal and military experts involved in the work of the Conference, in Geneva or in their respective capitals, had changed posts after 10 June 1977 and were no longer concerned with the Protocols. The new arrivals were not familiar with the material and tended to have other priorities. By the end of 1980, only 17 States were party to the Protocols.

It was then that the ICRC decided to institute a campaign aimed at the States. Since then, it has been using the entire range of diplomatic means at its disposal:

- Letters to all the States sent through diplomatic channels.
- Personal letters.
- Bringing up the Protocols with officials at all levels in meetings held mainly to discuss other topics, both in the field (through ICRC delegations) and at ICRC headquarters.
- Missions to various countries to discuss the Protocols with government representatives and the ministries concerned.
- Contacts with government officials at international fora, for example the United Nations, and with diplomats posted to Geneva.

The steps taken by the ICRC have always been directed at different government levels. It is important to bring the matter to the attention of heads of government or foreign ministers, that is, those responsible for taking political decisions. But it is also important to motivate the civil servants to do the preparatory work which will lead up to a political decision. Even in this age of instant telecommunications, personal contact has proved to be the best means of advancing a cause such as the ratification of the Protocols. For these reasons, ICRC representatives have visited about one hundred national capitals where they have had meetings with key officials who are either highly placed in government or have considerable expertise in the matter. Very often, these visits have

been repeated, even several times, mainly because crucial posts had changed hands. The frequency with which civil servants and especially diplomats change posts causes serious difficulties for a sustained effort of this kind.

ICRC officials at all levels have bent their backs to the task and continue to do so: from the ICRC President who has always raised the subject of the Protocols in his meetings with government officials to the delegates posted across the world who have to bring up the issue periodically with the people they deal with. Since 1983, a legal advisor specially assigned to the task spends a great deal of his time instigating and co-ordinating the ICRC's efforts. He has himself carried out many missions to promote the Protocols.

Results achieved: the present situation

At the time of writing (April 1987), 67 States are party to Protocol I and 61 to Protocol II. It would be simplistic to say that their decision to ratify the Protocols was the direct result of steps taken by the ICRC. The ICRC is certainly not responsible for each ratification or accession. There can nevertheless be no doubt that ICRC activities have had a positive effect in a great many cases and that this will continue to hold true. What these effects are, and what response ICRC activities can elicit in the capital of a sovereign State, is discussed below.

First, approaching a government in writing or through the visit of a delegate can impress on the ministries dealing with the matter the political, legal and psychological importance of ratification. Government administrations require such urging from the outside because, inundated as they are by an overwhelming number of issues, they do not always manage to establish a scale of priorities; the steps taken by the ICRC help them to do this with respect to humanitarian law.

Sometimes, the ICRC can also provide the information and explanations necessary to understand this body of law. There is only a limited number of major States which have experts in international humanitarian law on the staff of their ministries of Foreign Affairs, Defence or Justice. In other countries, it is a 'general practitioner' who must wade through the complexities of the two Protocols. The ICRC specialist can help by sending documents and, above all, by maintaining a dialogue with the govern-

ment jurists. This tends to make them feel comfortable with a hitherto unfamiliar subject.

The decision to ratify the Protocols is also a political act in the context of international relations. Governments want to know who has already ratified the Protocols and for what reasons, just as they want to know what has prompted others to hesitate or to reject the Protocols. The delegate can supply this information and, at the same time, impress on them the importance of ratification.

Final comments

In several countries the two Protocols are encountering political and legal obstacles to a greater degree than was the case with the 1949 Geneva Conventions. But it would be a mistake to make comparisons and jump to conclusions. Times change; there are shifts in the attitude of governments to international law; the number of treaties has increased enormously, etc. And let us not forget that the Protocols very directly concern areas as sensitive as national defence and State security, which is less true of the 1949 Conventions. It is not surprising, then, that each decision to ratify the Protocols represents a major accomplishment.

In April 1987, 67 States had ratified Protocol I and 61 had ratified Protocol II. In the light of the above-mentioned difficulties, this result is satisfactory. But such satisfaction is no reason to rest on one's laurels as there is still much work to be done. We have to reach our objective, that is, *to make the 1977 Protocols as universal a body of law as the Geneva Conventions*. The ICRC continues to strive toward this goal and, to attain it, needs the active support of the National Red Cross and Red Crescent Societies.

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