

The 1977 Geneva Protocols and the development of international humanitarian law

by Su Wei

Ten years ago, two Protocols additional to the Four Geneva Conventions were adopted in Geneva: one relating to the protection of victims of international armed conflicts, the other to the protection of victims of non-international armed conflicts. This marked a forward step in the development of international humanitarian law applicable in armed conflicts. The most outstanding problem confronting international humanitarian lawyers in the postwar years has been the protection of civilians in circumstances of armed conflicts, particularly in a period characterized by wars of national liberation. The two Protocols scored achievements on two points. First, provisions were elaborated aiming at protecting civilians from the effects of hostilities as opposed to simply protecting civilians in occupied territories as had been the case of the Fourth Geneva Convention of 1949. Secondly, the scope of the application of humanitarian law was greatly widened so as to bring a greater number of victims of armed conflicts under the protection of humanitarian law. This should in turn facilitate the observance and implementation of humanitarian law in conflicts. It is attempted in this paper to make some comments on the achievements of the Protocols, especially Protocol I relating to international armed conflicts.

1. Widened scope of application

Protocol I, as provided in Article 1 paragraph 3, "shall apply in situations referred to in Article 2 common to those Conventions", thus constituting a supplement to the 1949 Geneva Conventions. Here it reaf-

firms the achievements of the 1949 Geneva Conventions, which taking into account the experience of World War II, extended the application of humanitarian law to all cases of declared wars and other armed conflicts disregarding whether a state of war is recognized or not by the Parties concerned, and also to cases of armed resistance in occupied territories. In addition, the Protocol contains a new provision on the scope of application, i.e. Article 1 paragraph 4, which makes the Conventions and Protocol I applicable in “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes 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”. Such a provision has the effect of recognizing a legal standing to national liberation movements so far as the application of humanitarian law is concerned. As by definition the national liberation movements are not states as such, a special procedure of application should be established. Thus, Protocol I provides in Article 96 paragraph 3 that the authority representing a people engaged in a war of national liberation could bring the Conventions and the Protocol into operation by means of a declaration addressed to the depository. These provisions enable the national liberation movements to render humanitarian law applicable in the conflict. In practical terms, the national liberation movements have found in these provisions greater access to the protection of humanitarian law and must themselves act in compliance with the humanitarian rules in their military operations. In this way, the scope of application of humanitarian law has been greatly broadened, bringing about the progressive development of humanitarian law.

2. Protection of the wounded, sick and shipwrecked

Protocol I reaffirms the general protection of the wounded, sick and shipwrecked provided for in the 1949 Geneva Conventions. One significant development in this respect lies in redefining the terms “wounded”, “sick” and “shipwrecked”. By “wounded” and “sick”, the Protocol refers to any persons, whether military or civilian, who are in need of medical assistance or care and who refrain from any act of hostility; the protection includes maternity cases and newborn babies and other persons who may be in need of immediate medical assistance or care. By “shipwrecked”, it means persons, military or civilian, who are in peril at sea or in other waters as a result of misfortune and who refrain from any act of hostility. As to

medical protection, the Protocol adds new provisions concerning the respect for and protection of medical duties and medical transports. The Protocol provides that “under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom”¹. Medical transportation is of great importance in the protection of the wounded, sick and shipwrecked. The 1949 Geneva Conventions had already prohibited attacks on medical aircraft. But only when flying at heights, time and on routes agreed upon by the belligerents concerned could such aircraft be respected. In practical terms, only minimal protection was provided as such ideal conditions would hardly exist in actual armed conflicts. The rapid development of technology since 1949 and particularly the widespread use of helicopters in evacuating the wounded, sick and shipwrecked to medical facilities far from the battle zone called for an improvement in the provisions. Articles 21 to 31 of the Protocol, together with the technical provisions concerning distinctive signals and communication in Articles 5 to 13 of Annex I, provide substantial protection for medical aircraft. In and over areas controlled by friendly troops or in and over sea areas not physically controlled by an adverse party, the respect and protection of medical aircraft of a party to the conflict is not dependent upon an agreement with an adverse party. Even when flying in and over contact zones, medical aircraft should be respected and protected subject to prior agreement between belligerents concerned. Moreover, the Protocol still provides limited protection for a medical aircraft flying without, or deviating from the terms of such an agreement in and over areas controlled by an adversary in that the adverse party, once it recognizes it as a medical aircraft, is required to “make all reasonable efforts to give the order to land... before resorting to an attack against the aircraft”². The signalling system for the identification of medical aircraft improves the chances of protection as, once identified, a medical aircraft should be given substantial protection against attacks.

3. Protection of civilians

The civilian population and individual civilian should enjoy general protection against dangers arising from armed conflict. The dangers produced by military operations are of two different kinds, one resulting from recourse to arms and the other inherent in the power which the enemy

¹ Protocol I, Art. 16.

² Protocol I, Art. 27.

authorities may exercise over human beings³. The Fourth Geneva Convention of 1949 has dealt with the power which the enemy authority is able to exercise over civilians. But it does not touch upon the first category, which is considered to fall into the field of the law of The Hague rather than the law of Geneva to which the Geneva Conventions have been narrowly restricted. The 1977 Protocol breaks such a distinction between The Hague Law and Geneva Law, by introducing provisions within the scope of the former into that of the latter. In order to achieve effective protection of the civilian population, the Protocol sets various limitations on the conduct of belligerents with regard to the choice of means and methods of combat. In addition to reaffirming the fundamental rules, the Protocol develops new rules such as, that civilians and civilian objects shall never be the object of attacks or reprisals; the starvation of civilians as a method of warfare is prohibited; objects indispensable to the survival of the civilian population must be respected and protected; the use of means or methods of warfare which are intended or expected to cause damage to the natural environment thereby prejudicing the health or survival of the population is forbidden, and attacks on works and installations containing dangerous forces, whether they are military objectives or civilian objects, are prohibited. In short, constant care should always be taken by all belligerents concerned to spare the civilians, the civilian population and civilian objects.

As to humanitarian rules protecting civilians, the civilian population and civilian objects in the power of a Party to the conflict, the Protocol combines the humanitarian law of armed conflict with human rights in time of peace. This is a new feature of the Protocol, which takes the protection of fundamental human rights as a common goal to be sought both in peacetime and in armed conflict. In human rights law, the existence of armed conflict may be an excuse for derogating from legal obligations, but there are fundamental human rights which should be respected and protected even in armed conflict. Article 75 of the Protocol, which may be called a “mini-treaty” of human rights in armed conflicts, rightly falls into such a category. The Protocol also provides special protection to women and children as well as journalists engaged in dangerous professional missions.

4. Implementation of humanitarian law

Protocol I has strengthened the system of implementation. In 1949, the Protecting Power system was given an important role in the implementa-

³ Jean Pictet, *Humanitarian law and the protection of war victims*, A. W. Sijthoff, Leyden, Henry Dunant Institute, Geneva, 1975, p. 116.

tion of humanitarian law. The 1949 Geneva Conventions provide that "The present Convention shall be applied with the co-operation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict"⁴. But unfortunately such a system has been put into effect only rarely and partially since 1949. One inadequacy of the system seems to be that no designating procedure was provided. The Protocol adds new provisions concerning the appointment of Protecting Powers and their substitute. The ICRC is designated to play an important role in the appointment of Protecting Powers by offering good offices with a view to their designation, and even if necessary by acting as substitute. All these provisions will help to make the Protecting Power system practicable.

Dissemination constitutes an important aspect of the implementation of humanitarian law, for the law can only be implemented in so far as it is known to those bound by it and benefiting from it. While reaffirming the obligations of States Parties to disseminate humanitarian law in time of peace as in time of armed conflict, the Protocol further provides that the military authorities responsible for the application of the law in armed conflict should be fully acquainted with the law.

One more issue to be addressed concerns respect for the activities of the International Red Cross and Red Crescent Movement. The Movement, by its nature and origin, is bound to promote humanitarian law. The unique role played by the Movement in the application of humanitarian law has been consolidated in the relevant Conventions and Protocols. The 1977 Protocol makes much improvement in this regard. It provides a general legal basis for the activities of the Movement and obliges the States Parties to allow all possible facilities necessary for it to carry out its humanitarian activities.

The Red Cross Society of China has always exerted itself to promote the dissemination and teaching of humanitarian law, with the support and co-operation of the Government and the authorities of the armed forces. In China, the dissemination of the Conventions and the Protocols are included in national education programmes and military training courses. The fundamentals of humanity have been taking root in the hearts of the people all over the country. The Society maintains constant consultation and communication with government officials and experts from universities and research institutes. It supports wider accession to the Protocols, and China's accession to the Protocols is mainly due to her persistent peace policy and humanitarian ideals.

⁴ Article 8 common to Conventions I, II and III, and Article 9 of Convention IV.

*
* *

In concluding this short review, it should be noted that the number of States Parties to the Protocols is not broad enough as there are only 67 States Parties to Protocol I and 61 to Protocol II. Those which are not yet Parties to the Protocols include some major powers which should have greater influence on the implementation and promotion of humanitarian law. As the world has been witnessing constant violations of humanitarian law in the course of armed conflicts, it is time for the world community to take effective and concrete measures to stop such violations.

Su Wei
Legal adviser
of the Red Cross Society
of China
