

THE SIGNIFICANCE OF CODIFICATION FOR GENERAL INTERNATIONAL LAW WITH PARTICULAR ATTENTION TO THE RULES FOR THE PROTECTION OF CIVILIANS AGAINST THE EFFECTS OF HOSTILITIES*

When States wish to create new international laws, they assemble their representatives at a diplomatic conference. A great deal of time, energy, money and sometimes political prestige is expended while diplomats and government lawyers draw up a new treaty which they then proudly cite as an example of “codification”. Everyone knows that international treaties are binding only on those States — and they are sometimes few in number — that have become party to them through ratification or accession. But what about the other members of the international community? Does codification have consequences for States that are not party to the treaties involved? Does it also have an effect on the rest of international law?

In the doctoral thesis he wrote at the University of Basel, Marco Sassòli looks at these questions in the light of a specific example: the codification, by Protocol I additional to the Geneva Conventions, of the protection afforded by international law to the civilian population against the effects of hostilities. The author has undertaken to show the extent to which the 1977 Protocol has an impact on “general international law”, by which he means customary international law and the general principles of law. Obviously, Sassòli’s study will undoubtedly be of great significance for the implementation of international law, for he helps to highlight and explain those provisions of international humanitarian law intended to protect civilians against the effects of military operations in all circumstances, regardless of whether the government involved has ratified Protocol I. The relevance of this subject in today’s world is evident. While preparing his thesis, Sassòli worked as a lawyer in the ICRC Legal Division.

In collecting his source material and seeking answers to the question set, the author touches on a whole range of problems that I found very interesting but which limited space does not permit me to discuss here. Suffice it to say

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that Sassòli defies all opinion to the contrary and bases his work on a concept of international law that takes the normative element as its centrepiece. With the aid of the considerable more recent literature on the subject, he gains a clear view of the various sources of international law. He is particularly interested in the most widely accepted but also the most difficult to grasp of those sources: customary law. Sassòli attaches key importance to the general acceptance of the rules by those to whom they are addressed, above all the States. He concurs with the bulk of legal opinion and obviously also with the International Court of Justice (Nicaragua ruling) in that he is prepared to attribute less importance in individual cases to the classic requirement of State practice. This is a tenable view, at least as far as international humanitarian law is concerned. As the author shows, it is a distinct exception to be able to speak of verifiable State practice as regards the rules discussed here.

After stressing the importance of codification for international law as a whole, Sassòli ventures forth to examine the phenomenon of especial interest to him in the course of his study: the influence that a codifying instrument has upon its "environment", and primarily upon general international law relating to the same subject. To do so he works out a method that he calls "multi-factor analysis". This is basically a way of taking into account a variety of factors that have played some part in the creation of a treaty rule. Obvious examples of such factors are the statements made by representatives of States or their conduct during the decision-making process. These factors as a whole are capable of confirming existing customary international law, initiating changes in it or even replacing it.

This provides Sassòli with the methodological basis for discussing the particularities of those rules of international law that are destined to protect the civilian population against the effects of hostilities. In doing so, he confines himself to the law governing international armed conflict. Customary rules have always played an important role in the law of war. At the same time, ascertaining State practice is especially difficult because often neither one's own conduct nor the response to violations (by one's own side or by the opposing side) provides conclusive indications as to the actual legal convictions held by the respective State. To see whether an individual State agrees with a rule or not, it is necessary to look elsewhere, for example the standing orders of its armed forces. It is such orders that reveal what the supreme authorities consider legitimate conduct for their armed forces.

It goes without saying, of course, that the actual behaviour of States also has to be taken into account, as must the reasons they give to justify their actions, especially when this involves an alleged breach of the law. Sassòli therefore also studies the most recent practice in international law. The legal view of the Allies' air offensive during the Second World War, which culminated in the destruction of Dresden and the dropping of atomic bombs on Japan, is very instructive in this respect. After the war, Churchill remarked: "It seems to me that the moment has come when the question of bombing of German cities simply for the sake of increasing terror, though under other pretexts, should be reviewed" (p. 263). Churchill's warning remains valid in

other circumstances as well. Sassòli also rightly reminds us that qualifying an illegal act as a reprisal is not necessarily designed to strengthen the rule relating to reprisals. Sassòli also looks at various post-war conflicts, in particular the Vietnam War which raises a number of interesting points.

A description of the 1974-77 Diplomatic Conference, its history and decision-making process, leads into an analysis of individual provisions in that section of Protocol I which is devoted to the protection of the civilian population against the effects of hostilities. In examining each provision, Sassòli considers whether it corresponds with existing general international law and to what extent, if any, it can influence the international law that applies outside the scope of Protocol I. He bases his judgment above all on the reception given to each new provision during the work preliminary to the Conference (the *travaux préparatoires*), and the response of the States to it once adopted (as shown by their subsequent policy, any reservations or interpretative declarations made or justifications advanced for reprisals, etc.). Particular attention is given to fourteen provisions from Part IV of Protocol I (Articles 48 to 58). For example, Sassòli's analysis of Article 48 show that the principle of distinction (between combatants and the civilian population and between military objectives and civilian objects) is part of general international law. Sassòli feels that this principle, which had been jeopardized by the alarming turn that State practice took during the Second World War, has been saved and given new strength by the codification accomplished in 1977. «Das ZPI ist ein Dementi gegen die These, es sei *in desuetudo* gefallen (*"Additional Protocol I belies the claim that the principle has fallen into disuse"*) (p. 359).

In this way, the author considers the status in general international law of each provision. The prohibition of indiscriminate attacks — in particular carpet bombing — understandably receives the greatest attention (Article 51, paras 4 and 5). This provision introduces the proportionality principle into codified international law and specifies with greater precision the concept of the (still permissible) collateral damage occurring in lawful attacks. On the basis of the plentiful literature on these issues and the discussions at the Diplomatic Conference, Sassòli describes this provision, too, as being part of existing general international law, with the exception of the prohibition of attacks by methods or means that cannot be directed at a specific target. This latter prohibition he considers to be a creation of treaty law.

Sassòli's views on prohibitions of reprisals reflects the same realism that runs through the entire book. Although he cannot discern in general international law a comprehensive prohibition of reprisals against the civilian population, he does feel that, all in all, the rules of customary law do impose a certain limit in that reprisals against the civilian population may not be contemplated unless the other side has itself violated the prohibition of attacks on civilians. This conclusion seems justified.

In his final remarks, Sassòli reminds the reader of the oft-proclaimed renaissance of customary international law, a renaissance which, paradoxically, can also be attributed to the diligent work of codification. His thesis shows that rules of customary law to protect the civilian population have emerged in even stronger form from the codification of international humanitarian law by the Diplomatic Conference. His conclusions — carefully thought out and supported with an unbelievable abundance of source material — are important because they can help in making clear what law is in force for States that have not ratified Protocol I. It is no mean feat to have placed specific, current problems of international humanitarian law in the broader context of general international law. The rigorous logic of Sassòli's mental processes and his clarity of expression in German make this voluminous work a stimulating read.

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CASUALTIES OF CONFLICTS
*Report for the World Campaign for
the Protection of Victims of War*

Casualties of Conflict is an independent report prepared by the Department of Peace and Conflict Research of Uppsala University (Sweden) and designed as a contribution to the World Campaign for the Protection of Victims of War and as a reference document for the humanitarian endeavours of the International Red Cross and Red Crescent Movement.*

The authors of the report, Christer Ahlström and Kjell-Åke Nordquist, have tried to describe contemporary armed conflicts as objectively as possible, to depict in their many different aspects the sufferings that these conflicts cause to various categories of victims and to identify the different means, especially legal ones, that are available to the international community for limiting these sufferings.

* Christer Ahlström with contributions by Kjell-Åke Nordquist, *Casualties of Conflict — Report for the World Campaign for the Protection of Victims of War*, Department of Peace and Conflict Research, Uppsala University, Sweden, 1991, 74 pp.

This report, financed by the Canadian, Finnish and Swedish Red Cross Societies, is an independent reference document which does not express the opinions of the International Red Cross and Red Crescent Movement. It also exists in French and Spanish and may be obtained from the International Promotion Bureau, P.O. Box 109, 1211 Geneva 20, Switzerland.