Comments on Protocol I

Protocol I additional to the Geneva Conventions of 1949 is a product of the mid-1970s. It reflects the then-prevailing *Zeitgeist*: the confrontational mentality of the Cold War; the defiance of the West by a suddenly assertive and temporarily united "Third World"; the tendencies on the part of an entrenched majority in international organizations and forums to show no tolerance for the dissenting voices of a large and influential minority; and the cynical sacrifice of good sense (and good law) on the altar of political expediency.

Many experts in international humanitarian law at the time, having spent a lot of energy hammering out the text of the Protocol both before and during the difficult sessions of the 1974-1977 Diplomatic Conference, were deluding themselves that the law-creating process had been finally concluded and that everybody could live happily with the results. Of course, this was a fairy tale. Fairy tales generally end with the reassuring words that the protagonists lived happily ever after. But real life starts precisely at the point where fairy tales stop. The central issue is how the protagonists manage to live after the festivities. In international relations, the key aspect of treaty-making is implementation. And from the viewpoint of implementation, assessed in the light of 20 years of experience, it is evident that the Protocol has been a failure. It was not applied as such in the Gulf War, and it is openly disregarded by some of the major players in the world arena.

The full significance of this fact must be gauged against the background of the four Geneva Conventions of 1949. On the whole, taking into account not only the half-century since their recasting in their present version, but more than 13 decades of evolution and practice, these Conventions can surely pride themselves on a superb record of implementation. There have obviously been occasional lapses and even flagrant violations in some armed conflicts. But, generally speaking, it is doubtful that there is any multilateral convention on the same scale that has

achieved, within the same space of time, a better overall success rate in terms of actual respect and performance.

Why is 1977 Protocol I so different from the Geneva Conventions? Above all, because the Conventions reflect consensus and shared values, whereas the Protocol contains obvious bones of contention. Granted, possibly about 85% of the provisions of the Protocol are non-controversial. Either they reflect pre-existing customary international law or else, since no country contests their value, they are plausibly going to crystallize as customary international law in the relatively near future. Unfortunately, the remaining 15% or so of the Protocol's stipulations are exceedingly controversial, often owing to their sheer impracticability.

The controversial strictures of Protocol I preclude any chance of its achieving universal acceptance. In the absence of universality, the Protocol *per se* (as distinct from those segments of the text that are declaratory of customary international law) remains virtually irrelevant to any armed conflict in which one or more of the belligerents is not a Contracting State. The irrelevance of the Protocol to non-Contracting States in wartime creates complex problems in peacetime training and exercises for allied nations (for example within the framework of NATO) which are not all subject to the same legal obligations. Moreover, it is my contention and prognosis that some of the Protocol's more fanciful rules will be ignored even in an armed conflict where all the belligerents are Contracting States; for that reason, those thorny clauses are immensely dangerous and counterproductive. They are deplorable not only from the perspective of the Protocol itself, in that they curtail its prospective scope of application, but also from the standpoint of international humanitarian law as a whole, because of their potential detrimental impact on the basic Geneva Conventions.

The point is that, once officers and soldiers in Contracting States become accustomed to overlooking binding provisions of the Protocol because of their unrealistic nature, this will possibly — not to say probably — have a corrosive effect on today's almost automatic readiness to follow the Geneva Conventions themselves. Let me be more specific. Take, by way of illustration, the Protocol's comprehensive prohibition of attacks against civilians by way of reprisals (Article 51, para. 6). This injunction means that if Contracting State A commits atrocities against the civilian population of Contracting State B, the latter is not allowed to retaliate in kind against the civilian population of State A. But what do the framers of the Protocol expect State B to do? Turn the other cheek? That is a religious tenet rather than a serious military or political proposition. Since

the Protocol does not provide State B with any practical alternative response, what is likely to happen is that Article 51, para. 6 will remain a dead letter and — notwithstanding the paragraphs's lucid language — State B will resort to belligerent reprisals against the civilians of State A.

Furthermore, and this is the crux of the matter, the erosion in the standing and authority of international humanitarian law will not necessarily be confined to the Protocol. After all, the Geneva Conventions also prohibit reprisals against protected persons such as prisoners of war. If State A shoots prisoners of war of State B, measures of reprisal by State B against prisoners of war of State A are explicitly proscribed by the last paragraph of Article 13 of the Third Geneva Convention of 1949. Yet, under the Geneva Conventions, State B has a whole gamut of available belligerent reprisals to choose from. By contrast, under the Protocol almost all belligerent reprisals are banned. As indicated previously, I suspect that State B will take little notice of the Protocol's prohibitions in this regard. However, will failure to respect international humanitarian law stop there? Inasmuch as, in engaging in belligerent reprisals, State B will anyway be in breach of international humanitarian law, is there not a risk that it will prefer to execute prisoners of war of State A in violation of the Third Geneva Convention? To put it another way, the strict limitation on belligerent reprisals in the Protocol is apt not only to miss its mark but at the same time to jeopardize the hitherto unquestioned compliance with the 1949 Geneva Conventions.

There are a host of other flaws in the Protocol. The convoluted language of Article 44 apart, this provision virtually eliminates the time-honoured distinction between lawful and unlawful combatants.[1] There are also serious issues relating to mercenaries, siege warfare,[2] and some of the provisions on grave breaches. One of the more preposterous innovations of the Protocol is that, in accordance with Article 96, para. 3, combined with Article 1, para. 4, a group of terrorists proclaiming itself to be a national liberation movement fighting for the right to self-determination may make a unilateral declaration whereby it assumes

[1] Y. Dinstein, "The new Geneva Protocols: A step forward or backward?", *Year Book of World Affairs*, Vol. 33, 1979, pp. 269-272.

[2] Y. Dinstein, "Siege warfare and the starvation of civilians", in A.J.M. Delissen and G.J. Tanja (eds), *Humanitarian law of armed conflict: Challenges ahead. Essays in honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1991, pp. 148-152.

all the rights and obligations of a Contracting Party, despite the fact that the terrorists themselves fail to observe the laws of armed conflict.[3]

This is not to say that the whole of Protocol I is tainted. Indeed, there is little if any interaction between the multifarious parts of which the instrument is composed. When one studies the initial *travaux préparatoires*, it emerges that the Protocol was the result of an artificial amalgam by the ICRC of a cluster of unrelated proposals on a variety of themes.[4] Measures in favour of children, procedures for identification of medical aircraft, the entitlements of civil defence organizations, or stipulations pertaining to missing and dead have only a tenuous connection with each other. It is a pity that the ICRC rejected at the very outset proposals to deal separately with these discrete matters and preferred to consolidate them in a single draft. In any event, if some clauses were revised or even dropped altogether, such a step would not necessarily have repercussions on other sections of the Protocol.

It goes without saying that no revision of the Protocol can be carried out without a formal amendment. Still, amendments are a respectable tool in the hands of treaty-makers, and there are numerous precedents for taking a fresh look at an international instrument with the advantage of hindsight. Particular reference should be made here to the case of the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOs).[5] This agreement, prompted by a desire to achieve universal participation in an important Convention,[6] recognized the need to review the legal regime agreed upon earlier and indeed introduced a considerable change in it. Hopefully, this amending agreement will be seen as a precedent to be followed by the parties to the Protocol.

Even prior to the formal adoption of an amending instrument, certain steps can and should be taken, with a view to sorting out which provisions of Protocol I are generally acceptable and which require surgical excision or at least linguistic modification. It is a source of satisfaction that the ICRC is currently sponsoring a general study by a group of experts on

---

[3] Y. Dinstein, "Comments", *American University Law Review*, Vol. 31, 1982, pp. 849-853.

[4] Y. Dinstein, "Another step in codifying the laws of war", *Year Book of World Affairs*, Vol. 28, 1974, pp. 280-282.

[5] *International Legal Materials*, Vol. 33, 1994, p. 1309.

[6] See Preamble, *ibid.*, p. 1311.

the customary rules of international humanitarian law. If successful, such a study could lead to an evaluation of the exact status of the manifold provisions of the Protocol. The stage may then be set for a formal amendment of the instrument, the ultimate goal being to restore the universality of international humanitarian law.

Yoram Dinstein

Yoram Dinstein is Professor of International Law and President of the Tel Aviv University, Israel.