Growth of expertise as a result of treaty-making

The 1977 Protocols additional to the Geneva Conventions of 12 August 1949, adopted after a complex process of preparatory work and negotiations in various fora, have not been formally applicable in many armed conflicts. Yet it would not be appropriate to say that they have not stood the test of reality. One of the most important effects of these instruments on State practice has been to generate a large number of experts on the subject in all regions of the world, sharing knowledge on the interpretation of relevant rules and facing the challenge of their implementation.

As a young lawyer, assigned to take part in the government experts conferences on the reaffirmation and development of international humanitarian law applicable in armed conflicts that were first convened in Geneva in 1971, I was fascinated by the rare prospect of contributing to a treaty-making process on a subject which was highly political in nature and had previously been dealt with prior to two world wars, in 1907. It is true that important humanitarian conventions had been adopted in 1929, 1949 and 1954; but the courageous approach taken at the Hague Peace Conferences in 1899 and 1907 had soon fallen victim to the First World War, and serious efforts to combine "Hague law" and "Geneva law" remained stalled during the Cold War after 1956.

The unique situation of a young participant in the series of conferences held after 1971 must also be described in personal terms. The spirit of Max Huber and Carl Jacob Burkhardt was convincingly represented by senior ICRC delegates, who were able to rely on professional experience dating back to the thirties and forties. The ICRC had also recruited brilliant young jurists for the project with whom it was particularly rewarding to work on a daily basis. The government experts included a remarkable group of international lawyers, and more than two decades later we should pay hommage to those participants who are no longer alive, among them Richard Baxter, Rudolf Bindschedler, Erik Castrén, Gerald Draper, Paul de Lapradelle, Stanislaw Nahlik, Karl Josef Partsch, Nagendra Singh,

Waldemar Solf, and Hamed Sultan. One wonders how some of the humanitarian issues outstanding today would have been dealt with had these eminent figures still been among us.

At the series of meetings preparatory to the Diplomatic Conference, which included the 22nd International Conference of the Red Cross (Tehran, 1973), various sessions of the United Nations General Assembly and its Sixth Committee in the early seventies, and indeed at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts itself (Geneva, 1974-1977), the idea of national sovereignty was very strongly voiced. It may seem a paradox in retrospect that the more important humanitarian issues of subsequent years, such as protection against certain methods and means of warfare in non-international armed conflicts, were formally excluded from the texts. Yet there was a consensus to reaffirm the famous *Martens clause* in both Protocols: the commitment to established custom, the principles of humanity and the dictates of public conscience is one of the important results of the law-making process which has also affected other areas of international relations.

I soon had an opportunity to see these principles in action when I left the Ministry of Defence after the first session of the Diplomatic Conference in 1974 and joined the Federal Chancellor's Office in Bonn to deal with intra-German affairs: the reunification of families and traffic across the Iron Curtain became subjects of businesslike cooperation between the two German States. It was encouraging to see humanitarian principles being implemented in daily practice, supported by public opinion, though many obstacles remained.

Protection of the victims in conflict situations is a broad challenge which requires a generalist rather than specialist approach. In addition to armed conflicts, refugee movements prompted by other causes, internal disturbances, terrorism, drug abuse and exploitation by multinational companies require responsible action, which is often lacking. Where legal constraints cannot be enforced and existing rules are not implemented, the power of the State is in jeopardy and people are left unprotected. Indeed, in many parts of the world there have been and still are conflicts that dominate the daily lives of countless people. In too many cases the 1977 Protocols are not formally applicable. Seen in retrospect, certain issues that caused major controversies during the Conference obscured the need to find solutions for pressing problems affecting victims in the field. There was the tragedy in Afghanistan, in which proper implementation of Article 1, para. 4, of Protocol I would have improved the legal protection

of civilians and combatants on both warring sides. And there have been many other armed conflicts without a Protecting Power, without international fact-finding procedures and without humanitarian assistance.

More than ten years later, when I again joined the international law division of the German Defence Ministry and saw the 1977 Geneva Protocols still unratified by my own country, I was not amused. Important developments in international humanitarian law seemed to be in jeopardy in many States despite the indisputable need for clear and well accepted rules for military forces. There was no unanimity on the international level as to the interpretation of certain rules of the Protocols. In these circumstances any attempt to arrive at a convincing decision on the ratification and implementation of the 1977 Protocols and of the 1980 Convention on Certain Conventional Weapons required intensive consultations, which we started within the North Atlantic Alliance and beyond. These efforts were supported by academic publications[1] and by the fact that an increasing number of States were becoming party to the Protocols. As a result of this process, a consensus was reached that it should after all be possible to solve problems of interoperability in joint military operations between States that had ratified, States that had so far decided against ratification and States that had not yet taken a decision on the Protocols. Even more significantly, there was growing support for a policy requiring compliance with the rules on the conduct of military operations established for international armed conflicts also in situations of non-international armed conflict. This policy has now been introduced for US forces[2] and for the German Bundeswehr.[3] It is also recommended in a declaration adopted by the International Institute of Humanitarian Law in San Remo.[4] It is important to realize that such a policy serves not only humanitarian interests but also operational requirements of professional armed forces.

Germany ratified the two 1977 Additional Protocols in 1990 and, as a result of extensive cooperation at national and international levels, the

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[1] M. Bothe, P. Macalister-Smith, T. Kurzidem (eds), *National implementation of international humanitarian law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1990.

[2] United States Department of Defense, *DoD Directive 5100.77, DoD Law of War Program*, 10 July 1979, para. E-1; see also *The Commander's Handbook on the Law of Naval Operations (NWP9/FMFM 1-10)*, chapter 5.

[3] Ministry of Defence of the Federal Republic of Germany, *Humanitarian Law in Armed Conflicts: Manual*, Bonn, 1992, Section 211.

[4] International Institute of Humanitarian Law, "Declaration on the rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts", *IRRC*, No. 278, September-October 1990, pp. 404-408.

German *Manual on International Humanitarian Law* was issued very soon afterwards.[5] It was encouraging to see that the *Manual* was well received by the public and its content widely supported in commentaries written by academic experts.[6]

The Protocols may not have been formally applicable in the deplorably large number of armed conflicts that have occurred during the last two decades. But the impact of these instruments on State practice cannot be underestimated. In his Report to Congress on Coalition operations in the Gulf in 1991, General Colin Powell, then Chairman of the US Joint Chiefs of Staff, made it clear that the provisions of Additional Protocol I were, for the most part, applied as if they constituted customary law.[7] In particular, Article 51 of Protocol I — on the protection of the civilian population against the effects of hostilities — was observed during operations against Iraq.

We may conclude that States and international organizations, members of armed forces and civilians, practising lawyers and academics alike are all influenced today by the Protocols. They are challenged to join in the active efforts being made to promote the treaties' implementation.

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[5] *German Manual, op. cit.* (note 3).

[6] D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995, reviewed in *IRRC*, No. 309, November-December 1995, pp. 679-683.

[7] United States Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress*, Washington, 1992. See also L.C. Green, *The contemporary law of armed conflict*, Manchester and New York, 1993, p. xv, which is based on the same premise.