The prohibition of reprisals in Protocol I: Greater protection for war victims

It is not without reservations that I am responding to the invitation from the *Review* for 'veterans' of the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts (hereafter the Diplomatic Conference) to commemorate the signing 20 years ago of the Protocols additional to the Geneva Conventions. On 8 June 1977, all of us who contributed in one way or another to the drafting of those texts felt a sense of relief at having finally achieved our task. We also felt a kind of exhilaration at the thought that we had successfully completed an important undertaking that would benefit war victims. The two Protocols represented a major leap forward in the law of armed conflict. It should not be forgotten that practically two-thirds of the international community have now ratified these instruments. Yet compliance with them regrettably remains far from satisfactory. I need hardly recite the tragic litany of conflicts over the past 20 years that bear out this deficiency. The case best known to me is that of the "Yugoslav wars" (1991-1995). They constitute the clearest example of the yawning gap between the law itself and the degree to which it is implemented. What is even more worrying is that all of this is taking place in a world where the demise of "totalitarianism" has left the world with what is, for all practical purposes, a single centre of power. This centre comprises those States which, since the International Peace Conference held in 1899 in The Hague, have been inspired by their democratic traditions and their attachment to human rights and the rule of law to play a leading role in developing, affirming and reaffirming what today constitutes international humanitarian law applicable in armed conflicts. I therefore believe that this divergence between the letter of the law and the conduct of those responsible for implementing it results from a lack of determination on the part of governments to "ensure respect" for that law throughout the world. I am in no doubt whatsoever that they have sufficiently efficacious means at

their disposal to do so. What is missing, unfortunately, is the political will.

The sense of exhilaration that we felt when the Protocols were signed was doubtless justified with regard to the content and even the wording of this new law. For it is good law. I considered it so at the time and my opinion has not changed since. This law is well made, in the first place because, unlike the old law of The Hague, it makes war difficult to wage. Secondly, if, despite that difficulty, war is nevertheless engaged in, the Protocols provide penalties for violations of the rules governing it. Nowadays, anyone who intentionally violates those rules is held directly and personally responsible. How could it be otherwise in an international community that not only outlaws armed conflict but forbids *any* use of armed force, or even the threat thereof? It would be unfair to criticize a body of law so well adapted to its legal environment, reflecting as it does the trend towards establishing international public order where brute force holds sway.

The reservations I expressed at the beginning of this article thus have to do not with the law itself but with its implementation. But let us not forget that it took 40 years for the full value of the Hague Regulations to be appreciated, at Nuremberg. We may therefore reasonably hope that, in time, the political will — currently lacking — to implement this law may yet emerge. We may also hope that the concept of "ensuring respect" will finally be understood and applied in the way that drafters the Article 1 common to the Geneva Conventions intended. The concept was reaffirmed in the first paragraph of Article 1 of Protocol I. However — dare I say it? — this was done in a far different legal context from that of 1949. And that renders the resulting obligation on the part of the participating States much more binding than it was at the time. There can be little doubt, therefore, that the work accomplished between 1974 and 1977 represents a real advance towards better protection for war victims; and it is only right to observe the 20th anniversary of this achievement, despite the reservations mentioned above.

Obviously, like any other human undertaking, the Additional Protocols fall short of being ideal. But it is not my intention here to list their shortcomings. Instead, let us focus on the positive new developments that they contain, in particular that which seems most important to me: the prohibition of reprisals.

When it comes to protection, what is the most critical situation in which anyone can find himself in wartime? Quite obviously, it is finding oneself in enemy hands. The situation will be even more critical if the

captive has the misfortune of "being one of" an enemy that is waging "total war", or war without mercy (no matter that he may be the most peace-loving person in the world and perhaps even detests his own government). The captive risks being "punished" in reprisal for all the prisoners of war who have been shot, for all the wounded finished off and all the civilians tortured, this despite the fact that the captive may be innocent and have nothing whatsoever to do with these crimes, of which he may well profoundly disapprove. With its well-nigh absolute prohibition of reprisals against all categories of protected persons who fall into enemy hands, Protocol I goes further down the trail blazed in 1949. The underlying considerations are both humanitarian and rational. The history of war — and the Second World War in particular — clearly shows that, apart from being barbarous, unfair and inequitable as they invariably victimize the innocent, reprisals achieve nothing. Even if they are "justified" as a response to enemy violation of the law, they never result in the triumph of the rule of law. Moreover, all the mass executions of the last world war, all the Oradour-sur-Glane[1] of this world have not been enough to dampen people's determination to resist. Reprisals therefore appear pointless.

The Diplomatic Conference was somewhat less successful in prohibiting reprisals in the actual conduct of hostilities. What is clear is that the indiscriminate bombing of cities by one party to a conflict does not entitle the other to reply in kind, for civilians and non-military objects are protected by humanitarian law under all circumstances. In certain situations, however, it is permissible to respond in like manner to a grave and flagrant violation committed by the enemy on the battlefield. In such a case, however, the reply must be directed at combatants and military targets, and is restricted to certain circumstances. The effectiveness of this type of reprisal is a matter to be judged by military experts. In any case, attacking the civilian population, even as part of "justified" reprisals, achieves nothing. The bombardment of London and other British cities in the early years of the Second World War resulted only in the total destruction of Dresden and Leipzig in 1945. Neither the Allies nor the Axis powers were deterred by such losses and Germany surrendered only when further resistance was effectively impossible. Since 1945, so-called "in-

[1] A few days after the D-Day landings in June 1944, German troops rounded up and executed all 642 inhabitants of the town of Oradour-sur-Glane, in western France, in "reprisal" for the killing of a German officer by resistance fighters in a neighbouring village. — Comment by the translator.

ternal conflicts" have merely served to confirm what we already knew: even "justified" attacks on the civilian population in no way affect the outcome of a war. Their sole consequence is the further spread of barbarity.

It may be argued that Protocol I's prohibition of reprisals has not spelled the end of such practices. One thinks again of the "Yugoslav wars". Nevertheless, the relevant provisions are extremely precise and clear, leaving no doubt that reprisals against civilians and civilian targets constitute a grave breach of international humanitarian law. The mere fact that this point is now crystal-clear in the law is a highly significant step forward. At present, any combatant who chooses this course of action must be perfectly aware that he is in flagrant violation of the law and may well one day have to answer for his deeds. In other words, those who order or carry out such acts will no longer be able to claim to a national or international tribunal that they were responding to a similar violation by the enemy. If the aim of humanitarian law is, among other things, to guard against needless cruelty, then that cause is well served by this prohibition. Having been consecrated as a fundamental principle and restated in various provisions of Protocol I in an attempt clearly to define its scope, the prohibition of reprisals against protected persons and objects is unquestionably a bulwark against barbarity.

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