

Persuading States to accept humanitarian treaties

by Hans-Peter Gasser

At the close of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (Geneva, 1974-1977), the representatives of the States party to the 1949 Geneva Conventions adopted, on 8 June 1977, two Protocols additional to those Conventions. Following a preparatory period including intense negotiations that lasted for nearly ten years, the new treaties were accepted, despite considerable obstacles, by the plenipotentiaries without a vote and without opposition. Though the solutions adopted for particularly controversial problems could not always suit everyone concerned, the diplomats, legal advisers and military experts who had taken part nevertheless had every reason to return to their capitals with a feeling of satisfaction.

The Diplomatic Conference had barely come to an end, however, before the stage involving signature and ratification of the instruments (or accession to them) by the States had to be undertaken. In other words, the States had to accept in due form the new obligations laid down in the two Additional Protocols, thus committing themselves to respecting them in both peacetime and wartime.

Twelve months after the Final Act of the Diplomatic Conference was signed, on 10 June 1978, 62 States had signed Protocol I¹ and 58 had signed Protocol II.² The two Protocols entered into force on 7 December

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¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

1978 for the first two States (Ghana and the Libyan Arab Jamahiriya) that had deposited their instruments of ratification or accession with the depositary.

What follows is an account of the campaign conducted by the ICRC to persuade the States to accept the Additional Protocols.³

Early appeals for ratification

The first international forum to take note of the existence of the Additional Protocols was the 23rd International Conference of the Red Cross (Bucharest, 1977). The International Conference periodically brings together the States party to the Geneva Conventions and the various components of the International Red Cross and Red Crescent Movement to discuss matters relating to the implementation of humanitarian law and Red Cross activities. In a resolution, the Bucharest Conference urged the States to ratify or accede to the two Protocols.⁴ At almost the same time, the United Nations General Assembly took note of a report by the Secretary-General on the results of the Diplomatic Conference and passed a resolution inviting the member States to consider the possibility of becoming party to the Protocols.⁵

A debate on the situation regarding ratification of the Additional Protocols and ways to promote them subsequently became a regular feature on the agenda for the International Conference, and each successive Conference adopted a resolution inviting States to become party to them.⁶ Similarly, the Sixth committee of the United Nations General Assembly holds a debate every other year on the Additional Protocols' status of acceptance.

³ See also, by the same author: "Die Genfer Zusatzprotokolle vom 8. Juni 1977; von der Diplomatischen Konferenz zur Ratifikation durch die Staaten", C. Swinarski (ed.), *Studies and essays on international humanitarian law and on the principles of the Red Cross, in honour of Jean Pictet*, ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1984, pp. 147-165; and "Steps taken to encourage States to accept the 1977 Protocols", *IRRC*, No. 258, May-June 1987, pp. 259-266.

⁴ *IRRC*, No. 201, December 1977, p. 507 et seq.

⁵ UNGA Resolution 32/44 of 8 December 1977.

⁶ Resolution VII of the 24th International Conference (Manila, 1981), *IRRC*, No. 225, November-December 1981, p. 323; Resolution II of the 25th International Conference (Geneva, 1986), *IRRC*, No. 255, November-December 1986, p. 342. In its Resolution I, the 26th International Conference (Geneva, 1995) reaffirmed the appeal to the States by endorsing the Final Declaration of the International Conference for the Protection of War Victims (Geneva, 1993), *IRRC*, No. 310, January-February 1996, p. 58.

The main regional governmental organizations, in particular the Organization of African Unity, the Organization of American States and the Council of Europe, have also invited their members to become party to the 1977 Protocols. Among non-governmental organizations, the Inter-Parliamentary Union has shown interest in the Protocols on several occasions during its periodic conferences. And the National Red Cross and Red Crescent Societies have always had a special role in this regard, for although it is true that responsibility within the Movement for preparing and negotiating instruments of international humanitarian law applicable to armed conflict is assumed by the ICRC,⁷ the National Societies are also involved in such projects, in a twofold capacity. For one thing, they are part of the Movement and subscribe to its objectives (particularly that of striving for better protection of war victims); for another, they "support the public [national] authorities in their humanitarian tasks".⁸ Thus, representatives of several National Societies have, as advisers to their governments, taken an active part in the preparation of texts at the national level. It is therefore not surprising that the resolutions adopted by the International Conference regularly call upon the National Societies to urge their political authorities to ratify certain treaties. Many Red Cross and Red Crescent Societies have taken such action, although it has been impossible to report on these activities for lack of detailed information. Other Societies have not committed themselves, in the belief that such a campaign would be contrary to the apolitical role of the Red Cross in civil society. Both attitudes are understandable and acceptable in a Movement that must allow for the specific conditions in which every National Society works.

The ICRC comes out of its shell

What did the ICRC do following 10 June 1977 to promote the Protocols' acceptance by the States? Initially, when the Diplomatic Conference ended, the Committee opted for a more or less discreet approach, for in one way or another, after nearly ten years of uninterrupted work, it was time for everyone involved to 'catch his breath'. Even those who had been present at the birth of the new law still had to familiarize

⁷ Statutes of the International Red Cross and Red Crescent Movement (1986), Article 5, para. 2 (g).

⁸ *Ibid.*, Article 3, para. 1.

themselves with all its aspects. The ICRC's legal advisers, for their part, started to draft a commentary on the texts.⁹

By the end of 1980, however, there was no overlooking the fact that only 17 States had become bound by the Protocols. Two years later, of the 152 States party to the 1949 Conventions, only 27 had ratified Protocol I and 23 Protocol II. No great powers, no regional powers and no States possessing nuclear weapons were among them. The rate of ratification then gradually declined. Were the Protocols falling into oblivion, about to end a short life in the graveyard of good intentions?

The ICRC resolved to take a more active approach and to strengthen its commitment to securing acceptance of the Protocols. The aim was simple: ensure that all the States party to the Geneva Conventions also become party to the 1977 Protocols and that those instruments become universal, like the 1949 Conventions. Early in 1983, an ICRC legal expert was appointed special adviser and given the task of launching and coordinating a campaign to achieve this aim. He carried out these duties for thirteen years, until the end of 1995 when the ICRC Advisory Service on international humanitarian law was charged with continuing the campaign.¹⁰

As a result, between 1 January 1983 and 31 December 1995, 116 States became bound by Protocol I and 111 by Protocol II, which brought the total number of participating States to 143 and 134 respectively. Among them are two permanent members of the Security Council (China and the Russian Federation), nearly all members of NATO, all the countries of Central and Eastern Europe, nearly all African and Latin American States and a large number of Asian countries. The entire group comprises as many States from the North as from the South.

Since 1 January 1996, when the special campaign ended, only five new accessions to Protocol I and six to Protocol II have been registered.¹¹

⁹ Sandoz/Swinarski/Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1986.

¹⁰ See Paul Berman, "The ICRC's Advisory Service on International Humanitarian Law: the challenge of national implementation", *IRRC*, No. 312, May-June 1996, pp. 338-347.

¹¹ As at 31 October 1997.

Specific ICRC action

The ICRC used all available means of communicating with government representatives in order to persuade the States to take a positive decision. These included:

- letters from the ICRC President to Heads of State and Ministers of Foreign Affairs;
- personal and written representations by the ICRC President to senior government officials in national capitals and in Geneva;
- contacts made locally by ICRC delegates in the various ministries concerned;
- in-depth discussions between the special legal adviser and government officials both at permanent missions in Geneva and in national capitals;
- contacts with government representatives at various meetings, in particular the United Nations General Assembly.

Discussions were held at both the political level and with the responsible diplomatic, legal and military services. This approach proved to be effective, since without the impetus given by decision-makers, civil servants tend not to draw up the necessary documents, and without the necessary documents, political bodies will not take decisions. If concrete results are to be obtained, such prompting is essential at both levels in every ministry involved in the final decision on ratification. Decision-makers and working level must act in concert.

The personal involvement in the campaign of two ICRC Presidents — the late Alexandre Hay and, after him, Cornelio Sommaruga — played a key role, for their appeals persuaded many ministers to study the question and take a favourable decision.

A great deal of work has been done by ICRC delegates in the field, particularly in the regional delegations. Their personal commitment has ensured assiduous contact with the authorities and has produced some impressive results. It has been they who have asked the same questions over and over in the Ministries of Foreign Affairs and Defence: “And how are you getting on with the Protocols?” “Do you need any further information?” “Will your country’s name soon be added to the list of participating States?”.

The ICRC legal adviser heading the campaign travelled to some 70 capitals, often several times over, to meet with political representatives

and other officials, mostly from the Ministries of Foreign Affairs, Defence and Justice. Direct contact with the armed forces and their legal services often proved particularly useful. In addition, contacts were always made with the National Society in order to inform it of the representations and to explore with them possibilities for the Society's practical involvement in the ratification process. Finally, he advised ICRC delegates in the field on their own dealings with the authorities and determined what should be done from Geneva to follow up those approaches.

Reminiscences of "Protocol missions"

I ask the reader to allow me a few reminiscences of my activity to promote the ratification of the Protocols.

During the 1980s, I met a young legal adviser and a still younger trainee lawyer at the law department of Burkina Faso's Ministry of Foreign Affairs in Ougadougou. Those two were alone responsible for dealing with all legal questions of an international nature, whether bilateral or multilateral. They carried out this task in one single room, which served them as office, library and documentation centre. I would like to stress the warm welcome they gave me and their interest in the ICRC's message, in particular the introductory course on international humanitarian law. Shortly afterwards, Burkina Faso became party to the two Protocols. What a different atmosphere between that and the legal services of a great power! The US State Department in Washington, with its endless corridors and hundreds of legal experts — all perfectly familiar with the details of the two texts — is a veritable beehive of activity. The arguments for and against ratification had already been worked out and set down on paper when I went there. Yet now, twenty years later, the United States has still not ratified the two Protocols.

Recalling the different visits that stick in my mind, I cannot fail to mention my contacts in the Vatican. The Holy See is party to the Geneva Conventions and its representatives played an active role at the Diplomatic Conference of 1974-1977. But its ratification of the two treaties was delayed, the second Protocol being deemed unsatisfactory. The problem therefore lay in convincing the Secretary of State not only of the intrinsic value of Protocol II (admittedly weak in substance, but important as a symbol) while at the same time emphasizing the favourable effect that ratification by the Holy See would undoubtedly have in a number of capital cities, particularly in Latin America. Greeted by a Swiss guard who allowed me to exchange the din of St Peter's Square

for the silence of the Vatican Palace, I ascended one of the majestic staircases and found myself facing a Deputy Secretary of State in a splendid meeting room. Only a telephone struck a jarring note in those Renaissance surroundings. Shortly after our exchange of views, the Holy See became bound by both treaties, and issued a solemn declaration regarding Protocol II.

Another mission took me and the ICRC's regional delegate based in Jakarta to a very different but no less dazzling place: the palace of the Sultan of Brunei Darussalam, in Bandar Seri Begawan. That impressive residence is so vast that we lost our way, until a Gurkha member of the palace guard found us in front of one of the enormous portals carved out of precious wood and led us to the office of the ruler's chief counsellor. Brunei later acceded to the two Protocols.

In the 1980s, the chances of the Protocols being accepted by the nuclear powers were quite remote, if not non-existent (though China was already bound by both). Protocol I had been made part of the confrontation between the superpowers owing to the "nuclear question": were the international rules governing the use of nuclear weapons amended by the new law of 1977 or were they not? It was not until the end of the Cold War that positions became more flexible. Indeed, it is said that the first two treaties signed by Gorbachev at the outset of *perestroika* were the Additional Protocols.

The dissolution of the Soviet Union and the emergence of a large number of new States in Eastern Europe and Central Asia also put the ICRC on the alert. It was necessary to act quickly to ensure that the new republics became bound by the Geneva Conventions and their Additional Protocols (to which the USSR was already party at the time of the events of 1991). The international rules on State succession were well known, but how were the new governments going to behave in practice? The ICRC decided to send representatives to the capitals of the new republics and the Baltic States. Except in the Russian Federation, the Ukraine and Belarus, which were already bound by the Conventions and the Protocols through earlier ratification, the message of the ICRC delegates was the same everywhere: the new authorities were urged to confirm their countries' status of party to the Conventions and the Protocols by means of an official declaration, with a view to clarifying, confirming or creating a legal situation devoid of all ambiguity.

I met with the authorities of most of the countries that emerged from the former USSR. In record time, these new States followed the ICRC's

advice and submitted declarations to the depositary. All declared themselves to be bound by the 1949 Conventions and their Protocols.¹²

Many contacts among the armed forces of various countries taught me a great deal about the way in which international humanitarian law is viewed by the military. One of the lessons I learned was not automatically to conclude that military legal advisers are more open-minded than soldiers in the field: common sense and prejudice are to be found on both sides. And working with the military also forced me to learn a completely new language. The concept of “interoperability” is one example. It refers to ensuring the peaceful coexistence of armed forces within an alliance or any other form of collaboration in the event that one side is bound by Protocol I and the other is not. I began to understand that in a military alliance this concept enables States party to Protocol I to impose, or practically so, the new law on States non-party.

Perhaps the most gratifying moment came when a high-ranking officer of a military power not party to the Protocols said emphatically that Protocol I is “a very useful check-list for military commanders”. This Protocol today effectively serves as a frame of reference for general military staffs throughout the world, its status transcending the political controversies which sometimes obscure the true purpose of international humanitarian law, i.e. to limit the use of force to what is strictly necessary, to direct attacks solely against military objectives and to protect those not taking part in the hostilities, particularly the civilian population and persons deprived of their freedom.

And tomorrow?

In resolving to take action to bring about acceptance of the two Additional Protocols of 1977 by all States, the ICRC in the early 1980s embarked upon a major awareness-raising campaign. Its purpose was no more and no less than to persuade governments, in particular their Ministries of Foreign Affairs and the political and military officials responsible for national defence, to commit themselves to respecting and ensuring respect for certain rules in times of armed conflict. The priority targets for the campaign were always individuals, whether civilian or military, with government responsibilities. They formed a specific group with

¹² With the exception of Azerbaijan: 1949 Conventions only.

well-defined characteristics; the message was not intended for the general public.

The results achieved over the years have justified the ICRC's initiative to make the Additional Protocols as universally accepted as the Geneva Conventions. The task today is to persuade States which have not yet done so to become bound by these instruments. The torch has been passed to the ICRC Advisory Service on international humanitarian law, whose tasks include promoting the ratification of humanitarian treaties.

It should not be forgotten, however, that acceptance of an international treaty is but the first step down the long path to full compliance with their obligations by the States, by armed forces — whether “official” or not — and by all those who exercise *de facto* authority over men bearing arms. But a start has to be made somewhere.