

# Adoption of the Additional Protocols of 8 June 1977: A milestone in the development of international humanitarian law

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## Abstract

*On 8 June 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted two Protocols Additional to the 1949 Geneva Conventions. This was the result of nearly ten years of intensive and delicate negotiations. Additional Protocol I protects the victims of international armed conflicts, while Additional Protocol II protects the victims of non-international armed conflicts. These Protocols, which do not replace but supplement the 1949 Geneva Conventions, updated both the law protecting war victims and the law on the conduct of hostilities. This article commemorates the 40th anniversary of the adoption of the 1977 Additional Protocols.*

**Keywords:** Geneva Conventions, Protocols Additional to the Geneva Conventions, international armed conflicts, non-international armed conflicts, wars of national liberation, protection of war victims, conduct of hostilities, nuclear weapons, customary international humanitarian law.



On 8 June 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted two Protocols Additional to the 1949 Geneva Conventions.<sup>1</sup> This was the outcome of ten years of intensive and delicate negotiations – a long and sometimes painful delivery.

In 2017, we celebrated the 40th anniversary of the adoption of the Additional Protocols. This anniversary provides an opportunity to reflect on a number of questions. Why was it necessary to supplement the 1949 Geneva Conventions with the Additional Protocols? What were the issues involved in the negotiations? What were the main achievements and the main failures? These are the main issues which will be addressed in the present article.

## **Why was it necessary to supplement the 1949 Geneva Conventions with the Additional Protocols?**

All rules protecting wounded and sick members of the armed forces, shipwrecked people, prisoners of war (PoWs) and civilians in the hands of an enemy power were thoroughly overhauled following the Second World War to take into account the experiences of that terrible conflict. The process culminated with the adoption of the four Geneva Conventions of 12 August 1949, which remain in force today and still form the bedrock of the protection of war victims.<sup>2</sup>

- 1 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II). Texts of the Additional Protocols can be found in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, 17 vols, Federal Political Department, Bern, 1978 (*Official Records*), Vol. 1, pp. 115–198; *International Review of the Red Cross*, Vol. 17, No. 197–198, 1977, pp. 3–101; United Nations Treaty Series, Vol. 1125, pp. 1–699; *Revue Générale de Droit International Public*, Vol. 82, No. 1, 1978, pp. 329–398; Dietrich Schindler and Jiří Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Martinus Nijhoff, Dordrecht, and Institut Henry-Dunant, Geneva, 1988, pp. 621–718; International Committee of the Red Cross (ICRC) and International Federation of Red Cross and Red Crescent Societies, *Handbook of the International Red Cross and Red Crescent Movement*, 14th ed., Geneva, 2011 (Red Cross Handbook), pp. 239–330.
- 2 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) relative to the Treatment of Prisoners of War; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Texts of the Geneva Conventions can be found in *Final Record of the Diplomatic Conference of Geneva of 1949*, 4 vols, Federal Political Department, Bern, 1949 (*1949 Final Record*), Vol. 1, pp. 203–341; United Nations Treaty Series, Vol. 75, 1950, pp. 5–468; D. Schindler and J. Toman (eds), above note 1, pp. 373–594; Red Cross Handbook, above note 1, pp. 33–237.

However, the Diplomatic Conference of 1949 made almost no changes to the law regarding the conduct of hostilities – in other words, the rules that govern the methods and means of warfare. Four years after Hiroshima, the rules governing the methods and means of warfare (particularly the rules relating to air warfare) still mainly consisted of the provisions of the Hague Convention relating to the Laws and Customs of War on Land of 18 October 1907, which were adopted during the era of balloons and airships.<sup>3</sup> The Soviet Union in particular criticized the Diplomatic Conference’s refusal to discuss the legality of nuclear weapons, and to take appropriate measures to protect civilians against the effects of hostilities, especially against the threat of nuclear weapons.<sup>4</sup>

Fully aware that the rules protecting civilians against the effect of hostilities needed updating, the International Committee of the Red Cross (ICRC) prepared, with the help of a group of experts, an ambitious project entitled the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (Draft Rules).<sup>5</sup> These rules amounted to a draft “Fifth Geneva Convention”, aiming to restore the fundamental principle of immunity of the civilian population against the effects of hostilities. That principle had been shockingly violated throughout the Second World War, and the Nuremberg Tribunal, by refusing to punish those responsible for such violations, had failed to restore its authority. Article 14 of the Draft Rules contained a ban on the use of weapons “whose harmful effects – resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population”.<sup>6</sup> That provision amounted to a ban on using nuclear weapons, which led to the failure of the project.

The ICRC submitted the Draft Rules to the 19th International Conference of the Red Cross, which took place in New Delhi in October and November 1957. The project was shot down by an unholy alliance of the United States and Soviet

3 Hague Convention (II) with respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, in *The Proceedings of the Hague Peace Conferences: The Conference of 1899*, Oxford University Press, New York, 1920, pp. 251–262; Georg Friedrich von Martens, *Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international*, 2nd series, Vol. 26, Librairie Dietrich, Leipzig, 1901, pp. 949–979; D. Schindler and J. Toman (eds), above note 1, pp. 63–95. Hague Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, in *The Proceedings of the Hague Peace Conferences: The Conference of 1907*, Oxford University Press, New York, 1920, pp. 620–631; Georg Friedrich von Martens, *Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international*, 3rd series, Vol. 3, Librairie Hans Buske, Leipzig, 1907, pp. 461–503; D. Schindler and J. Toman (eds), above note 1, pp. 65–98; Red Cross Handbook, above note 1, pp. 344–355. Hague Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, The Hague, 18 October 1907, in *The Proceedings of the Hague Peace Conferences: The Conference of 1907*, Oxford University Press, New York, 1920, p. 678; G. F. von Martens and H. Triepel, *Nouveau recueil général de traités*, above, pp. 745–750; D. Schindler and J. Toman (eds), above note 1, pp. 201–206.

4 *1949 Final Record*, above note 2, Vol. 2-A, pp. 761–762, 802–805; Vol. 2-B, pp. 495–509; Vol. 3, p. 181.

5 Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, ICRC, Geneva, 1956.

6 *Ibid.*, p. 101.

Union.<sup>7</sup> That painful failure left a deep scar in the ICRC's memory, and for a long time prevented any new codification attempts.

No help was forthcoming from the United Nations (UN), which during the 1950s and 1960s obstinately refused to deal with humanitarian law. The UN Charter had been adopted to prevent war, and discussing the laws and customs of war would have amounted to an admission that the UN might fail in its primary mission, a prospect that it could not countenance.<sup>8</sup>

Things started to change when the International Conference on Human Rights, held in Tehran in May 1968, declared in its Resolution XXIII that "the Red Cross Geneva Conventions of 1949 are not sufficiently broad in scope to cover all armed conflicts" and asked the UN General Assembly to invite the Secretary-General to examine "the need for additional humanitarian international conventions or for possible revision of existing Conventions".<sup>9</sup>

The reference to "human rights in armed conflicts" instead of humanitarian law in the title of Resolution XXIII, and the fact that the International Conference on Human Rights failed to take into account Article 3 common to the four Geneva Conventions, which addresses "armed conflict not of an international character", showed that governments had had little interest in – not to mention blatant ignorance of – humanitarian law in the twenty years preceding the adoption of that resolution.<sup>10</sup>

So why did the International Conference on Human Rights suddenly take an interest in humanitarian law in 1968?

It was mainly a consequence of decolonization and the emergence of a group of States that had recently recovered independence in Africa and Asia. Those States did not like being bound by a set of treaties that they played no role in drafting because they were not represented at the 1949 Diplomatic Conference.

In particular, those States thought that the rules relating to the conduct of hostilities were unsuited to the wars of decolonization they had to wage in order to regain their independence. They also resented the fact that captured "freedom fighters" were denied PoW status and protection under Geneva Convention III.

7 *XIXth International Conference of the Red Cross, New Delhi, October–November 1957: Proceedings*, Indian Red Cross, New Delhi, 1957; *XIXth International Conference of the Red Cross, New Delhi, October–November 1957: Final Record concerning the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, ICRC, Geneva, April 1958.

8 Josef L. Kunz, "The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision", *American Journal of International Law*, Vol. 45, No. 1, 1951, pp. 37–61.

9 International Conference on Human Rights, Resolution XXIII, "Human Rights in Armed Conflicts", *Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968*, UN Doc. A/CONF.32/41, New York, 1968, p. 18. Between 1968 and 1977, the UN General Assembly adopted, in each regular session, one or several resolutions relating to the reaffirmation and development of international humanitarian law, generally under the title of "Respect for Human Rights in Armed Conflicts": see Resolutions 2444 (XXIII) 1968, 2597 (XXIV) 1969, 2674 (XXV) 1970, 2675 (XXV) 1970, 2676 (XXV) 1970, 2677 (XXV) 1970, 2852 (XXVI) 1971, 2853 (XXVI) 1971, 3032 (XXVII) 1972, 3076 (XXVIII) 1973, 3102 (XXVIII) 1973, 3103 (XXVIII) 1973, 3319 (XXIX) 1974, 3500 (XXX) 1975, 31/19-1976, and 32/44-1977.

10 The French version of Resolution XXIII referred to "la Convention [singular] de Genève de la Croix-Rouge de 1949", which testifies to the degree of ignorance regarding humanitarian law that prevailed in diplomatic circles at the time.

The ICRC felt the wind of the bullet when it was informed of Resolution XXIII, which confronted it with two questions:

- First, should the ICRC let the UN take responsibility for revising the Geneva Conventions or should it reassert the leadership role that it had had in this area since the adoption of the original Geneva Convention of 22 August 1864, which marked the starting point of contemporary IHL?<sup>11</sup>
- Second, should the 1949 Geneva Conventions be overhauled by opening a revision procedure, as requested by Resolution XXIII, or should additional protocols be adopted, without touching the Conventions themselves?

On the first point, the ICRC had no doubt that if the UN took a leadership role in developing humanitarian law, this would inevitably politicize this branch of law. As a result, the ICRC had to seek to reassert its traditional leadership role in that area. It did so by submitting to the 21st International Conference of the Red Cross, which took place in Istanbul in September 1969, an important report on the reaffirmation and development of IHL, and by securing the support of National Red Cross and Red Crescent Societies, as well as of the States taking part in the Conference.<sup>12</sup>

The ICRC undertook large-scale consultations so as to identify both the expectations of the international community and the fields in which new developments appeared possible.<sup>13</sup> It then convened two conferences of experts from the International Red Cross and Red Crescent Movement, as well as two conferences of government experts.<sup>14</sup> On the basis of those consultations, the

11 François Bugnion, “The International Committee of the Red Cross and the Development of International Humanitarian Law”, *Chicago Journal of International Law*, Vol. 5, No. 1, 2004, pp. 191–215.

12 ICRC, *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts*, Doc. D. S.4a, b, e, report submitted to the 21st International Conference of the Red Cross, Istanbul, September 1969. The report was supplemented by a second document specifically dealing with the protection of victims of non-international armed conflicts: ICRC, *Protection of Victims of Non-International Armed Conflicts*, Doc. D.S.5 a–b, report submitted to the 21st International Conference of the Red Cross, Istanbul, September 1969; *XXIst International Conference of the Red Cross, Istanbul, September 6 to 13, 1969: Report*, Turkish Red Crescent, Istanbul, 1969.

13 Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May–12 June 1971, documents submitted by the ICRC, 8 vols, Geneva, 1971: Vol. 1: *Introduction*; Vol. 2: *Measures Intended to Reinforce the Implementation of the Existing Law*; Vol. 3: *Protection of the Civilian Population against Dangers of Hostilities*; Vol. 4: *Rules Relative to Behaviour of Combatants*; Vol. 5: *Protection of Victims of Non-International Armed Conflicts*; Vol. 6: *Rules Applicable in Guerrilla Warfare*; Vol. 7: *Protection of the Wounded and Sick*; Vol. 8: *Annexes*.

14 Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, The Hague, 1–6 March 1971, *Report on the Work of the Conference*, Doc. D-1195, ICRC, Geneva, April 1971; Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May–12 June 1971, *Report on the Work of the Conference*, ICRC, Geneva, August 1971; Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 2nd Session, Geneva, 3 May–3 June 1972, documents submitted by the ICRC, 3 vols, Geneva, January 1972: Vol. 1: *Texts*; Vols 2 and 3: *Commentaries*; Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vienna, 20–24 March 1972, *Report on the Work of the Conference*, Doc. D-1254, ICRC, Geneva, April 1972; Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 2nd Session, Geneva, 3 May–3 June 1972, *Report on the Work of the Conference*, 2 vols, ICRC, Geneva, July 1972.

ICRC elaborated two draft additional protocols, which it submitted to the 22nd International Conference of the Red Cross, which met in Tehran in 1973.<sup>15</sup> The Conference expressed support for both projects.<sup>16</sup> The ICRC then requested the Swiss government, depositary of the Geneva Conventions, to convene a diplomatic conference.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974–77 Diplomatic Conference) held four sessions in Geneva between 1974 and 1977. All States party to the Geneva Conventions were duly invited as members of the Conference. Furthermore, the UN, the ICRC and several national liberation movements recognized by regional organizations were invited as observers. ICRC representatives took part in nearly all meetings of the conference in an expert capacity.<sup>17</sup>

On the second point, the ICRC quickly realized that it would be pure folly to expose the 1949 Geneva Conventions to a revision process, since it was far from certain that the international community, deeply divided by the Cold War, would agree to any new treaties. There was a real risk that seeking to revise the existing Conventions, while failing to replace them with new treaties, would ruin their authority.<sup>18</sup> The most basic common sense therefore dictated that the aim should be to adopt additional protocols, so that the 1949 Conventions would be preserved.

This leads to our second question: what were the key issues and the main bones of contention involved in the negotiations?

- 15 Draft Protocols Additional to the Geneva Conventions of 12 August 1949, ICRC, Geneva, June 1973 (Draft APs); *Draft Protocols Additional to the Geneva Conventions of 12 August 1949: Commentary*, ICRC, Geneva, October 1973 (ICRC Commentary on Draft APs).
- 16 *XXIInd International Conference of the Red Cross, Teheran, 8–15 November 1973: Report*, Red Lion and Sun Society of Iran, Tehran, 1973; *Report on the Study by the XXIInd International Conference of the Red Cross of the Draft Additional Protocols to the Geneva Conventions of 12 August 1949*, Doc. CDDH/6, ICRC, Geneva, January 1974.
- 17 *Official Records*, above note 1. Three years after the adoption of the Additional Protocols, a small group of scholars, directed by Professor Michael Bothe, published a commentary on them. See Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, with the collaboration of Martin Eaton, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 1982. Five years later, the ICRC published its own commentary, essentially written by the ICRC representatives who had served in the various committees and working groups of the Diplomatic Conference in an expert capacity: Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on APs). We may also mention three collections of essays which shed light on the works of the 1974–77 Diplomatic Conference and on the interpretation and scope of the Additional Protocols: Charles Rousseau and Michel Virally, “Vers un nouveau droit international humanitaire?”, *Revue générale de droit international public*, Vol. 82, No. 1, 1978; Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, 2 vols, Editoriale Scientifica, Naples, 1979; Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Geneva, and Martinus Nijhoff, The Hague, 1984. For a contemporary assessment of the Additional Protocols, see Giovanni Mantilla, “The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols”, in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?*, Oxford University Press, Oxford and New York, 2017, pp. 35–68.
- 18 Regarding the price to be paid for a failed codification project, see Richard R. Baxter, “The Effects of Ill-Conceived Codification and Development of International Law”, in *En hommage à Paul Guggenheim*, Faculté de Droit de l’Université de Genève et Institut Universitaire de Hautes Études Internationales, Geneva, 1968, pp. 146–166.

## Issues and perspectives

Two issues dominated the debate: the question of nuclear weapons, and the classification of wars of national liberation.<sup>19</sup>

Right from the initial consultations, the United States and other States that possessed nuclear weapons made it clear that they would not take part in discussions about the legality or illegality of those weapons, which they regarded as the cornerstone of their security policies.

Since negotiations would have made no sense without the involvement of those States, it was vital to work out some compromise. In the end, it was agreed that the legality of nuclear weapons would not be on the Conference's agenda. However, it was also agreed that rules relating to the protection of civilians from the effects of hostilities, which the Conference would review, applied to all weapons, including nuclear weapons.<sup>20</sup> This explains why, in its advisory opinion of 8 July 1996 on the legality of the threat or use of nuclear weapons, the International Court of Justice (ICJ) was able to rely heavily on the provisions of Additional Protocol I (AP I), even though nuclear weapons were not mentioned as such in the treaty.<sup>21</sup>

On the second point – the legal classification of wars of national liberation – it quickly became clear that the grievances of developing countries were deeply rooted in the past. When European countries conquered countries in the Americas, Asia and Africa, they denied indigenous peoples the benefit of the laws and customs of war, on the grounds that such rules only applied between so-called “civilized nations”, not in their dealings with peoples over which they were seeking to assert their authority. Thus, to mention just one example, during the conquest of Algeria (1830–47), the French army applied a scorched-earth policy, destroying villages and crops on a massive scale – a method of combat that, without a doubt, would have been labelled as unlawful had it been used in a war between European countries.<sup>22</sup>

19 Since the two draft additional protocols prepared by the ICRC, which were accepted as the basis for the deliberations of the 1974–77 Diplomatic Conference, covered a wide range of aspects of modern warfare, the Conference was of course confronted with a wide range of issues, such as the law on the conduct of hostilities, guerrilla warfare, the status of captured combatants in irregular warfare, the fate of the missing, the protection of the civilian population against the effects of hostilities, relief operations, blockades, non-international armed conflicts, scrutiny, and repression of violations. Many of these issues led to heated and passionate debate, sometimes concluded by a vote. However, it was widely accepted that attention focused on two key issues that might have wrecked the Conference: the question of the legality or illegality of nuclear weapons, which could have led to the abstention of the United States and other nuclear powers; and the question of the legal qualification of wars of national liberation, which totally dominated the first session of the Diplomatic Conference, right from the opening ceremony, and resulted in a sharp division of the conference and two votes, the second one at the very end of the session. This issue also strongly influenced the debates on a wide range of other matters, such as the status of captured combatants in irregular warfare (Article 44 of Additional Protocol I (AP I)). The votes concluding the first session of the 1974–77 Diplomatic Conference left deep wounds which took a long time to heal, as demonstrated by the refusal of some States to ratify AP I.

20 ICRC Commentary on APs, above note 17, pp. 585–596.

21 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, pp. 226–267, esp. pp. 256–260.

22 Alain-Gérard Slama, *La guerre d'Algérie: Histoire d'une déchirure*, Collection La Découverte, No. 301, Éditions Gallimard, Paris, 1996, pp. 16–17; Bruno Étienne and François Pouillon, *Abd El-Kader, le Magnifique*, Collection La Découverte, No. 431, Éditions Gallimard and Institut du Monde Arabe, Paris, 2003, pp. 24–53.

Conversely, when peoples in Asia and Africa took up arms to regain their independence after the Second World War, the colonial powers declared that, since a colonial territory was an integral part of the metropolitan territory, those conflicts were essentially an internal matter subject to the exclusive competence of the State concerned. The colonial powers thus argued either that IHL did not apply to those confrontations, or that such conflicts were only subject to common Article 3, which applied to non-international armed conflicts and extended only minimal protection to captured combatants and civilians. That was the position adopted by France with respect to the Algerian War (1954–62) and by the United Kingdom with respect to the Mau Mau insurrection in Kenya (1952–59).<sup>23</sup>

Based on the peoples right of self-determination, enshrined in the UN Charter and in numerous resolutions of the UN General Assembly, developing countries argued that colonial peoples had a legal personality distinct from that of the metropolitan powers, and that wars of national liberation should therefore be recognized as international armed conflicts, subject to all the provisions of the 1949 Geneva Conventions, and not as non-international armed conflicts governed by common Article 3 alone.<sup>24</sup>

This question totally dominated the first session of the 1974–77 Diplomatic Conference, resulting in a heated debate in which arguments based on *jus ad bellum* – i.e., the question of whether the use of force is lawful – interfered with the debate regarding *jus in bello* – i.e., the question of the limits on the use of armed force.

After a prolonged, impassioned debate, the Diplomatic Conference held two votes resulting in the adoption of Article 1, paragraph 4, of AP I, defining as international armed conflicts those “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination”.<sup>25</sup>

That victory came at a price, however. There is a strong presumption that Article 1, paragraph 4 is the main obstacle which prevented South Africa (until the end of Apartheid), Israel and the United States from ratifying the Additional

23 Françoise Perret and François Bugnion, *De Budapest à Saigon, Histoire du Comité international de la Croix-Rouge*, Vol. 4: 1956–1965, ICRC and Georg Editors, Geneva, 2009, pp. 177–221, 259–268 (English translation forthcoming). See also Fabian Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria*, trans. Dona Geyer, University of Pennsylvania Press, Philadelphia, PA, 2013, pp. 120–125.

24 Georges Abi-Saab, “Wars of National Liberation and the Laws of War”, *Annals of International Studies*, Vol. 3, 1972, pp. 93–117; Georges Abi-Saab, “Wars of National Liberation in the Geneva Conventions and Protocols”, *Collected Courses of the Hague Academy of International Law*, Vol. 165, No. 4, 1979, pp. 353–445. The president of the Islamic Republic of Mauritania, Mokhtar Ould Dada, specially came to Geneva to address the opening ceremony of the 1974–77 Diplomatic Conference. He forcefully denounced the ongoing colonial situations in Africa, Asia and the Middle East, asserted the right of oppressed peoples to take up arms to recover their independence, and called for recognition of “freedom fighter” status: see *Official Records*, above note 1, Vol. 5, Doc. CDDH/SR.1, pp. 12–14.

25 A first vote took place at the 13th session of Committee I on 22 March 1974; the draft of Article 1, paragraph 4 was adopted by seventy votes to twenty-one with thirteen abstentions. A second vote on Article 1 as a whole took place in the 36th plenary session on 23 May 1977; the article was adopted by eighty-seven votes to one with eleven abstentions. *Official Records*, above note 1, Vol. 8, Doc. CDDH/I/SR.13, p. 102; Vol. 6, Doc. CDDH/SR.36, pp. 40–41.

Protocols of 1977.<sup>26</sup> After all, this provision is based on the concept of “peoples”, which is fraught with uncertainty, as many recent crises around the world have continued to show.

## Achievements and failures

After setting out the main areas of controversy, we can address the third question: what were the main developments and the main shortcomings of the Additional Protocols?

There is no doubt that the main achievement of the 1974–77 Diplomatic Conference was the restoration of the traditional principle of immunity of the civilian population against the effects of hostilities, which was dramatically violated during the Second World War and in many subsequent conflicts.

After long and difficult debates, the Diplomatic Conference adopted detailed provisions on the protection of civilians and on what may appear to be the other side of the same coin – i.e., the definition of combatants and military objectives.<sup>27</sup>

A few years ago, the ICRC carried out an in-depth study on customary IHL involving some 100 highly qualified experts from all over the world.<sup>28</sup> The study showed that the provisions of AP I relating to the conduct of hostilities and the protection of civilians (Articles 35–60) reflected customary international law, either because those provisions codified pre-existing customary rules or because international customs had crystallized around the wording used in the relevant provisions of AP I. This implies that those provisions are binding upon all States, whether or not they are party to AP I.<sup>29</sup>

The study on customary IHL also showed that the customary rules codified by these provisions applied to all armed conflicts, whether international or non-international.<sup>30</sup>

26 George H. Aldrich, “Some Reflections on the Origins of the 1977 Geneva Protocols”, in C. Swinarski (ed.), above note 17, pp. 129–137, esp. p. 136.

27 AP I, Arts 35–60.

28 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study).

29 *Ibid.* See also Jean-Marie Henckaerts, “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflicts”, *International Review of the Red Cross*, Vol. 87, No. 857, 2005, pp. 175–212; François Bugnion, “Droit international humanitaire coutumier”, *Swiss Review of International and European Law*, Vol. 17, No. 2, 2007, pp. 165–214 esp. pp. 183–190 (English translation: “Customary International Humanitarian Law”, *African Yearbook on International Humanitarian Law*, 2008, pp. 59–99).

30 See the references cited in note 29. For a critical US analysis of the ICRC Customary Law Study, see John B. Bellinger and William J. Haynes, “A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007, pp. 443–471. For another US analysis of the customary nature of the provisions of AP I relating to the conduct of hostilities, see Michael J. Matheson, “The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions”, *American University Journal of International Law and Policy*, Vol. 2, No. 2, 1987, pp. 419–436. For an analysis by the former head of the US delegation to the 1974–77 Diplomatic Conference, see George H. Aldrich, “Customary International Humanitarian Law – An Interpretation on Behalf of the International Committee of the Red Cross”, *British Yearbook of International Law*, Vol. 76, 2006, pp. 503–524.

This conclusion can easily be explained. Indeed, it would be unacceptable for States to use methods and means of warfare against their own people that they renounced using against a foreign enemy. This had already been clearly stated by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in its judgment of 2 October 1995 in the *Tadić* case:

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.<sup>31</sup>

This shows the remarkable impact of AP I, which goes far beyond the scope of international armed conflicts alone.

In this author's view, the most painful failure of the 1974–77 Diplomatic Conference concerned Additional Protocol II (AP II), which applies to non-international armed conflicts – i.e., the large majority of conflicts that have taken place since the end of the Second World War. After broad consultations, the ICRC submitted to the Diplomatic Conference a relatively ambitious draft aiming to strengthen the protection of both captured combatants – members of government armed forces and opposition forces alike – and civilians affected by these conflicts.<sup>32</sup> This level of protection was strengthened further during the Diplomatic Conference's debates.<sup>33</sup>

However, once wars of national liberation had been recognized as international armed conflicts, many countries in Asia, Africa and Latin America lost interest in the draft AP II. In addition, several of those countries opposed the adoption of provisions which, they feared, might restrict their ability to quell a rebellion and restore national unity.

As the Diplomatic Conference was coming to a close, it became clear that the draft AP II would not obtain the two-thirds majority required for its adoption. It was then that the Pakistani delegation proposed to replace the draft resulting from work done by the Conference's committees, which consisted of forty-seven articles, with a revised draft containing twenty-eight articles, amputated from all the controversial and most restrictive provisions. With the clock ticking, the Pakistani

31 ICTY, *The Prosecutor v. Duško Tadić a/k/a "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 119, cited in Marco Sassòli, Antoine Bouvier and Anne Quintin (eds), *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 3rd ed., Vol. 3, ICRC, Geneva, 2011, pp. 1758–1795, esp. p. 1781.

32 Draft APs, above note 15, pp. 33–46; ICRC Commentary on Draft APs, above note 15, pp. 129–176; *Official Records*, above note 1, Vol. 1, Part 3, pp. 33–46.

33 Doc. CDDH/402. To our knowledge, this document was not reproduced in the *Official Records*. The drafts of the articles adopted by the Conference's three plenary committees can be consulted in the committees' reports, which are reproduced in Volumes 10, 13 and 15 of the *Official Records*, above note 1.

delegation's draft was hastily adopted in an atmosphere resembling liquidation at the lowest price.<sup>34</sup>

Thus, while the original ICRC draft had included several provisions for the protection of captured combatants and other persons deprived of their liberty because of a non-international armed conflict, so as to ensure them humane treatment and minimal guarantees in case of prosecution,<sup>35</sup> AP II does not afford armed combatants – insurgents or members of government armed forces – any effective legal protection in case of capture which might induce them to respect the laws and customs of war.

Indeed, no provision in AP II prevents captured combatants from being subjected to the most severe penalties – including the death penalty, provided they were not below 18 years of age at the time of the offence – simply for taking part in hostilities, either as members of insurgent armed groups or as members of government armed forces.<sup>36</sup> If captured combatants are subject to the most severe penalties simply for taking part in hostilities, violations of the laws and customs of war can in practice no longer be punished, since no additional penalty can be inflicted. Conversely, if combatants – insurgents or members of government armed forces – know that IHL will not give them any effective protection in case of capture, what incentive do they have to comply with that law?

Similarly, the ICRC draft incorporated a provision recalling that all parties enjoyed equal rights and were bound by the same obligations in case of non-international armed conflict, stating: “The rights and duties of the parties to the conflict under the present Protocol are equally valid for all of them.”<sup>37</sup> This draft provision was the expression of the principle of equality of belligerents under the law of armed conflicts, which underlies all of the laws and customs of war.<sup>38</sup>

34 Whereas the 1974–77 Diplomatic Conference's committees had dedicated part or the totality of seventy-seven sessions to examining the ICRC's draft, not to mention countless meetings of various working parties, the plenary committee rushed through its examination of Pakistan's draft in only six sessions. Deferring the adoption of AP II to a fifth session of the Diplomatic Conference or to another conference was no solution either. After four sessions of the Diplomatic Conference, most delegations wanted to conclude and had no interest in another session. It was also obvious that a majority of States would not support the prospect of a diplomatic conference, the main purpose of which would be updating the law applicable to non-international armed conflicts.

35 Draft APs, above note 15, Draft Protocol II, Arts 6–10, pp. 35–36.

36 As demonstrated by the Spanish Civil War (1936–39), nothing prevents insurgents, provided they reach a certain degree of organization, from setting up their own courts and tribunals and from prosecuting their adversaries. Thus, the officers and men who remained loyal to the Spanish Republic were indicted and convicted for armed rebellion by the military courts set up by the insurgents, just as nationalist officers and men were indicted and convicted by the military courts of the Spanish Republic.

37 Draft APs, above note 15, Draft Protocol II, Art. 5, p. 34.

38 The fact that government forces and insurgents find themselves in radically different positions under national law and, in most cases, under public international law does not prevent them from enjoying equal rights and duties under the laws and customs of war. Any other solution would be bound to lead to unrestricted warfare and unrestricted violence, since no force on earth could compel insurgents to respect a set of rules which they would perceive as discriminatory. Furthermore, the distinction between government armed forces and insurgent armed groups may become relative and fluid in case of civil war, either because the international community divides along ideological lines of fracture, with some States recognizing one party as the legitimate representative of the divided State while others recognize the opposite party as such, as was the case for many years with regard to Vietnam, Laos and Cambodia; or because military victory leads to a reversal of legal positions and status, the insurgents taking the place of the former government, as was the case at the end of the Spanish Civil War, following the victory of the insurgents led by Fidel Castro in Cuba in January 1959, following the victory of the Sandinista insurrection in Nicaragua in July 1979, and in several subsequent conflicts.

It was also intended to induce insurgents to respect the laws and customs of war by recalling that they could not claim benefit from such laws and customs without accepting the corresponding obligations. It was also a way of making sure that insurgents would be bound by the Protocol, since neither the draft AP II nor general international law provided them with the possibility of acceding to such a treaty.

This provision was struck down, as were all provisions referring to the rights and duties of insurgents. The results are plain to see.

## Conclusion

There is no doubt that the ICRC made the right decision when it decided to assume responsibility for the preparatory work ahead of the 1974–77 Diplomatic Conference. Not only did this decision enable it to draw from its experience in codifying and developing humanitarian law, but also, because of its work in the field on most theatres of war, it was able to give a voice to victims during the preparatory meetings and then at the Diplomatic Conference itself – even though several participants in the expert meetings and the Diplomatic Conference, as well as some external observers, would have expected the ICRC to speak with a clearer and louder voice when advocating for war victims.

Similarly, there is no doubt that the ICRC was right to aim for the adoption of additional protocols instead of a revision of the 1949 Geneva Conventions. That decision clearly reined in the scope of the negotiations, limited risks and preserved the achievements of the 1949 Diplomatic Conference.

When it comes to weighing up the 1977 Additional Protocols, there are two key developments to bear in mind. First, the long negotiation period leading to the adoption of the 1977 Additional Protocols gave nations that gained independence after 1949 the possibility not only of taking part in drafting the new treaties, but also of shaping them according to their expectations and needs. The debates on wars of national liberation, on the status of combatants in irregular warfare, on the conduct of hostilities and on protections for the civilian population were either largely driven or strongly influenced by third-world countries, which could, when united, ensure through votes the adoption of formula responding to their expectations. These prolonged negotiations allowed those States to take ownership of IHL, which is crucial for ensuring that it is universally accepted, applied and complied with. Second, the Additional Protocols updated the law regarding the conduct of hostilities and restored the principle of immunity of the civilian population against the effects of hostilities, in both international and non-international armed conflicts.

These represent major achievements, and it is therefore fitting that we should celebrate the 40th anniversary of the adoption of the two 1977 Additional Protocols.