30 YEARS FROM THE ADOPTION OF ADDITIONAL PROTOCOLS I AND II TO THE GENEVA CONVENTIONS

Beatrice Onica Jarka,
Nicolae Titulescu University, Law Faculty

ABSTRACT
The article reflects in a concentrated form some of the International Humanitarian Law progress happened in the last 30 years from the adoption of the Additional Protocols I and II to the 1949 Geneva Conventions. This progress refer to the developing of customary humanitarian law, extension of the essence of the humanitarian law applicable to international armed conflicts to internal armed conflicts and the adoption of other conventional norms of humanitarian law in specific areas.

I. INTRODUCTION

Following the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, which took place in four sessions, on 8th of July 1977, Additional Protocol I and Additional Protocol II to the 1949Geneva Conventions were adopted The protocols were named in accordance with their content: the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of International Armed Conflicts – Protocol I and the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts – Protocol II.

The result of several years of ICRC's efforts, the two protocols have been moving forward the development of international humanitarian law on topics of greatest importance covering the protection of victims of armed conflicts.

II. THE ADOPTION OF PROTOCOL I – SIGNIFICANCE

Additional Protocol I had not only developed the existing norms on the protection of wounded, sick and shipwrecked, methods and means of warfare – combatant and prisoner of war status, civilian population but had also introduced cornerstone marks in the protection of victims in international humanitarian law conflicts. Some of these cornerstone norms refer to the enlargement of the definition of international armed conflict to include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (article I paragraph 4), the enlargement of the situations in which armed forces are recognized as such to extend the qualification of prisoners of war to categories of persons not covered by the general rule enunciated in the III Geneva convention (articles 43, 44 and 67) introduction of the categories of illegal combatants: spies and mercenaries (articles 46 and 47) limitation on parties to employ certain methods or means of warfare and definition of perfidy (articles 35, 37, 38, 40, 41 and 42) specific protection of prisoners of war against any medical

procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty, protection of civilian persons and property against attacks or threats of violence launched indiscriminately (articles 49, 51, 52, 54, 57, 58) protection of environment against widespread long term and sever damage (article 55), introduction of special protection for children (articles 77 and 78), women (article 76) refugees and stateless persons (article 73), journalists (article 79) and introduction of fundamental guarantees for persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under the Protocol without any adverse distinction based upon race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (article 75).

III. THE ADOPTION OF PROTOCOL II – SIGNIFICANCE

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), 8 June 1977, represents one of the most important results achieved in international humanitarian law. Its adoption is the step from the rudimentary framework of minimum standards represented by article 3 common to the 1949 Geneva Conventions to a detailed treaty applicable in internal armed conflicts. The evident disparity existing between the norms regulating the international armed conflicts and internal armed conflicts before the adoption of Protocol II was, to a certain extent, mitigated by introducing written rules regarding the fundamental guarantees applicable to all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted and special protection for children (article 4), express minimum protection with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained (article 5), the conditions for penal prosecutions (article 6), the protection of wounded, sick and shipwrecked (articles 7 and 8), the protection for medical staff and units (articles 9 and 10), regulated use of distinctive emblem (article 12) special protection for the civilian population (article 13), protection of objects indispensable to the survival of the civilian population (article14), protection of works and installations containing dangerous forces (article 15), protection of cultural objects and of places of worship (article 16), prohibition of forced movement of civilians (article 17), the intervention of relief societies and relief actions (article 18).

Although the intent behind the adoption of Protocol II was not to bring internal armed conflicts to the same level of regulation as it exits in the international armed conflicts, the rules adopted reflect the awareness of the international community in connection to this type of conflict which becomes more and more widespread.

IV. INTERNATIONAL HUMANITARIAN LAW DEVELOPMENTS BROUGHT IN THE 30 YEARS FROM ADOPTION OF THE TWO PROTOCOLS

The adoption and further the entering into force and continuing ratification since 1977 of the two Additional Protocols brought into existence new norms of humanitarian law and extended the conventional protection of the victims in international and internal armed conflicts. In addition, the mere adoption and entering into force of the two Additional Protocols have contributed and is still contributing to the development of the international humanitarian law in general. If in certain situations the two Protocols enunciated only the principle, it was the further development through customary law or further conventional law which developed the regulation of victims protection in the internal and international armed conflict.

It is relevant for the purpose of this article to underline several developments of the rules of the two Additional Protocols in the years that followed their adoption as the impulse on the developing of customary humanitarian law, the extension of the essence of humanitarian law applicable to international armed conflict to internal armed conflicts and the adoption of other conventional norms of humanitarian law in specific areas as mercenary and mercenarism prohibition and child solders These aspects together with the specific examples are only some selected issues which are not intended to be either extensive or exhaustive but merely illustrative for the 30 years of international humanitarian law development.

a. Developing of customary law

Additional Protocol I codified pre- existing rules of customary international law, but also laid down the foundation for the formation of new customary rules, not only in international armed conflicts but also in the non- international armed conflicts[1]. In the same time, Additional Protocol II contributed to the creation of customary rules for the regulation of the internal armed conflict. This took place through the practice and *opinion juris* of states which not only transformed in customary rules different norms contained in the two protocols but also extended their applications to situations not necessarily envisaged by these bodies of conventional law.

Such developments were reflected in the study called Customary Humanitarian Law published in 2005 Cambridge University Press, by ICRC with Jean Marie Henkaerts and Loiuse Doswald Beck as authors and with the contribution of Carolin Allvermann. Knut Dorman and Baptiste Rolle. The study was initiated by ICRC in 1995, at the request of International Conference of the Red Cross and Red Crescent. The study comprises 161 rules of customary humanitarian law grouped in six parts: part I – The Principle of Distinction, part II – Specifically protected Persons and Objects, part II – Specific Methods of Warfare, part IV - Weapons, part V – Treatment of Civilians and Persons Hors de Combat, Part VI – Implementation.

[1] See Jean –Marie Henckaerts – Study on Customary International Humanitarian Law: A contribution to the understanding and respect for the rule of law in armed conflict , International Review of the Red Cross, volume 87, no. 857, March 2005, p. 187

The study which took ten years of preparation concentrates also the state practice and *opinio juris* as to two additional protocols.

Although the coverage of international humanitarian law by the ICRC study is impressive, we choose as an example of customary rules developed in connection to Additional Protocol I state practice and *opinion juris* - the International Court of Justice Advisory Opinion of 8th July 1996 referring to the threat or use of nuclear weapons. The ICRC study took note of the International Court of Justice Advisory Opinion and stated that it deemed it not appropriate to engage in similar exercise at virtually the same time.[2] .

The International Court of Justice Advisory Opinion of 8 July 1996[3] was delivered at the request of UN General Assembly which had asked the following question: "Is the threat or use of nuclear weapons in any circumstances permitted under international law?".
Without precedent in the history of advisory opinions delivered by International Court of Justice, more than 30 states submitted written statements in the proceedings and this led the Court to find that it " the extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behavior expected of States" and they apply to nuclear weapons. In this sense, the Court concluded unanimously that a threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful; a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons; and by seven votes to seven, by President casting vote that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake"[4].
Although the International Court of Justice advisory opinion does not represent state practice in itself, it certainly reflects the majority of state practice and *opinio juris*. As Jean Marie Henkaerts stated in its article "Study on Customary International Humanitarian Law: A contribution to the understanding and respect

[2] See Jean Marie Henkaerts and Louise Doswald Beck - Customary Humanitarian Law, 2005 Cambridge University Press, Volume I Rules, p 255.
[3] See UN General Assembly, Res 49/75 K on request for an advisory opinion from the International Criminal Court on the legality of the threat or use of nuclear weapons, 15 December 1994, and ICJ, Nuclear Weapons Case, Advisory Opinion, 8 July 1996, ICJ Reports 1996.
[4] See ICJ, Nuclear Weapons Case, Advisory Opinion, 8 July 1996, ICJ Reports 1996.

for the rule of law in armed conflict" published in the International Review of the Red Cross, the finding of the Court is significant "given that a number of states undertook the negotiation of Additional Protocol I on the understanding that the Protocol would not apply to the use of nuclear weapons".

b. Extension of the essence of the humanitarian law applicable to international armed conflicts to internal armed conflicts

Initially thought and negotiated as separated corps of law, Additional Protocol I for the protection of victims in international armed conflicts and Additional Protocol II for the protection of victims in internal armed conflicts developed through the years, at least from the point of view of their very essence, to form a single body of legal norms applicable both to international and internal armed conflicts. It was the main achievement in the developments brought by the two Protocols that the state practices and *opinio juris* favored a unitary approach.

This unitary approach was first reflected in the International Criminal Tribunal for Former Yugoslavia jurisprudence which held in Tadic Jurisdiction Appeal that customary rules governing internal conflicts include protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or not longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban certain methods of conducting hostilities, as well as the principle of personal criminal responsibility for the acts figuring in grave breaches articles apply also to internal armed conflicts[5].

The International Committee of Red Cross Study on Customary Humanitarian Law, reveals even more profoundly the development of customary rules similar and parallel to those existing in Additional Protocol I for the protection of victims of internal armed conflict. The drafting of the Additional Protocol II rudimentary in certain respects made possible the establishment of more detailed rules which filled in, for certain fields of application, the gap between the regulation of internal armed conflict and that of international armed conflict. One example in this sense is the regulation of conduct of hostilities in internal armed conflicts which is provided in a vague manner in article 13 from Additional Protocol II. The International Committee of Red Cross Study considers that rules of customary law had been created in this respect and they are applicable in internal armed conflicts. Such rules cover the basic principles on the conduct of hostilities and include rules on specifically protected persons and objects and specific methods of warfare, similar to those existing in Additional Protocol I.

c. Adoption of other conventional norms of humanitarian law in specific areas

An important contribution brought by the adoption of two protocols is represented also by the enunciation of rules which were further developed and detailed in international conventions. Some of the fields in which such rules were enunciated are the regulation of mercenaries and the of the child soldier.

[5] See James G. Stewart, Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict, International Review of Red Cross, June 2003, Vol 85, nr. 850, p. 321-323.

The first and only provision which defines and transform the mercenary in an illegal combatant, implicitly prohibiting such conduct, is article 47 in the Additional Protocol I, which gives the definition of the mercenary and provides for the sanction.
Except for the Convention on the "Elimination of Mercenarism in Africa" adopted by the Organization of African Unity in Libreville on 3 July 1977, which is a regional instrument, there have been no other definition and no other similar provisions until the adoption of the UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries. This Convention was adopted on 4 December 1989 by Resolution 44/34 of the United Nations General Assembly. Comprising 21 articles, the 1989 Convention pursues steps previously taken by Third World countries, seconded at the time by socialist countries, to fight against mercenarism throughout the world. The definition of a mercenary is derived from Article 47 of Protocol I, but goes further by applying to "armed conflict" (Article 1, paragraph 1) and also to "any other situation" (Article 1, paragraph 2). The adoption of the UN Convention of 1989 is an obviously a step forward in the development of the regulation of mercenaries and mercenarism brought by Additional Protocol I.
A second field in which both protocols enunciated rules is the use of child soldiers in armed conflicts. Provisions regulating the use of child soldiers may be found in the Additional Protocol I - article 77, which provides at paragraph 2 that the Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces and also that in recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavor to give priority to those who are oldest. Similar provisions may be found in Additional Protocol II, which provides at article 4 that children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.
Following the enunciation of these rules, the Convention on the Rights of the Child (1989) with the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000) and the Rome Statute of International Criminal Court (1998) which criminalise the infringement of the rule provided in the two Protocols were adopted.

V. CONCLUSION

The adoption of the two Protocols represents one of the most important moments of the international humanitarian law, which demonstrated the will of international community to protect the victims of armed conflicts. The further developments of these bodies of law either in customary rules or in more detailed conventional norms is significant from the point of view of international humanitarian law which starts to become more and more present in the public conscience of the international community.