PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I)

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II)

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE ADOPTION OF AN ADDITIONAL DISTINCTIVE EMBLEM (PROTOCOL III)

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Historical Perspective

There are three Protocols Additional to the Geneva Conventions of 12 August 1949, two of which were adopted in 1977 and the third in 2005. Both Protocol I and II (hereinafter "the 1977 Protocols") were adopted by States on 8 June 1977 and entered into force on 7 December 1978. Protocol I regulates conflicts of an international nature and as of October 2020 is binding on 174 States. Protocol II applies to non-international armed conflicts and as of October 2020 has 169 State parties. The Protocols develop and supplement the four 1949 Geneva Conventions and are only open to those States that are also party to these Conventions. Together these instruments are the best known of the treaty documents and are the major components of what is today referred to as International Humanitarian Law (hereinafter "IHL"). Additional Protocol III relating to the Adoption of an Additional Distinctive Emblem (hereinafter "the 2005 Protocol") was adopted by States in 2005 and entered into force on 14 January 2007. As of October 2020, it is binding on 78 States.

The 1977 Protocols

The 1977 Protocols at the time of their adoption were particularly important international instruments. Protocol I addresses two areas of human suffering resulting from armed conflict that had been neglected in treaty law since the adoption of the Hague Conventions of 1907. These are first, the conduct by combatants of hostilities, and secondly, the protection of the civilian population against the harmful effects of hostilities. Protocol II is groundbreaking as the first legal instrument devoted solely to the regulation of non-international armed conflicts.

Their impact over the years has been even more profound in that they have rendered obsolete the historical division in IHL into those rules that regulate the actual conduct of hostilities, the Law of The Hague and the Law of Geneva, with its humanitarian focus on protecting the victims of armed conflict. The 1977 Protocols deal with both these areas and in doing so mark the emergence of a new era in the legal regulation of armed conflict: the integration of humanitarian principles across the breadth of IHL.

The 1977 Protocols were a long time in fruition. From as early as the 1950s, there had been pressure in certain quarters for a revision and update of the provisions of IHL. The events of the Second World War had highlighted failures in the existing legal protections for the victims of armed conflict. The four 1949 Geneva Conventions went a long way in addressing these concerns. However, large gaps remained in the existing rules that were exacerbated by the vast changes that had occurred in the means and methods of warfare since their adoption. Moreover, the IV Geneva Convention for the protection of civilians, despite its name, is limited in terms of those covered by its provisions and contains no protections for civilians from the actual conduct of hostilities. Non-

international armed conflicts were also proliferating and there was only one treaty provision of the most general nature that was applicable in such circumstances.

The political background that had the most influence on the movement for revisiting the treaty rules of IHL was the process of decolonization and its associated so-called wars of self-determination, in particular the armed struggles against colonial domination, alien occupation and racist regimes. In the period between 1945 and 1965, the majority of the colonial and non-self-governing territories in Asia and Africa achieved independence, statehood, and membership of the United Nations. This gave them unprecedented influence in the international setting. One of their major goals was to hasten the process of decolonization and to undermine alien and racist regimes. Along with this was the desire to achieve elevation of the armed conflicts that characterized these struggles to the status of international armed conflicts within IHL. These newly emerged States also sought legal protections analogous to those for prisoners of war for guerilla fighters taking part in such conflicts.

These wars of self-determination had also fundamentally changed the face of warfare, as they were conducted using guerilla-style and unconventional methods of conflict. Such tactics involved the civilian population to an unprecedented extent and starkly exposed the limitations of the existing law. The ambitions of these newly emerged States for political and legal change set the scene for inevitable strong differences between themselves and other members of the international community as to the content of any new humanitarian rules regulating armed conflict.

At the forefront of responding to these developments was the International Committee of the Red Cross (hereinafter "ICRC"), the Swiss based organization with a special responsibility as the promoter and guardian of IHL. In this role, it disseminates, monitors compliance with and contributes to the development of IHL. As such, the ICRC occupies a unique place in the international legal system, with its mandate recognised by States. As early as 1956, the ICRC completed a set of Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War. These Draft Rules were submitted to the XIXth International Red Cross Conference held in New Delhi in 1957.

No action was taken on the Draft Rules. Although the ICRC continued its efforts, for some years, the international community shelved the question of the further revision of IHL. Further impetus for progress, however, came from the work undertaken by the United Nations Commission on Human Rights and the United Nations General Assembly on human rights in times of peace that began to expand logically into concern for human rights in armed conflicts. The starting point of this process was the 1968 International Conference on Human Rights held in Tehran. At this Conference, a resolution was adopted requesting the General Assembly to invite the Secretary-General of the United Nations to study the need for additional humanitarian conventions or for the possible revision of existing conventions. The General Assembly affirmed and adopted this request and continued its focus on armed conflict in subsequent resolutions. The outcome was three reports by the Secretary-General to the General Assembly in 1969, 1970 and 1971 setting out the areas of IHL that needed attention.

Continuing the momentum for improvements in the protections offered to victims of armed conflict, in 1971 and 1972, the ICRC convened conferences of government experts to consider what new rules of IHL were needed. The first conference was criticized for its limited invitation to only some 40 governments. The second, however, was open to all States parties to the 1949 Geneva Conventions, and some 70 governments sent representatives. Based on the work of these two conferences, the ICRC developed full drafts of the texts of two Protocols, Protocol I in relation to international armed conflicts and Protocol II in relation to non-international armed conflicts (hereinafter "Draft Protocols"). In 1973, the ICRC sent the Draft Protocols to all governments, accompanied by a commentary.

It was now up to governments to take over the process of negotiating any new rules of IHL. In 1974, the Swiss government in its capacity as the depository of the 1949 Geneva Conventions summoned a Diplomatic Conference on the Reaffirmation and Development of International

Humanitarian Law Applicable in Armed Conflicts (hereinafter "Diplomatic Conference"). In an attempt to avoid the perception that the Protocols represented a revision of existing rules, the title of the Diplomatic Conference deliberately referred to "reaffirming and developing" the law. Any suggestion of a more fundamental process may have had the unwanted effect of weakening the existing provisions of the 1949 Geneva Conventions. All States who were parties to the Geneva Conventions or Members of the United Nations were invited. These numbered some 155 States at the time. In addition, some 11 National Liberation Movements and 51 inter-governmental or non-governmental organisations participated as observers. The Diplomatic Conference met on four occasions between 1974 and 1977 and the two Protocols were adopted by consensus on 8 June 1977 and representatives of 102 States and 3 National Liberation Movements signed the Final Act on 10 June 1977.

The 2005 Protocol

The original Geneva Convention of 22 August 1864 adopted a red cross on a white background as the sole emblem to identify medical services of armed forces and volunteer relief societies. There is nothing in the records of the conference that adopted this emblem as to why this was the emblem of choice. The emblem serves two different purposes, one protective and the other indicative. These purposes have been present in one form or another from its inception. As a protective device, an emblem is the visible sign of the protections provided by the Geneva Conventions. As an indicative device, the emblem reflects the fact that a person or object is linked to the International Red Cross and Red Crescent Movement (hereinafter "the Movement").

Over the years, the question of the emblem has been beset by problems that have threatened its acceptance as universal, neutral and impartial. Of particular concern was that after its adoption, the red cross was seen by some States as bearing unacceptable religious connotations. Other emblems were also in use from time to time by different States, and pressure was exerted in some quarters for their official acceptance. Finally, as a result of these differences, the 1929 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armies in the Field (hereinafter the "1929 Convention") recognised the red crescent, and the red lion and sun on a white background but only for use by those States who had used it prior to the adoption of the 1929 Convention. This solution was adopted by the First Geneva Convention of 1949, and article 44 thereof makes the distinction between the protective and indicative use of the emblem. In the latter situation, the emblem is to be of a comparatively small size.

Controversy over the emblem, however, was to continue. First, it was difficult to persuade some States that there was no religious or political significance in those two of the symbols that could been seen as associated with the principal monotheistic religions. Secondly, there were States who were not prepared to use any of the recognized emblems that had been adopted by the 1929 Convention. Another difficulty called for resolution. The use of the emblem is a pre-requisite for recognition of National Societies and of the Movement. As a result of this requirement, for many years the National Societies of Israel, Kazakhstan and Eritrea had been unable to join the Movement as full members given their failure to adopt any of the recognised emblems.

The drafting history of the 2005 Protocol commenced in 1995 under the auspices of the ICRC with the establishment of a working group made up of representatives of governments and national societies, the ICRC, the Movement and other interested parties. Its main work was to develop a solution in terms of a symbol devoid of any political, religious or other connotation and which could thus be used all over the world. It was agreed relatively early that the only way forward was to develop an additional emblem through a third Protocol. It was also necessary that any new emblem would allow for the insertion by a National Society of any indicative sign that it already used. After an intensive process of testing various possibilities, an unofficial consensus emerged that the name of the additional symbol should be the red crystal. By 2000, a draft Protocol formulated by the ICRC to that effect was ready to be presented to a Diplomatic Conference of States parties to the 1949 Geneva Conventions. The unstable situation in the Middle East, however, derailed this process, and it was not until 2005 after intense negotiations over the intervening period

that Switzerland convened a Diplomatic Conference to consider the draft. Some 144 State parties to the 1949 Geneva Conventions sent delegations to the Conference that took place in Geneva from 5 to8 December 2005. The 2005 Protocol was adopted by 98 votes to 27 with 10 abstentions.

Significant Developments in the Negotiating History

The 1977 Protocols

The Draft Protocols prepared by the ICRC were the main working documents of the Diplomatic Conference. Reaching agreement on the proposals they contained was never going to be a straightforward task. The issue of the regulation of armed conflict at the best of times is highly charged politically, as it deals with issues of national security and goes to the very heart of the survival of the State. The Diplomatic Conference was also the first occasion for newly independent countries to participate in drafting rules of IHL. The 1949 Geneva Conventions had required only one session to achieve their adoption. The negotiations of the 1977 Protocols, however, given the number of highly sensitive political issues raised by the Draft Protocols, led to lengthy negotiations that required four sessions to complete.

At the commencement of the Diplomatic Conference, the issue immediately arose as to the place of wars of self-determination in the scheme of IHL. Two associated issues presented themselves, one procedural and one substantive. The procedural issue related to the participation of liberation organizations in the deliberations. The resolution of this issue took some four weeks of intense negotiations. Finally, it was agreed that liberation movements recognized by regional organizations could participate with the right to speak and make proposals but with no right to vote.

The substantive issue in relation to wars of self-determination was contained in amendments presented to the Diplomatic Conference as to the scope of Protocol I. The amendments were based on the argument that certain categories of non-international armed conflicts should be elevated to the level of international and consequently come within the scope of Protocol I. These amendments aroused great controversy. Finally, after much debate at the Committee level, a draft article was adopted by consensus at the Diplomatic Conference that extended the scope of application of the Protocol to include some former non-international armed conflicts.

It also proved to be extremely difficult to achieve consensus on new rules dealing with the reality of "guerilla warfare" that characterized these newly elevated conflicts. The expansion of the scope of application of the Protocol required clarification of those fighters who were now to be entitled to combatant status. This status carries with it the right to be treated as a prisoner of war on capture. Generally speaking, the rules of IHL on combatant status are based on regular armed forces that wear uniforms and carry arms openly. By doing so, they distinguish themselves from the civilian population. In contrast, irregular fighters blend with the civilian population and rely on the element of surprise thereby placing civilians at increased risk. Negotiators were faced with a dilemma. On the one hand, it was hoped that if guerilla fighters could qualify as prisoners of war this would encourage them to comply with the rules of armed conflict. On the other hand, any change in the existing requirements could impact adversely on civilians. The eventual outcome of the intense negotiations was a compromise resulting in a somewhat unclear set of provisions that henceforth included some irregular fighters in the definition of what constitutes a combatant and thereby entitled to the coveted status of prisoner of war.

The innovations in Draft Protocol I that were designed to achieve the better protection of civilians against the conduct hostilities also caused concern for many States. It will be recalled that from the perspective of the ICRC, the core motivation behind the summoning of the Diplomatic Conference was to achieve such changes in order to protect civilians against the effect of hostilities. To limit the liberty of States to choose the way in which they conducted armed conflict, however, had direct implications for the national security and defense of the State. Despite these concerns, the Diplomatic Conference succeeded in adopting a comprehensive and detailed set of provisions protecting the civilian population and civilian objects from the impact of armed conflict.

Another novel development was the adoption for the first time of provisions explicitly addressing protection of the natural environment. Armed conflict has always been environmentally destructive with often-disastrous impact on the civilian population and civilian objects. Prior to Protocol I, there were no treaty provisions in IHL that referred specifically to the environment. Such protections could be implied to some degree from the general core principles of IHL that the right of the parties to the conflict to choose methods or means of warfare is not unlimited and the rule of proportionality. The ICRC Draft Protocol I submitted to the Diplomatic Conference contained no reference to the environment. However, the 1970s witnessed such rapid increasing awareness of environmental issues that two provisions providing protections for the environment against the impact of armed conflict were introduced during the Diplomatic Conference negotiations and subsequently adopted by States.

In the case of Protocol II, the issue of its scope of application, as was the case with Protocol I, was of primary importance and the subject of intense debate. The regulation of non-international armed conflicts raises a potential conflict with the fundamental tenet of the international legal system: non-intervention with the domestic affairs of a State. Internal matters are prima facie beyond the scope of international law. All that had been achieved in 1949 was one treaty provision protecting victims of non-international armed conflicts: the so-called mini-convention contained in Common Article 3 to the 1949 Geneva Conventions. This article provides a minimum number of basic rules and applies to all non-international armed conflicts. That latter concept is undefined.

The majority view of the committee of the Diplomatic Conference entrusted with reaching agreement on the draft of Protocol II was that it should include a definition of the armed conflicts to which it applied. There was support for both a wide definition and one more restricted. In the end, a more restrictive definition was accepted, and the Draft Protocol II presented to the Diplomatic Conference had a relatively limited coverage as compared with Common Article 3. In other respects, however, it was a relatively comprehensive document importantly containing substantial provisions protecting civilians against the effect of hostilities. It became apparent, however, during the Diplomatic Conference deliberations that this Draft would not be acceptable to all delegations. The major concerns appeared to be the potential of the Draft Protocol to interfere with the sovereign right of States to manage their own affairs within their borders and the fear that international status might be given to those considered by many States to be rebels. Several delegations were also of the view that the Draft's provisions were not workable in the particular circumstances of internal armed conflict.

A last-minute re-draft of the Draft Protocol was accepted by the Diplomatic Conference that eliminated half the articles. The strictly humanitarian rules were retained, but the majority of draft articles for the protection of civilians from the conduct of hostilities were deleted. There remained, however, some basic new rules protecting victims of non-international armed conflicts from the means and methods of conflict.

The 2005 Protocol

The ideal solution from the perspective of the ICRC to the difficulties that had arisen over the years concerning the emblem was the adoption of one single emblem. This result, however, was impossible to achieve at the negotiations on the 2005 Protocol. After difficult and contentious debates that were not so much related to issues of substance but concerned the legal and political situation in the Middle East, the Additional Protocol with its symbol of the red crescent was adopted by a majority vote. It is the only component of the four 1949 Geneva Conventions and their Additional Protocols not to have been adopted by consensus.

Summary of Key Provisions

The final form of the 1977 Protocols reflects the concern that the new rules should not be seen as a revision of existing law. Protocol I talks in terms of "supplementing" the four Geneva

Conventions and Protocol II as supplementing and developing the law. This constraint on the scope of the proposed new instruments to some extent explains the lack of harmony between the provisions of the Geneva Conventions and the Protocols. In the final result, however, the Protocols undoubtedly represent a revision of the existing treaty rules and contain some significant new rules.

Protocol I

Application of Protocol I and definition of combatants

In the case of Protocol I, article 2(4) thereof expands the scope of application of the Protocol to include certain categories of struggles for self-determination and against alien occupation and racist regimes. These previously non-international armed conflicts thereby acquire the status of international armed conflicts and are governed by the relevant treaty rules.

Articles 44 and 45 contain the relevant rules defining the circumstances in which fighters in the new category of international armed conflicts become entitled to combatant status. In certain limited situations, the wearing of uniforms and the open carrying of weapons by such individuals is no longer mandatory at all times. The new rules also provide for a number of other changes including a provision designed to furnish some basis fundamental guarantees for fighters taking part in hostilities who fall outside the definition of combatants.

Means and methods of conflict

Apart from some rudimentary provisions in The Hague Regulations annexed to the 1907 Hague Convention IV, Protocol I represents the first time that the provisions of IHL have regulated the means and methods of combat to protect the civilian population from the effects of hostilities. Part IV thereof provides a detailed set of rules to achieve this objective. Article 48 of Protocol I requires a distinction to always be drawn in military operations between the civilian population and combatants and between civilian and military objects. This basic rule is supplemented by specific rules in article 51 designed to spell out how the distinction between civilian and military objects is to be facilitated and how the level of damage to the civilian population and civilian objects is to be contained. Central to this scheme is the prohibition of indiscriminate attacks the definition of which includes disproportionate attacks.

Protection of the Environment

Protocol I contains two provisions specific to the natural environment. Article 35 and 55 both protect the natural environment against “widespread, long-term and severe damage”. Reprisals against the environment are also prohibited by article 55(2).

Protection of Women

Another key provision is article 76 that extends the protections for women against rape, forced prostitution and any other form of indecent assault in the IV Geneva Convention. As noted previously, that Convention is of limited scope but Protocol I extends these protections to all persons in the territory of a Party to the conflict. Protocol I does not adopt the outdated reference in the above Convention to these acts as constituting attacks on the honour of women but stops short of their outright prohibition.

Monitoring and Implementation

Protocol I provides major advances relating to monitoring and implementation mechanisms such as providing for the first time in the case of IHL for a permanent fact-finding body, the International Fact-Finding Commission. The latter body, made up of members appointed from Contracting Parties to the 1949 Geneva Conventions and Protocol I, is tasked *inter alia* with enquiring into any facts alleged to constitute serious breaches of the Conventions or Protocol.

Protocol I also expands the acts that constitute grave breaches of IHL and that are punishable as war crimes.

Protocol II

Protocol II is the only treaty document devoted entirely to non-international armed conflicts. Unlike Common Article 3 of the 1949 Geneva Conventions that applies to all non-international armed conflicts, Protocol II only applies to a specific type of conflict. Protocol II encompasses armed conflicts that take part in the territory of a State between its armed forces and dissident armed forces that have a certain level of organization and have control over a part of its territory. The aim of the definition is to rule out of the application of Protocol II to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature".

Its key provisions are those that provide fundamental guarantees for all persons who take no direct part in hostilities, such as those deprived of their liberty, the sick, wounded and shipwrecked, as well as to medical and religious personnel, medical units and transports allowed to display the distinctive emblem of the Red Cross or Red Crescent. Medical activities as such are granted general protection. The civilian population, objects indispensable to their survival, works and installations containing dangerous forces, cultural objects and places of worship are also the subject of special provisions designed to protect them from the effects of hostilities.

The 2005 Protocol

As is the case with the 1977 Protocols, the 2005 Protocol is not an independent document. It supplements and is governed by the provisions of the four Geneva Conventions of 1949 and the 1977 Additional Protocols. It is a short document of relatively limited coverage with some 17 articles, only seven of which are substantive provisions.

Its 10 preambular paragraphs, amongst other things, confirm that States remain at liberty to choose whatever emblem they wish to use within their territories and that the emblem serves two different functions, one protective and the other indicative.

In terms of status, according to article 2 of the 2005 Protocol, its emblem is in addition to and has equal status to the other emblems. Article 2 also stipulates that the conditions for use of and respect for the Protocol's emblem are identical to those for the distinctive emblems established by the 1949 Geneva Conventions and, where applicable, the 1977 Additional Protocols.

The 2005 Protocol refers to the additional emblem as the "third Protocol emblem". However, the ICRC has subsequently formally adopted the use of the name "red crystal".

Article 3 of the 2005 Protocol allows for the use of a symbol within the red crystal on certain conditions. The only symbol that meets these conditions is the red shield of David which has been in use by the Israeli National Society (Magen David Adom) since the 1930s. This option is restricted to its use for indicative purposes not in its protective function where the red crystal alone must be used.

Apart from the States parties and their National Societies, by articles 3, 4 and 5 of the 2005 Protocol certain other actors such as the ICRC may use the red crystal emblem in defined circumstances.

Actual and Potential Influence of the Protocols on Subsequent Developments

The 1977 Protocols undoubtedly represent a major achievement in developing the rules of IHL. Despite their limitations, they increased awareness that more needed to be achieved in the existing international legal protections for the victims of armed conflicts. They also set the

precedent for the continued development of protections for civilians against the impact of hostilities in both international armed conflicts and non-international armed conflicts.

The provisions of Protocol I that provoked such controversy during the negotiations have proven to be of limited significance. For example, the expansion of the application of Protocol I to wars of self-determination and the changes in relation to those fighters entitled to combatant privileges are largely a product of their era and of little practical importance. However, they remain the basis for the refusal of a handful of States to accept Protocol I. Protocol II also remains objectionable but to a different set of States that are more likely to be engaged in conflicts covered by its provisions.

Some of the innovative provisions have also not met the intentions of the drafters. For example, the International Humanitarian Fact-Finding Commission to date has not fulfilled its potential. Under article 90 of Protocol I, States had to specifically declare that they accepted the competence of the Commission before it could be established, and this did not occur until 1991. The Commission did not receive its first mandate until 2001, and this was from an international institution rather than a State as originally envisaged. Time will tell if the Commission finds a more active role.

Since their adoption, the 1977 Protocols, however, have contributed to further developments in IHL in several ways. First, in the case of Protocol II, several subsequent treaty documents have adopted its distinction between non-international armed conflicts and internal disturbances, etc., in setting out their scope of application. Examples of such instruments are the 1999 Protocol to the 1954 Hague Convention for the Protection of Cultural Property and the 1998 Statute of the International Criminal Court.

Secondly, the provisions of the 1977 Protocols have played a vital role in the development of customary international law. These laws are binding on all States as opposed to treaty rules that only bind the States parties thereto. In some cases, the Protocols have provided a precedent for States to follow in developing a customary norm. For example, the provision of Protocol I on the minimum protections accorded to all persons in the power of a party to an armed conflict has been of unforeseen significance, particularly in the case of so-called “unlawful combatants”. Although not a term found in IHL, it is widely understood as covering those participating directly in hostilities who are not entitled to prisoner of war status when they fall into the power of the enemy. This class of individuals has assumed significance in current times and in the era of the so-called “war on terror” when it became of considerable importance to determine what protections these persons have, if any, under IHL. The view has developed that article 75 of Protocol I, which sets out the minimum protections that apply to all persons in the hands of a party to an international armed conflict, also represents customary international law thus binding all States irrespective of their membership of Protocol I.

Much of the progress, however, in the development of customary IHL has taken place in the context of the enforcement of its provisions through the exponential growth of modern International Criminal Law from the 1990s onwards. It had become apparent after the adoption of the Protocols that their complex treaty making process had serious limitations as a means of developing this area of international law. In the right circumstances, the formation of customary international law can be a more flexible and dynamic process of international law making. The emergence of a customary norm can also overcome the problem of the uneven membership of treaties and gaps in their coverage.

A good example of this phenomenon is the development of IHL through the work of the ad hoc international criminal tribunals established in the 1990s. The Protocols have played an important role in their work. In the case of the International Criminal Tribunal for Rwanda (hereinafter “ICTR”) established by the Security Council in 1994, Protocol II is specifically part of its jurisdiction and its provisions have been interpreted and applied in cases before the ICTR. By way of contrast, the jurisdiction of the International Tribunal for the former Yugoslavia (hereinafter

"ICTY") established by the Security Council in 1993 does not include the 1977 Protocols, and it was limited to applying customary IHL in its decision-making. The ICTY, however, in its survey of State practice in relation to a particular case has frequently relied on the ratification, interpretation and implementation of the 1977 Protocols as relevant in its assessment of the customary law position as, for example, in the 1998 *Furundžija* case.

The development of customary law through the work of the ICTY has been particularly comprehensive and groundbreaking in the case of non-international armed conflicts. Protocol II was without doubt groundbreaking at its time of adoption. As mentioned previously, some States, including those frequently involved in armed conflicts covered by the new rules, failed to ratify this Protocol. Moreover, there remained significant gaps in the treaty rules even if adopted by States. These defects have been largely overcome by the rapid development of customary international law. Protocol II played its part in this process and has been relied on by the ICTY in a number of cases. The 1995 *Tadic* case is of particular importance in this context. After its survey of existing customary international law in internal armed strife, the ICTY concluded that, "many provisions of this Protocol [Protocol II] can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles".

Other international judicial bodies have also had to resort to the provisions of the 1977 Protocols in their work. For example, the International Criminal Court has relied on Protocol II to provide content to some of the crimes in its statute, as for example, in the 2012 *Lubanga* case.

The jurisprudence of the ICTY is also regarded as having set in train the resolution of another major issue in IHL. At the time of its adoption, it was unclear from the text of Protocol II whether breach of any its provisions could be criminal in nature and even more broadly whether violations of the law of non-international armed conflicts generally could result in individual criminal responsibility. The question became urgent with the conflicts in the former Yugoslavia and Rwanda. In the case of the purely non-international armed conflict in Rwanda, as mentioned above, serious violations of Protocol II are specifically included in the jurisdiction of the ICTR. This overcame the problem in relation to that tribunal, but it left open the question of the criminality of offences of non-international armed conflicts generally. The finding of the 1995 *Tadic* case that violations of IHL occurring in non-international armed conflict could constitute war crimes rapidly became accepted as a matter of customary international law.

The 2005 Protocol

There has been slow progress in the participation and accessions to the 2005 Protocol. To date, only some 22 States parties have adopted national legislation implementing this Protocol.

Although there was general agreement at the time of its adoption that the rules on the use of the emblem in the 2005 Protocol were far from clear and awaited further clarification through the practice of States, to date this has not occurred. No State has used the red crystal for protective purposes for its military vehicles or for its Ministry of Health controlled facilities or vehicles and on only one occasion has a National Society (the Magen David Adom of Israel) used the red crystal for indicative purposes.

This Introductory Note was written in March 2021.

Related Materials

A. Legal Instruments

Hague Conventions of 1899 and 1907 (Text of the Conventions available on the website of Yale Law School's *Avalon Project*).

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