

THE CONTENT AND IMPORTANCE OF PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS

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Abstract

Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, of 08 June 1977, is one of the most significant rules of international armed conflicts. This paper will give the overview of its content, as well as its main achievements. The shift in the protection of persons who do not or are no longer taking part in an international armed conflict is provided by the fact that many of the provisions of this Protocol are now part of customary international law and, therefore, are binding for all actors in International Law - not only for its signatories.

Key words: international armed conflict, civilians, international custom.

JEL classification: K33

INTRODUCTION

The Geneva Conventions of 1949 are considered as one of the most important acts in the field of international humanitarian law, both in international and non-international armed conflicts. After the practice showed that the Conventions have become obsolete and that they have to be revised, two Protocols to the Geneva Conventions were adopted back in the 1977.

The paper will present a review of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter: Protocol I), 8 June 1977, which refers only to international armed conflicts.

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SADRŽAJ I ZNAČAJ DOPUNSKOG PROTOKOLA UZ ŽENEVSKE KONVENCIJE O ZAŠTITI ŽRTAVA MEĐUNARODNIH ORUŽANIH SUKOBA

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Sažetak

Dopunski protokol uz Ženevske konvencije od 12.08.1949. godine o zaštiti žrtava međunarodnih oružanih sukoba, od 08.06.1977. godine jedan je od najznačajnijih akata za međunarodne oružane sukobe. U radu će biti dat prikaz njegovog sadržaja, kao i osnovnih dostignuća. Pomak u zaštiti osoba koje ne učestvuju ili više ne učestvuju u međunarodnom oružanom sukobu omogućen je činjenicom da je veliki broj odredbi ovog Protokola danas dio međunarodnog običajnog prava, te stoga obavezuje ne samo njegove potpisnice, već sve aktere u međunaronom pravu.

Ključne riječi: međunarodni oružani sukob, civilni, međunarodni običaj.

JEL klasifikacija: K33

UVOD

Jednim on najznačajnijih akata iz oblasti međunarodnog humanitarnog prava, i za međunarodne i za nemedunarodne oružane sukobe, kao i jednim od najznačajnijih međunarodnih ugovora uopšte smatraju se Ženevske konvencije iz 1949. godine. No, praksa je pokazala da su ove konvencije postale zastarjele i da ih je bilo potrebno revidirati. Stoga su 1977. godine usvojena dva protokola na iste.

U ovom radu bit će dat prikaz Dopunskog protokola uz Ženevske konvencije od 12.08.1949. godine o zaštiti žrtava međunarodnih oružanih sukoba, od 08.06.1977. godine (u daljem tekstu: Protokol I), koji se odnosi samo na međunarodne oružane sukobe.

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PROTOCOL I OF 1977

Based on a draft rules from 1956, Resolutions adopted at two International Conferences of the Red Cross during the 1960s and Resolutions adopted at the International Conference on Human Rights that was held in Tehran in 1968, the International Committee of the Red Cross (ICRC) has taken into consideration the possibility to adopt Additional Protocols to the Geneva Conventions. Attendees of the 21st International Conference of the Red Cross in 1969 that took place in Istanbul officially confirmed the abovementioned idea and thus, work on preparation of new acts has begun.²

The Geneva Conventions of 1949 represent significant progress in the history of development of the international humanitarian law. However, new states that were established during decolonization between 1949-1977 and that did not take part in adoption of the rules, were not willing to support it. Besides, rules relating to the conduct of hostilities have not been modernized since 1907 and adoption of the Hague Conventions and for that reason, a need for improvement of the Geneva Conventions of 1949 has emerged. As a result, competent officials decided to adopt new rules that will be included in Conventions in the form of Protocols. In fact, the Protocols of 1977 actually connect and modernize the Geneva Convention-law and the Hague Convention-law.

Participants of the International Conference on Human Rights that took place in Tehran in 1973, discussed and expressed their full support to the draft (of the Protocols). As depository for the Geneva Conventions, the Swiss Government convened the Diplomatic Conference on the Reaffirmation and Development of the International Humanitarian Law Applicable in Armed Conflicts, in Geneva. After four sessions, the Conference ended in 1977. During a final session, representatives of 102 countries adopted 102 Articles of the Protocol I and 28 Articles of the Protocol II.

The fundamental role of the Protocol I was in fact in defining of certain terms in the field of the international humanitarian law, which are actually the same terms that were used in the Geneva Conventions of 1949, but they have never been defined.³ Furthermore, the Protocol I actually extends the protection that arises from the First Geneva Convention and the Second Convention, that refer to protection of wounded and sick civilians. However, the Protocol I has not set protection only for wounded and sick civilians, but also for those who are considered to be weak due to their predispositions, and those are women and children.

2 The modernization and expansion of application of rules of the international humanitarian law is always more than welcomed. The ICRC recently proposed introduction of the rules of the international humanitarian law in the video game industry. Thus, video games that simulate battlefields have to respect the rules of the international humanitarian law. As a result, there are video games that automatically end the game, if rules of the international humanitarian law are not respected (for example, in case of killing of civilians).

3 These are the terms such as a civilian, a civilian object, civil defense, a combatant and an attack.

PROTOKOL I IZ 1977. GODINE

Na osnovu nacrta pravila iz 1956. godine te rezolucija usvojenih na dvije Međunarodne konferencije Crvenog krsta/križa šezdesetih godina prošlog stoljeća i rezolucija usvojenih na Međunarodnoj konferenciji o ljudskim pravima koja je održana u Teheranu 1968. godine, MKCK je uzeo u razmatranje mogućnost da se dopune Ženevske konvencije iz 1949. godine. Ista misao je zvanično potvrđena na 21. međunarodnoj koferenciji Crvenog krsta/križa iz 1969. godine u Istanbulu. Započeo je posao oko pripreme novih akata.²

Ženevske konvencije iz 1949. godine predstavljale su značajan napredak u razvoju međunarodnog humanitarnog prava. Međutim, tokom perioda 1949-1977. godine došlo je do nastanka novih država dekolonizacijom, a iste nisu bile voljne poštovati pravila u čijem donošenju nisu same učestvovalle. I ne samo to – pravila o vođenju neprijateljstava nisu bila modernizovana još od 1907. godine i usvajanja Haških konvencija, te je i iz tog razloga postojala potreba za unaprednjem Ženevskih konvencija iz 1949. godine. Odlučeno je da se donesu nova pravila koja će biti sadržana u konvencijama u obliku protokola. Protokoli iz 1977. godine ustvari spajaju Ženevsko i Haško pravo, te ih osavremenjuju.

U Teheranu je 1973. godine održana međunarodna konferencija Crvenog krsta/križa koja je razmotrila nacrt teksta i u potpunosti podržala isti. Kao depozitar Ženevskih konvencija švicarska vlada je sazvala u Ženevi Diplomsku konferenciju o reafirmaciji i razvoju međunarodnog humanitarnog prava primjenjivog u oružanim sukobima. Konferencija je završena 1977. godine, nakon četiri zasjedanja. Na završnom zasjedanju opunomoćenici 102 zemlje su usvojili 102 člana Protokola I i 28 članova Protokola II.

Osnovni značaj Protokola I jeste utvrđivanje definicija pojedinih pojmoveva iz oblasti međunarodnog humanitarnog prava, i to onih pojmoveva koji su korišteni i u Ženevskim konvencijama iz 1949. godine, ali nikad nisu definisani.³ Nadalje, Protokol I proširuje zaštitu koja proizlazi iz Prve i Druge konvencije za civilne ranjenike i bolesnike. Međutim, zaštitom Protokola I nisu obuhvaćeni samo stvarno ranjeni i bolesni civili, već i oni koji se zbog svoje predispozicije smatraju slabijima – žene, djeca. Treba spomenuti i novinu Protokola I u pružanju zaštite brodolomcima. Naime, Protokol I pruža zaštitu brodolomcima ne samo iz mora, već i iz plovnih rijeka i jezera.⁴

2 Modernizacija pravila i širenje međunarodnog humanitarnog prava uvijek je dobro došlo. Tako je nedavno MKCK predložio da se u video igrice uvede ova grana prava, odnosno da se u igricama koje simuliraju borbe moraju poštovati pravila međunarodnog humanitarnog prava. Napravljene su igrice u kojima nepoštivanje međunarodnog humanitarnog prava (primjerice ubijanje civila) automatski dovodi do prekida igre (GAME OVER).

3 Riječ je o pojmovima kao što su civilna osoba, civilni objekat, civilna zaštita, borac, napad.

4 Član 8. tačka b) Protokola I

We should also mention a novelty of the Protocol I in providing protection to the shipwrecked persons that covers sea, but also navigable waters; rivers and lakes.⁴

States assent to the Protocol I in the usual ways:

- signing the Protocol;
- acceding to the Protocol.

However, national liberation movements can assent to apply and be bound by the Protocol on the basis of unilateral declaration addressed to the depositary.⁵ The declaring authority is thereby immediately bound by the Geneva Conventions of 1949 and the Protocol I, and consequently enjoys the same rights and must discharge the same obligations as any other state party to the conflict. All states have the obligation to spread knowledge of the Geneva Conventions and its Protocols.⁶

THE CONTENT OF THE PROTOCOL I

The Protocol I provides an overview of the rules relating to the conduct of combatants during hostilities. The main principle on which the rules are based is limited right of the parties to the conflict to choose methods and means used to wage war. Namely, use of the methods, means and weapons that cause unnecessary injury or unnecessary suffering is prohibited.⁷

The Protocol I is composed of six parts:

1. General Provisions;
2. Wounded, sick and shipwrecked;
3. Methods and means of warfare; Combatants and prisoners of war;
4. Civilians and civilian population;
5. Execution of the Conventions and of its Protocols;
6. Final Resolutions.

The first part refers to the general principles of the Protocol I and it defines the field of application of the Protocol. After that, the Protocol stipulates basic definitions and determines the legal status of the parties to the conflict and the Protecting Powers and their substitutes.

The second part of the Protocol I is composed of three sections: General Protection, Medical Transportation and Missing and Dead Persons. First, the second part defines terminology that will be used in the document such as “*woun-*

4 The Article 8, item b) of the Protocol I

5 *Ibid*, Article 96, Paragraph 3

6 The Article 47 of the First Geneva Convention, the Article 48 of the Second Geneva Convention, the Article 127 of the Third Geneva Convention, the Article 144 of the Fourth Geneva Convention, the Article 83 of the Protocol I, the Article 19 of the Protocol II

7 The Article 35 of the Protocol I

- Protokolu I može pristupiti svaka država na uobičajene načine:
- potpisom;
 - pristupom.

Međutim, ukoliko se radi o narodnooslobodilačkim pokretima, isti mogu Protokol I primjenjivati na osnovu jednostrane izjave upućene depozitaru.⁵ Tom izjavom će Ženevske konvencije iz 1949. godine i Protokol I s trenutačnim djelovanjem stupiti na snagu za navedeni narodnooslobodilački pokret kao stranu u sukobu. Isto tako, narodnooslobodilački pokret preuzima ista prava i obaveze koje je preuzeila i država koja je potpisala Ženevske konvencije iz 1949. godine i Protokol I, a koji podjednako obavezuju sve strane u sukobu.

Sve države imaju obavezu širiti znanje o Ženevskim konvencijama i njihovim Protokolima.⁶

SADRŽAJ PROTOKOLA I

Protokol I daje pregled pravila koja se odnose na ponašanje boraca tokom trajanja neprijateljstava, a glavno načelo na kojem se zasnivaju ova pravila jeste ograničenost prava strana u sukobu da izaberu metode i sredstva koja će koristiti u sukobu. Naime, zabranjena je upotreba metoda, sredstava i oružja koji izazivaju nepotrebne ozljede ili nepotrebna stradanja.⁷

Protokol I sastoji se iz šest dijelova:

1. Opšte odredbe;
2. Ranjenici, bolesnici i brodolomci;
3. Metode i sredstva ratovanja. Status boraca i ratnih zarobljenika;
4. Civilno stanovništvo;
5. Izvršenje Konvencije i ovog Protokola;
6. Završne odredbe.

Prvi dio označava opšta načela Protokola I i definiše polje njegove primjene. Nakon toga daje osnovne definicije, te određuje pravni status strana u sukobu, kao i sile zaštitnice i njihove supstitute.

Drugi dio Protokola I sastavljen je od tri odjeljka: Opšta zaštita, Sanitet-ski prevozi i Nestale i umrle osobe. U ovom dijelu se prvo utvrđuje terminologija koja će se koristiti u nastavku teksta. Autori tu daju definicije poj-

⁵ *Ibid.*, član 96, stav 3.

⁶ Član 47. Prve konvencije, član 48. Druge konvencije, član 127. Treće konvencije, član 144. Četvrte konvencije, član 83. Protokola I, član 19. Protokola II

⁷ Član 35. Protokola I

ded", "sick"⁸, "shipwrecked"⁹, "medical personnel"¹⁰ etc. Following the terms, the Protocol defines general protection that certain persons in international armed conflicts enjoy, while a number of Articles refers to medical transportation, protection and agreements related to this area. The last section of the Second part of the Protocol refers to missing and dead persons, and establishment of a rule that primarily refers to this section.

The third part of the Protocol I refers to methods and means of warfare and establishment of the status of combatants and prisoners of war. This part of the Protocol is mainly based on the principle to limit methods and means of warfare: use of weapons and other means and methods that can cause unnecessary suffering is prohibited.¹¹ Killing, injuring or capturing an adversary by resort to perfidy is also prohibited.¹² In addition to all this, denying mercy and fight against the enemy who did not take part or no longer takes part in the conflict, the enemy who already surrendered or clearly shows that he intends to do it, is prohibited.¹³

The fourth part of the Protocol I regulates protection of civilian population and civilian objects from consequences of conflicts. Civilians are those persons who do not belong to one of the categories of persons who take part in armed conflicts, while civilian objects are non-military objects that have no contribution to military action and whose destruction does not offer a military advantage.¹⁴ The principle of distinction between civilians and combatants and distinction between civilian and military objects, is the main principle that applies to protection of the civilian population. Bearing in mind that only combatants and military objects can be targets of an attack, attacks on civilians and civilian objects is prohibited, as well as putting civilians in the presence of combatants and military objects, in order to protect them. At the same time, all possible measures aimed to prevent accidental attacks on civilians or causing any kind of damage to civilians must be undertaken, which means that civilians must be removed from the place of attack, while starvation of civilians or destruction of objects that are crucial for their survival is also prohibited.¹⁵ The aforementioned

8 The Article 8 item a) of the Protocol I defines "wounded" and "sick" as persons who are in need of medical assistance or care and who refrain from any act of hostility, due to trauma, disease or other physical or mental disorder or disability.

9 The Article 8 item b) of the Protocol I defines "shipwrecked" as persons who are in peril at sea or in other waters, as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility.

10 The Article 8 item c) of the Protocol I stipulates that the term "medical personnel" means those persons assigned, by a party to the conflict, exclusively to the medical purposes (also defined by the Protocol), or to the administration of medical units or to the operation or administration of medical transports.

11 The Article 35 of the Protocol I

12 *Ibid*, the Article 37

13 *Ibid*, the Articles 41 and 42

14 *Ibid*, the Articles 50 and 52

15 *Ibid*, the Articles 51, 57 and 58

mova kao što su „ranjeni“ i „bolesni“⁸, „brodolomci“⁹, „sanitetsko osoblje“¹⁰ i slično. Nakon toga ovaj dio Protokola propisuje opštu zaštitu koju uživaju pojedine osobe u međunarodnim oružanim sukobima. Određen broj članova odnosi se, kako je već rečeno, i na sanitetska vozila, njihovu zaštitu i sporazume u vezi sa njima. Posljednji odjeljak Dijela II Protokola I odnosi se na nestale i umrle osobe, uz utvrđivanje načela koje se prvenstveno postavlja u primjeni ovog odjeljka.

Treći dio Protokola I odnosi se na metode i sredstva ratovanja, te na određivanje statusa borca i ratnog zarobljenika. Glavni princip na kojem se zasniva ovaj dio Protokola jeste princip ograničenja metoda i sredstava ratovanja: zabranjeno je upotrebljavati oružje i ostala sredstva, kao i metode koje uzazivaju nepotrebna stradanja.¹¹ Takođe je zabranjeno podmuklo ubijanje, ranjavanje i zarobljavanje protivnika.¹² Pored svega navedenog, zabranjeno je i uskraćivanje milosti, kao i borba protiv neprijatelja koji nije sudjelovao ili više ne sudjeluje u borbi, i koji se predao, ili na nedvojben način pokazuje da to namjerava učiniti.¹³

Četvrti dio Protokola I odnosi se na zaštitu civilnog stanovništva i civilnih objekata od posljedica sukoba. Civilni su one osobe koje ne pripadaju oružanim snagama, a civilni objekti su oni objekti koji nisu vojni, odnosno koji ne doprinose vojnom djelovanju i čije uništenje ne doprinosi vojnoj prednosti.¹⁴ Osnovno pravilo u vezi sa civilnim stanovništvom jeste da se u svaku dobu i na svakom mjestu mora praviti razlika između njih i boraca, te između civilnih i vojnih objekata. S obzirom da samo borci i vojni objekti mogu biti cilj napada, zabranjeno je ne samo napadati civile i civilne objekte ili štititi borce i vojne objekte stavljanjem civila u njihovo prisustvo, već se moraju poduzeći sve moguće mjere kako bi se spriječili slučajni napadi civila i štete kod istih.¹⁵ Ovo posljednje ne znači samo izdvajanje civila od mjesta napada, već i zabranu izglađnjivanja civila ili zabranu uništavanja objekata koji su neophodni za njihovo preživljavanje. To pokazuje da se od boraca na obje strane traži

8 Član 8. tačka a) Protokola I utvrđuje da se pod izrazom „ranjeni“ i „bolesni“ prvenstveno podrazumijevaju osobe kojima je zbog povrede, bolesti ili drugih fizičkih ili mentalnih poremećaja ili teškoća potrebna liječnička pomoć ili njega, i koja se uzdržavaju od svakog akta neprijateljstva.

9 Član 8. tačka b) Protokola I utvrđuje da se pod izrazom „brodolomci“ podrazumijevaju osobe koje se nalaze u opasnosti na moru ili u drugim vodama, kao posljedica nesreće koja je zadesila njih ili brod ili zrakoplov u kojem se nalaze.

10 Član 8. tačka c) Protokola I utvrđuje da se pod izrazom „sanitetsko osoblje“ podrazumijevaju osobe koje je jedna strana u sukobu odredila isključivo za sanitetske zadatke (definisane takođe ovim Protokolom), ili za zadatke upravljanja sanitetskim jedinicama, ili za funkcionisanje ili upravljanje sanitetskim prevozima.

11 Član 35. Protokola I

12 *Ibid.*, član 37.

13 *Ibid.*, članovi 41. i 42.

14 *Ibid.*, članovi 50. i 52.

15 *Ibid.*, članovi 51., 57. i 58.

rules show that combatants on both sides should fight in a fair way, not hiding themselves behind the civilians.¹⁶ In general, civilians are all persons who are not defined as combatants, who do not take part in the hostilities, who do not have the right to take part and who may even be punished for taking part in the hostilities. On the other hand, combatants are members of armed forces who take direct part in the hostilities, who are entitled to do it and who can be punished for taking part in the hostilities. The first ones are protected from attacks and effects of the conflict as civilian population located under the power of the enemy, while combatants are protected when their direct participation in the hostilities ends, or when they fall into enemy's hands, when they are wounded, sick or shipwrecked, and if they parachute from an aircraft in case of a trouble.

The principle of distinction between civilians and combatants is one of the basic rules that is being applied in the international humanitarian law, in both international and non-international armed conflicts. The principle was first mentioned in the Preamble of the Saint Petersburg Declaration of 1868 (Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 29 November 1868, which reads that the only legitimate object which states should endeavour to accomplish during war, is to weaken the military forces of the enemy. The Article 25 of the Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (hereinafter: the Hague Regulations) also establishes a similar rule stipulating that attacking towns, villages, dwellings and buildings which are undefended, is prohibited. The Articles 28, 51 and 52 of the Protocol I refer to the same rule. The fact that there are no reserves to application of provisions that regulate the principle shows the significance of the principle, while some states like Mexico and the UK emphasized that the principle confirms the existing customary law and that it represents the very essence of the international humanitarian law.¹⁷ Civilians should be always distinguished from combatants, and in case of a doubt whether a person is a civilian or a combatant, he/she will be considered a civilian.¹⁸ In these cases, there should be a careful assessment of all elements needed to determine whether a person can be attacked or not, and in case of any kind of suspicion, attacks should be suspended.

16 The Article 38 of the Protocol I clearly shows that combatants on both sides should fight in a fair way. The Article also bans abuse of opponents' symbols

17 Numerous acts of the international humanitarian law confirm the principle of distinction between civilians and combatants; the Article 3 Paragraph 2 of the Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980; the Article 3 Paragraph 7 of the Second Protocol Additional to the aforementioned Convention; the Article 2 Paragraph 1 of the Protocol III to the aforementioned Convention and the Article 8 Paragraph 2, item b), sub-item i) of the Rome Statute of the International Criminal Court, 1998.

18 The Article 59 Paragraph 1 of the Protocol I

fer borba, a ne skrivanje iza civila.¹⁶ U suštini, civilni su sve osobe koje nisu borci, ne učestvuju neposredno u neprijateljstvima, nemaju pravo da neposredno učestvuju u sukobu; čak mogu biti kažnjeni zbog samog učešća u neprijateljstvima. S druge strane, borci su pripadnici oružanih snaga koji učestvuju neposredno u neprijateljstvima, imaju pravo na to, te ne mogu biti kažnjeni zbog istoga. Prvi su zaštićeni kao civilno stanovništvo koje se nalazi pod vlašću neprijatelja, te od napada i dejstava sukoba, dok su borci zaštićeni kada prestane njihovo direktno učestvovanje u neprijateljstvima, odnosno kada padnu u ruke neprijatelju, kada su ranjeni, bolesni, ukoliko su brodolomci, te ukoliko u nevolji iskaču padobranom iz zrakoplova.

Princip razlikovanja između civilnog stanovništva i boraca je jedno od osnovnih pravila međunarodnog humanitarnog prava, i međunarodnih i nemedunarodnih oružanih sukoba. Prvi put je spomenuto u preambuli Petrogradske deklaracije o upotrebi eksplozivnih metaka od 29.11.1868. godine, u kojoj je utvrđeno da jedini cilj kojem države u sukobu trebaju težiti jeste slabljenje vojnih potencijala neprijatelja. Pravilnik o zakonima i običajima rata na kopnu, od 18.10.1907. godine (u nastavku teksta: Haški pravilnik) takođe utvrđuje slično pravilo u članu 25., gdje se kaže da je zabranjeno napadati nebranjene gradove, sela, naselje i zgrade. Isto pravilo propisuju i članovi 28., 51. i 52. Protokola I. Koliko je ovo pravilo bitno pokazuje i činjenica da na odredbe koje ga utvrđuju nisu stavljene rezerve, a čak su i određene države (Meksiko, Velika Britanija) naglasile da je to pravilo potvrda postojećeg običajnog prava i da spada u samu suštinu međunarodog humanitarnog prava.¹⁷ Civile uvijek treba razlikovati od boraca a, ukoliko postoji nedoumica oko toga da li je određena osoba civil ili borac, ista će se smatrati civilom.¹⁸ U svakom slučaju, ukoliko postoji sumnja u pogledu statusa određene osobe, mora se izvršiti pažljiva procjena svih elemenata da bi se utvrdilo da li se ta osoba smije napasti ili ne. Ne smije se napasti svako ko je sumnjiv.

Pravilo koje slijedi iz prethodnog pravila jeste pravilo razlikovanja civilnih od vojnih objekata. Naime, strane u sukobu moraju u svakom trenutku praviti razliku između civilnih i vojnih objekata. Napadi ne smiju biti usmjereni na civilne objekte. Ovo pravilo uzraženo je u članu 48. i članu 52. stav 2. Protokola I. Utvrđuju ga i član 3. stav 7. Drugog izmijenjenog i dopunjeno

¹⁶ Da se od boraca na obje strane traži fer borba pokazuje i član 38. Protokola I, koji zabranjuje zloupotrebu simbola humanosti i državnih simbola protivničke strane.

¹⁷ Pravilo razlikovanja civila od boraca potvrđeno je brojnim aktima međunarodnog humanitarnog prava: član 3. stav 2. Protokola II uz Konvenciju o zabrani ili ograničavanju upotrebe određenih vrsta klasičnog oružja za koje se može smatrati da ima prekomjerne traumatske efekte ili da djeluje bez razlike u pogledu ciljeva iz 1980. godine, član 3. stav 7. Izmijenjenog i dopunjeno protokola uz istu Konvenciju, član 2. stav 1. Protokola III uz istu Konvenciju, član 8. tačka 2. b) i) Rimskog statuta Međunarodnog krivičnog suda iz 1998. godine.

¹⁸ Član 59. stav 1. Protokola I

The rule that arises from the aforementioned principle is the one that refers to distinction between civilian objects and military objects. Namely, the parties to the conflict must at all times distinguish between civilians and combatants and attacks must not be directed against civilians. The Article 48 and the Article 52 Paragraph 2 of the Protocol I mention the same rule, as well as the Article 3 Paragraph 7 of the Second Protocol Additional, the Article 2 Paragraph 1 of the Third Protocol to the Convention on Certain Conventional Weapons¹⁹ and the Article 8 Paragraph 2, item b, sub-item ii) of the Rome Statute of the International Criminal Court.

Rule logically derived from the previous read: Indiscriminate attacks are prohibited! The Article 51 Paragraph 4 of the Protocol I confirms this stance. Only France voted against application of this provision, claiming that it violates the right to defense and carrying out defensive military operations. Despite all this, no state made a reservation upon signing of the Protocol.²⁰

Precautions in attack imply the obligation to undertake all feasible precautions in order to avoid and minimize incidental loss of civilian life, injury to civilians and damages to civilian objects. The obligation to undertake all feasible precautions was first time defined in the Article 2 Paragraph 3 of the Ninth Hague Convention of 1907. The precaution rule applies both to international and non-international armed conflicts, although rules that refer to non-international armed conflicts do not explicitly mention this.²¹ “All feasible precautions” mean the obligation of military commanders to collect all informations about presence of civilians in the place which they plan to attack, natural environment, objects under special protection etc. At the same time, parties to the conflict should undertake all feasible precautions in order to cancel the attack, if it becomes clear that the objective is not a military one, or that the attack may cause incidental loss of civilian life, injury to civilians, damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.²²

The principle on the prohibition of attacks of persons who are unable to fight is also generally accepted; it is applicable both in international and non-international armed conflicts, and it is regulated by the Lieber Code²³ and the Hague

19 The Protocol was adopted on 10 October 1980 and B&H succeeded to the Protocol on 15 December 1993 (“The Official Gazette of the Republic of B&H”, No: 25/93).

20 Henckaerts J.-M. / Doswald-Beck L., *Customary International Humanitarian Law, Volume I: Rules*, translated by S. Abraham, University Press, Cambridge, 2005, p. 37

21 Although it is not explicitly stated, it is considered that the rule arises from the Article 13, Paragraph 1 of the Protocol II, which reads: “*The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.*”.

22 The Article 51, Paragraph 5 of the Protocol I

23 The Article 71 of the Lieber Code of 1863

protokola, član 2. stav 1. Trećeg protokola uz Konvenciju o određenom klasičnom oružju¹⁹ i član 8. stav 2. tačka b) podtačka ii) Rimskog statuta Međunarodnog krivičnog suda.

Pravilo logično izvedeno iz prethodnog glasi: napadi bez izbora ciljeva su zabranjeni! Navedeno je potvrđeno članom 51. stav 4. Protokola I. Jedino je Francuska glasala protiv ove odredbe, jer je smatrala da narušava pravo na odbranu i da narušava izvođenje odbrambenih vojnih operacija. Unatoč svemu, ni ova država nije prilikom potpisivanja ovog Protokola stavila rezervu na naznačeni član.²⁰

Predostrožnost u napadu podrazumijeva obavezu preuzimanja svih mogućih mjera predostrožnosti da bi se izbjegli, odnosno sveli na najmanju moguću mjeru slučajni gubitci i povrede civila te štete na civilnim objektima. Prvi put obaveza predostrožnosti u napadu je utvrđena u članu 2. stav 3. Devete haške konvencije iz 1907. godine. Ovo pravilo o predostrožnosti vrijedi i za međunarodne i za nemeđunarodne oružane sukobe, iako eksplicitno nije navedeno u pravu nemeđunarodnih oružanih sukoba.²¹ „Sve moguće mjere“ podrazumijevaju obavezu vojnih zapovjednika da prikupe sve moguće informacije o prisustvu civila na mjestu koje planiraju napasti, o prirodnom okolišu, objektima koji su pod posebnom zaštitom i slično. Isto tako, strane u sukobu moraju preuzeti sve moguće mjere kako bi prekinule napad ako postane jasno da cilj napada nije vojni, ili da napad može prouzrokovati slučajne gubitke života civila i njihove povrede, ili oštećenja civilnih objekata, a koji bi bili nesrazmerni u odnosu na predviđenu konkretnu i direktnu vojnu prednost.²²

Opšteprihvaćeno je i pravilo o zabrani napada osoba koje su onesposobljene za borbu. Ovo pravilo primjenjivo je kako u međunarodnim, tako i u nemeđunarodnim oružanim sukobima. Prisutno je bilo još i u Lieberovom kodeksu²³ i Haškom pravilniku²⁴. Podrazumijeva da su osobe koje se nalaze pod vlašću neprijatelja, zatim osobe bez svijesti, brodolomci, ranjenici, bolesnici, kao i osobe koje nedvojbeno daju do znanja da se žele predati – zaštićene od napada.²⁵ Takve osobe ne smiju biti predmet napada čak ni kada je teško držati ili evakuisati zarobljenike; prepreke se moraju prevazići raz-

¹⁹ Ovaj Protokol je usvojen 10.10.1980., a BiH ga je prihvatile sukcesijom 15.12.1993. („Službeni list Republike BiH“, broj: 25/93).

²⁰ Henckaerts J.-M. / Doswald-Beck L., *Običajno međunarodno humanitarno pravo*, Tom I: Pravila, preveo S. Avram, University Press, Cambridge 2005., str. 37.

²¹ Iako nije eksplicitno navedeno, smatra se da proizlazi iz člana 13. stav 1. Protokola II, koji glasi: „Civilno stanovništvo i pojedinci civili uživaju opštu zaštitu od opasnosti koje proizlaze iz vojnih operacija. Kako bi se provedla ta zaštita, ova će pravila biti poštovana u svakoj prilici.“

²² Član 51. stav 5. Protokola I

²³ Član 71. Lieberovog kodeksa iz 1863. godine

²⁴ Član 23. tačka c) Haškog pravilnika

²⁵ Član 41. i član 85. stav 3. tačka e) Protokola I, član 3. Ženevske konvencije iz 1949. godine

Regulations²⁴. According to the principle, persons who are under the power of the enemy, unconscious persons, shipwrecked, wounded, sick, and those who undoubtedly make it clear that they want to hand over – are protected from attacks.²⁵ These persons shall not be subject to attack, even in case of difficulties to hold or evacuate prisoners; obstacles must be overcome by disarmament and release or in any other way, but the rule shall not be called into question in no case.

Wounded, sick and shipwrecked must be treated with respect and they should be given proper protection.²⁶ In all circumstances, they shall receive, to the fullest extent practicable, the medical care and attention required by their condition and they shall be protected from injustice and all attacks on their personal integrity.

According to provisions of the Protocol I, persons who used to be considered stateless or refugees before the war, will be considered as persons protected by the Fourth Convention. Pregnant women and mothers with small children will be given priority when considering cases of arrest or internment. Death penalty against them shall not be executed.

Children under the age of 15 cannot be recruited in the armed forces. If this happens and if they fall into enemy's hands, they shall continue to benefit from the special protection that children in armed conflict are entitled to, whether they are prisoners of war or not. Death penalty shall not be imposed against persons who committed crimes while they were juveniles.²⁷

Journalists engaged in dangerous professional missions shall be considered as civilians and they shall be provided with a special identity card. They accompany the armed forces of the state, but they are not members of these forces. However, if they fall into enemy hands, they will be considered prisoners of war.²⁸

The Article 82 of the Protocol I refers to legal advisors as persons who have the knowledge about the international humanitarian law and in this regard, they will assist military commanders in its implementation.

One of the novelties of the Protocol I is a provision of the Article 1, Paragraph 4, which establishes that conflicts aimed to exercise the right of self-determination are in fact international armed conflicts, as well as the provision of the Article 70, which establishes that the party that controls occupied territory cannot reject an offer for relief actions, which come from impartial humanitarian organizations and neutral forces.

It has already been noted that attacking buildings dedicated to religion, science and art activities is prohibited in all armed conflicts. Every destruction,

24 The Article 23 item c) of the Hague Regulations

25 The Article 41 and the Article 85 Paragraph 3, item e) of the Protocol I, the Article 3 of the Geneva Conventions of 1949

26 The Article 10 of the Protocol I

27 *Ibid*, the Article 77

28 *Ibid*, the Article 79

oružavanjem i puštanjem na slobodu tih osoba, ili na drugi način, ali ni u kojem slučaju se ovo pravilo ne smije dovoditi u pitanje.

Sa ranjenicima, bolesnicima i brodolomcima mora se postupati sa poštovanjem i mora im se pružiti zaštita.²⁶ U svakoj situaciji im se, u skladu sa vlastitim mogućnostima, mora pružiti medicinska njega koju zahtjeva njihovo stanje. Moraju biti zaštićeni od nepravde i mogućih nasrtaja na lični integritet.

Prema odredbama Protokola I, osobe koje su se prije početka sukoba smatrali osobama bez državljanstva ili izbjeglicama - smatrati će se zaštićenim osobama u smislu Četvrte konvencije. Trudnice i majke s malom djecom će imati prednost pri razmatranju slučajeva uhićenja ili internisanja. Takođe, treba se izbjegći izricanje smrtnе kazne nad njima.

Djeca mlada od 15 godina ne smiju biti novačena u oružane snage. Ukoliko do toga ipak dođe te padnu u neprijateljske ruke, uživat će posebnu zaštitu koju uživaju djeca u oružanim sukobima, bez obzira jesu li ratni zarobljenici. Nad osobama koje su kao maloljetnici izvršili krivična djela ne smije se izricati smrtna kazna.²⁷

Novinari koji su angažovani u opasnim profesionalnim misijama smatrati će se civilima, i moraju biti opskrbljeni posebnom ličnom iskaznicom. Oni prate oružane snage države, ali nisu pripadnici tih snaga. Međutim, ukoliko padnu u ruke neprijatelju, smatrati će se ratnim zarobljenicima.²⁸

Članom 82. Protokola I ustanovljeni su pravni savjetnici, odnosno osobe koje poznaju međunarodno humanitarno pravo i koje će pružati pomoć vojnim zapovjednicima u njegovoj primjeni.

Jedna od novina Protokola I jeste odredba njegovog člana 1. stav 4., koja utvrđuje da su ratovi za samoopredjeljenje ustvari međunarodni oružani sukobi, kao i odredba člana 70., koja utvrđuje da okupant ne smije odbiti ponudu za pružanje humanitarne pomoći od strane neutralnih sila i nepri-strasnih humanitarnih organizacija.

Već je navedeno da je u svim oružanim sukobima zabranjeno napadati zgrade namijenjene bogosluženju, nauci i umjetnosti. Svaka zapljena, uništenje ili namjerno oštećenje institucija namijenjenih za ove svrhe je zabranjena, kao i svaka kрадa, pljačka ili neosnovano prisvajanje, i bilo koji drugi akt vandalizma uperen protiv dobara od značaja za kulturno naslijede svih naroda. Protokol I u tom smislu kulturna dobra svrstava među civilne objekte, i pruža im istu zaštitu kakvu imaju civilni objekti.²⁹ U skladu s tim, zabranjeno je ova dobra uzimati za predmete napada a, ako dođe do njih-

26 Član 10. Protokola I

27 *Ibid.*, član 77.

28 *Ibid.*, član 79.

29 Član 53. Protokola I

damage or seizure related to the institutions that are dedicated to the aforementioned purposes is prohibited, as well as any kind of theft, robbery or unlawful usurpation or any other kind of vandalism act, directed against objects that constitute cultural heritage of peoples. In this regard, the Protocol I mentions objects that constitute cultural heritage as civilian objects and stipulates the same kind of protection, as in the case of civilian objects.²⁹ Thus, taking the abovementioned objects as target of an attack is prohibited and it is considered as a serious violation of the international humanitarian law.

The Article 90 of the Protocol I refers to establishment of an International Fact-Finding Commission and its main goal is to carry out an investigation about violations of the international humanitarian law. The Commission is competent to investigate any facts alleged to be grave breach as defined in the Geneva Convention of 1949 and the Protocol I.

Nowadays, the obligation to protect medical activities is also included into provisions of customary international law, but a special problem in this field is related to medical aircrafts, bearing in mind that its speed prevents the enemy to distinguish whether it is a military object or a protected object. For this reason, medical aircrafts are considered protected if they fly in line with a flight plan that was previously accepted by both sides to the conflict.³⁰

Medical experiments on persons who are in the power of the enemy, persons who are interned, detained or otherwise deprived of liberty are not allowed.³¹ Exceptions are not allowed even with consent of these persons, because these are exceptional circumstances and there are no guarantees that they decided on their own.

Following the aforementioned rules, serious violations of the Geneva Conventions are the following:

- Attack on civilian population;
- Carrying out indiscriminate attacks affecting civilian population, knowing that it will cause excessive civilian losses;
- Attacking a person knowing that he/she is "*hors de combat*";
- Perfidy when using a distinctive emblem;
- Deportation or relocation of population from the occupied territory (regardless of the fact whether deportation or relocation is carried out within or outside of the territory of their country);
- Carrying out attacks against objects and installations that contain dangerous forces knowing that it will cause excessive civilian losses;
- Attacking demilitarized and unprotected places.³²

²⁹ The Article 53 of the Protocol I

³⁰ Gasser H.-P., *International Humanitarian Law*, translated by Z. Lakic, the International Committee of the Red Cross, Bosnia and Herzegovina, 2003, p. 39

³¹ The Article 11 of the Protocol I

³² *Ibid*, the Article 85

vog razaranja, to se smatra teškim povredama međunarodnog humanitarnog prava.

Članom 90. Protokola I osnovana je Komisija za utvrđivanje činjeničnog stanja. Njen glavni cilj jeste sprovodenje istrage u vezi sa kršenjem međunarodnog humanitarnog prava. U njenoj nadležnosti nalazi se ispitivanje činjenica za koje se tvrdi da predstavljaju teška kršenja Ženevskih konvencija iz 1949. godine i Protokola I.

U odredbe međunarodnog običajnog prava danas se ubraja i obaveza zaštite medicinske djelatnosti, gdje se specifičan problem javlja kod medicinskih letjelica, jer zbog njihove brzine neprijatelj nije u stanju razlučiti radi li se o vojnem ili zaštićenom objektu. Iz tog razloga smatra se da su iste zaštićene ukoliko lete po planu letenja koji je prethodno prihvaćen od obje strane u sukobu.³⁰

Medicinski eksperimenti na osobama koje se nalaze u rukama neprijatelja, ili su internisane, zadržane u pritvoru ili na drugi način lišene slobode - nisu dozvoljeni.³¹ Izuzeci nisu dozvoljeni ni u slučaju da takva osoba pristane na eksperimente, jer se nalazi u vanrednim okolnostima i nije garantovano da je odluka donesena slobodnom voljom.

Iz navedenih pravila slijedi da se teškim kršenjem Protokola I smatraju sljedeća djela:

- napad na civilno stanovništvo;
- izvođenje napada bez izbora ciljeva koji pogadaju civilno stanovništvo, sa znanjem da će prouzrokovati prekomjerne civilne gubitke;
- napad na osobu uz znanje da je izvan bojnog ustrojstva;
- perfidija prilikom upotrebe znaka raspoznavanja;
- deportovanje ili premještanje stanovništva okupiranog područja (bez obzira radi li se o deportovanju ili premještanju unutar ili izvan teritorija njihove države);
- preduzimanje napada na građevine i instalacije koje sadrže opasne sile sa znanjem da će prouzrokovati prekomjerne civilne gubitke;
- napad na nebranjena i demilitarizovana mjesta.³²

ZAKLJUČAK

Protokol I iz 1977. godine je jedan od najznačajnijih dokumenata iz oblasti međunarodnih oružanih sukoba. Cilj svakog od njihovih članova jeste minimizirati stradanja u sukobu.

³⁰ Gasser H.-P., *Međunarodno humanitarno pravo*, prevela Z. Lakić, Međunarodni komitet Crvenog križa/krsta, Bosna i Hercegovina 2003., str. 39.

³¹ Član 11. Protokola I

³² *Ibid.*, član 85.

CONCLUSION

The Protocol I of 1977 is one of the most important documents in the field of international armed conflicts and the goal of each of its articles is to minimize casualties in the conflict.

The principles of the Protocol I, which transformed into rules of the customary international law, are: the principle of distinction between civilians and combatants and between civilian objects and military objective, the prohibition of indiscriminate attacks and the principle of proportionality in attack. The obligation to take precautions in attack and in terms of the consequences of attacks are also considered to be a customary rule, as well as the obligation to respect and protect medical and religious personnel, medical units and transportation, i.e. personnel and facilities aimed to provide humanitarian aid and civilian journalists.

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13. The Rome Statute of the International Criminal Court of 1998

Pravila Protokola I koja su prerasla u međunarodno običajno pravo jesu: princip razlikovanja između civila i boraca, kao i između civilnih objekata i vojnih ciljeva, zatim zabrana napada bez razlikovanja ciljeva, te princip proporcionalnosti prilikom napada. Obaveza preduzimanja mjera predostrožnosti u napadu i u pogledu posljedica napada takođe se smatra običajnim pravilom, kao i obaveza da se poštuju i zaštite sanitetsko i vjersko osoblje, sanitetske jedinice i transporti, odnosno osoblje i objekti za humanitarnu pomoć i civilni novinari.

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