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The reservations to the Protocols additional to the Geneva Conventions for the protection of war victims

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On 8 June 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974-1977) adopted two protocols additional to the Geneva Conventions of 12 August 1949 for the protection of war victims. The Protocols have not yet attained the universality of the Geneva Conventions,¹ but 160 States are nevertheless party to the Additional Protocol relating to the Protection of Victims of International Armed Conflicts (Protocol I), and 153 are party to the Additional Protocol relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

The Additional Protocols undeniably enhanced international humanitarian law. The aim here is not to re-examine how – although this is discussed when relevant – but rather to draw up an inventory of all the reservations with which the Protocols have been encumbered.² To date, 34 States have formulated nearly 150 unilateral declarations pertaining to Protocol I, whereas 13 States have formulated 13 declarations pertaining to Protocol II.³ This article endeavours to ascertain whether those declarations constitute true reservations and, if so, to assess their scope.

Legal norms applicable to reservations to the Additional Protocols

Like the Geneva Conventions, which they supplement, the Additional Protocols are silent on the subject of reservations. The draft protocol applicable to international armed conflicts drawn up by the International Committee of the Red Cross (ICRC) contained a single article entitling the

¹ The full and updated list of States party to the 1949 Geneva Conventions and to their 1977 Protocols additional is accessible on the website of the Swiss Federal Department of Foreign Affairs at <<http://www.eda.admin.ch/eda/fr/home/topics/intla/intrea/chdep/warvic.html>>

² On the same subject, see: Lise S. Boudreault, "Les réserves apportées au Protocole additionnel I aux Conventions de Genève sur le droit humanitaire", *Revue québécoise de droit international*, 1989-90, vol. 6, No. 2, pp. 105-119; Rupert Granville Glover, "International Humanitarian Law ... With Reservations?", *Canterbury Law Review*, vol. 2, 1984, No. 2, pp. 220-229. For an exhaustive analysis of the reservations to the Geneva Conventions, see Claude Pilloud, "Reservations to the Geneva Conventions of 1949", *International Review of the Red Cross (IRRC)*, No. 180, March 1976, pp. 107-124, and No. 181, April 1976, pp. 195-221.

³ The reservations and declarations are reproduced at www.icrc.org/ihl.

States to formulate reservations when they signed, ratified or adhered to the protocol and to withdraw them at any time. There were two restrictions: reservations deemed *a priori* to be incompatible with the humanitarian object and purpose of the Protocol, in particular certain fundamental provisions, were prohibited, and any reservation would lose effect five years after it had been formulated unless it was renewed by means of a declaration addressed to the depositary.⁴

The article was not maintained, the Diplomatic Conference preferring to abide by the Vienna Convention on the Law of Treaties,⁵ which codifies the principles of customary law⁶.

Article 2(1)(d) of the Vienna Convention defines a reservation as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”. As Paul Reuter explains, “reservations essentially set conditions: the State agrees to be bound on condition that certain legal effects of the treaty do not apply to it, either by rejecting or modifying a rule or by the way in which it interprets or applies that rule”.⁷

Unilateral declarations, for their part, aim simply “to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions” and are generally said to be interpretative.⁸ Interpretative declarations are not defined in the Vienna Convention and are therefore not covered by the norms relating to reservations, but rather by the rules relating to the interpretation of treaties (Art. 31). If, however, implementation of a declaration aimed at “interpreting” a treaty’s provisions results in the exclusion or modification of their usual legal effect, then the declaration is a reservation and the relevant legal norms apply to it.⁹

As we shall see, it is not always easy to distinguish between reservations and interpretative declarations. The “phrasing” or “name” chosen by the State is not decisive, although it can point us in the right direction.¹⁰ In the case at hand, the names chosen by the States do not always correspond to the content of their declarations,¹¹ and some States give different names to declarations with the same effect. Moreover, the use of overly vague terms often makes it difficult to assess the legal effect being sought by the reserving State. Technically, a reservation can only be formulated in writing when the treaty is signed, ratified or adhered to, given that a reservation formulated when a treaty subject to ratification is signed must, to have effect, be

⁴ ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary*, Geneva, October 1973, pp. 103-105.

⁵ Adopted on 23 May 1969, the Convention entered into force on 27 January 1980.

⁶ ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (hereafter *Commentary*), ICRC, Geneva/Martinus Nijhoff Publishers, Dordrecht, 1987, paras 3666 ff; Michael Bothe, Karl Josef Partsch, Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, Dordrecht, 1982, pp. 570-572; Leslie C. Green, “The New Law of Armed Conflict”, *Annuaire canadien de droit international*, 1977, Vol. 15, pp. 3-41, at p. 25.

⁷ Paul Reuter, *Introduction au droit des traités*, 3^e edition revised and supplemented by Philippe Cahier, PUF, Paris, 1995, p. 71 [translated from the French].

⁸ International Law Commission (ILC), “Guide to practice: Consolidated text of all draft guidelines adopted by the Commission or proposed by the Special Rapporteur”, *Seventh report on reservations to treaties*, by Alain Pellet, Special Rapporteur, 16 May 2002, Doc. A/CN.4/526/Add.1, para. 1.2.

⁹ ILC, *Third report on reservations to treaties*, by Alain Pellet, Special Rapporteur, 2 July 1998, Doc. A/CN.4/491/Add.4, para. 392; European Court of Human Rights, *Belilos*, 29 April 1988, Series A, Vol. 132.

¹⁰ ILC, “Guide to practice”, *op. cit.*, para. 1.3.2 (Phrasing and name).

¹¹ For an explanation of the practice of France, whose accession to Protocol I was accompanied by a series of 18 “reservations and declarations”, see Marie-Hélène Aubert, *Rapport fait au nom de la Commission des Affaires étrangères sur le projet de loi, adopté par le Sénat, autorisant l’adhésion au Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (protocole I)*, Annex 1, National Assembly, No. 2833, 20 December 2000.

confirmed on ratification (Art. 23(1) and (2) of the Vienna Convention).¹² The admissibility of a reservation is governed by Article 19, paragraph (c) of which stipulates that any reservation that is not expressly or implicitly prohibited by the treaty is admissible unless it “is incompatible with the object and purpose of the treaty”; the International Court of Justice determined likewise in its 1951 Advisory Opinion on reservations to the Convention on Genocide¹³. According to Pierre-Henri Imbert, “ruling on the compatibility of a reservation is tantamount to assessing the importance of the provision reserved, how essential it is in terms of the object and purpose of the treaty”.¹⁴

The Protocols provide no mechanism for objectively determining whether a reservation is compatible with their object and purpose. It is therefore up to each State party to decide the matter individually and to indicate, as provided by the Vienna Convention, whether it accepts or objects to a reservation.¹⁵ Thus, it is acceptance of a reservation by another State that makes the reserving State a party to the treaty (Art. 20(4)(a) and (c)). A reservation to which no objections have been raised within a twelve-month period is considered to have been accepted (Art. 20(5)).

Regrettably, none of the States party to the Protocols has objected to the reservations formulated, as was sometimes the case for the Geneva Conventions. Not only does the absence of any objection not necessarily mean that the reservation is compatible with the object and purpose of the treaty,¹⁶ it simultaneously deprives us of a useful means of gauging the reservation’s admissibility.

Moreover, in the absence of an independent national, international or other body able to rule objectively on a reservation’s admissibility and the consequences of inadmissibility, objections to reservations are one of the rare means of obliging States to withdraw reservations.¹⁷

Declarations of non-recognition

Four States (Oman, Qatar, Syrian Arab Republic, United Arab Emirates) used the same wording to formulate a declaration relating to the non-recognition of the State of Israel. For example,¹⁸ “the Government of the United Arab Emirates takes the view that its acceptance of the said protocol does not, in any way, imply its recognition of Israel, nor does it oblige to apply the provisions of the protocol in respect of the said country”.

As it is worded, this is in fact not one, but two declarations: one (simple) declaration of non-recognition and one declaration precluding the Protocol’s application between the declaring State

¹² Of the States that formulated declarations on signing the Protocols, seven merely “reserved” the right to formulate reservations on ratification, and subsequently did so (Australia, Canada, Germany, Greece, Italy, Portugal, Spain), two confirmed almost all their reservations on ratification (Switzerland, United Kingdom) and one has not yet ratified the Protocols (United States).

¹³ International Court of Justice, *Reservations to the Convention on Genocide: Advisory Opinion of May 28th 1951*, ICJ Reports, 1951, pp. 15-69. The same test is used in the 1978 Convention on Succession of States in respect of Treaties (Art. 20), which entered into force on November 1996, and in the 1986 Convention on the Law on Treaties between States and International Organizations (Art. 19), which has not entered into force.

¹⁴ Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, p. 66 [translated from the French].

¹⁵ Explicit acceptance of or objection to a reservation must, like the reservation itself, be formulated in writing and communicated to the contracting States and to the other States entitled to become parties to the treaty (Art. 23(1)). In the case of the Protocols, Switzerland, as the depositary, is in charge of notifying the communications it receives to the States party to the Geneva Conventions, whether or not they are signatories of the Protocols (P I Art. 100 and P II Art. 26).

¹⁶ European Court of Human Rights, *Blilos, op. cit.*, para. 47; Committee on Human Rights, *General Comment No. 24*, 1994, para. 17.

¹⁷ ILC, *Second report on reservations to treaties*, by Alain Pellet, Special Rapporteur, 13 June 1993, Doc. A/CN.4/477/add. 1, paras 241-251.

¹⁸ This is not the only instance in which certain Arab countries made such a declaration. Israel objected to the practice with respect to the 1925 Geneva Protocol and the 1949 Geneva Conventions. See Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, North-Holland, Amsterdam, 1988, pp. 109-110.

and the designated State. The first raises no legal problems, “since it is generally accepted that participation in the same multilateral treaty does not signify mutual recognition, even implicit”.¹⁹ The second, however, is more controversial in nature: it was only after protracted discussion that the International Law Commission agreed with the prevailing doctrine that “declarations of exclusion” are not reservations within the meaning of the Vienna Convention, chiefly on the basis of practical considerations relating to the difficulty of applying the reservations system to them, but also because such declarations deal, not with the effect of the treaty’s provisions, but rather with the capacity of the non-recognized entity to be bound by the treaty.²⁰

In the present case, the declarations of exclusion serve no immediate purpose, as Israel is not a party to the Protocols. Nevertheless, this kind of declaration can have a genuine legal effect on the treaty’s application, which is entirely precluded between the declaring party and the non-recognized entity, both of which are nevertheless bound by the existing rules of customary law. This is, at the very least, cause for concern, given that the Protocols are intended to be humanitarian and universal.

Reservations and interpretative declarations relating to Protocol I²¹

Situations of occupation

Protocol I applies, in addition to the situations mentioned in Article 1(4), to the situations of international armed conflict covered by Article 2 common to the Geneva Conventions, i.e. “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, [...]. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party [...]” The Socialist Federal Republic of Yugoslavia declared at the time of ratification that the provisions of the Protocol concerning occupation would be applied “in keeping with Article 238 of the Constitution of the Socialist Federal Republic of Yugoslavia according to which no one shall have the right to acknowledge or sign an act of capitulation, nor to accept or recognize the occupation of the Socialist Federal Republic of Yugoslavia or any of its individual parts”. Article 123 of the Constitution of The former Yugoslav Republic of Macedonia, the only successor State to the Socialist Federal Republic of Yugoslavia to succeed to the latter’s reservations,²² likewise stipulates that “no one shall have the right to recognize the occupation of Macedonia or any of its parts”. It is hard to see how the implementation of such a declaration could modify the application of the Protocol:

¹⁹ ILC, *Report of the International Law Commission on the work of its fifty-first session*, 3 May-23 July 1999, Official Records of the General Assembly, Fifty-fourth session, Supplement No.10 (A/54/10), p. 114, and the reference it cites: Joe Verhoeven, *La reconnaissance internationale dans la pratique contemporaine*, Paris, Pedone, pp. 428-431. It is no doubt to dispel all doubts that Article 4 of Protocol I was adopted; it stipulates that “[t]he application of the Conventions and of this Protocol [...] shall not affect the legal status of the Parties to the conflict”.

²⁰ ILC, *Fourth report on reservations to treaties*, by Alain Pellet, Special Rapporteur, 24 March 1999, Doc. A/CN.4/499, paras 44-54. See also the authors cited in ILC, *Report of the International Law Commission on the work of its fifty-first session*, *op. cit.*, pp. 115-117; Imbert, *op. cit.*, p. 17.

²¹ This section does not consider declarations expressing the general position of certain States on the Protocols (Egypt, Holy See, Ireland, Russia) or the declarations accepting the competence of the International Fact-Finding Commission formulated by 62 States under P I Art. 90.

²² Notification of 19 September 1996 clarifying the declaration of succession of 16 September 1993. Although Article 20 of the 1978 Vienna Convention on Succession of States in respect of Treaties stipulates that “a newly independent State [...] shall be considered as maintaining any reservation to that treaty [...] unless [...] it expresses a contrary intention”, Switzerland and the ICRC have long considered that succession is unreserved in cases in which the successor State has not expressed itself on that point. See Serge Gamma and Lucius Caflish, “La Suisse, dépositaire des Conventions de Genève”, *Beilage zur ASMZ*, No. 3, 1999, pp. 7-9; Bruno Zimmermann, “La succession d’États et les Conventions de Genève”, in Christophe Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles, in honour of Jean Pictet*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1984, pp. 122-123.

occupation is a situation on the ground whose objective existence leads to the application of specific rules that have nothing to do with any act recognizing the occupation.²³

Wars of national liberation – Articles 1(4) and 96(3)

Protocol I also applies, under the terms of Article 1(4), to international armed conflicts that take the form of “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 [...]”. Article 96(3) authorizes the authority representing a people engaged against a State party to the Protocol in an armed conflict of this type to apply the Conventions and the Protocol in relation to it by means of a unilateral declaration addressed to the depositary. The declaring authority is thereby immediately bound by those instruments, and consequently enjoys the same rights and must discharge the same obligations as any other State party to the conflict. Eight States (Belgium, Canada, France, Germany, Ireland, the Republic of Korea, Spain and the United Kingdom) have made a declaration pertaining to Article 96(3). While the German and Spanish declarations simply emphasize - but do not modify - certain elements of the provision, the other six declarations truly seek to limit its scope. Belgium and the Republic of Korea, in spite of the titles of their respective “declarations”, as well as Canada and Ireland, require that an authority concerned by Article 96(3) also be recognized by the relevant regional intergovernmental organization.²⁴ France and the United Kingdom, for their part, reserve the right to recognize the declaring authority. Are such reservations incompatible with the object and purpose of the Protocol? Probably not, since they do not question the application of the Conventions and the Protocol in conflicts of self-determination. France and the United Kingdom also declared, in connection with Article 1(4), that “the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation”.

The problem seems to be more the Protocols’ threshold of application - at what point does an international armed conflict exist? - than the specific characteristics of the conflicts covered by Article 1(4). One thing is certain: neither Article 1 of the Protocol nor Article 2 common to Geneva Conventions requires that the conflict attain a certain level of intensity, as the United Kingdom had initially suggested²⁵. The terms of common Article 2, according to which the Conventions apply “to all cases of [...] armed conflict which may arise between two or more of the High Contracting Parties”, require at a minimum the use of force by the parties in conflict, and a national liberation movement can thus qualify.

Although it is accepted that the mere commission of acts of terrorism does not give rise to an armed conflict within the meaning of Article 1(4), the measures taken by the State to counter such acts, such as the launch of military operations, can transform the situation into an armed conflict.

²³ Art. 42 of the 1907 Hague Regulations concerning the Laws and Customs of War on Land. The *Commentary* explains that occupation exists “where organized military resistance has been defeated, where the sovereign exercise of power conferred by law on the government has become impossible, and where an administration has been established for the purpose of maintaining law and order” (para. 1699).

²⁴ Such a requirement was not part of the final text, although it was on that basis that national liberation movements were invited to participate in the Diplomatic Conference. As explained in the *Commentary*, “[t]he definition of a group as a people does not arise from a decision by a regional or worldwide intergovernmental organization: by their declarations such organizations can take note of and proclaim the existence of peoples, but they cannot create them. While a group of population declared to be a ‘people’ by an intergovernmental organization may in fact be considered to be such, the contrary conclusion does not necessarily follow from the absence of such a declaration, as the reasons for the absence may vary” (para. 104).

²⁵ On signing the Protocol, the United Kingdom had declared, “a) in relation to Article 1, that the term ‘armed conflict’ of itself and in its context implies a certain level of intensity of military operations which must be present before the Conventions or the Protocol are to apply to any given situation, and that this level of intensity cannot be less than that required for the application of Protocol II, by virtue of Article 1 of that Protocol, to internal conflicts”.

It is at that point that the Conventions and the Protocol would apply to all the parties to the conflict and that the Protocol's fifth preambular paragraph²⁶ would be truly meaningful.

Protecting powers – Article 5

Saudi Arabia's reservation in respect of Article 5 as a whole is surprising because Saudi Arabia formulated no reservation in respect of common Articles 8/8/8/9 and 10/10/10/11 to the Geneva Conventions relating to protecting powers. The reservation is all the more startling in that the consent of the parties lies at the heart of the implementation system under the Protocol.²⁷ It is hard to gauge the reservation's compatibility with the object and purpose of the Protocol. On the one hand, the provisions of Article 5 are so closely bound up with those of the Geneva Conventions that it seems impossible for a State to accept the one while validly opposing the other. However, the prevailing pessimism about the Protecting Power system, which has rarely functioned since its inclusion in the Conventions and to which recourse has never been had under the Protocol,²⁸ should in practice attenuate the reservation's impact.

We note in passing that the Australian declaration relating to the functions that the protecting powers may have to exercise in combat zones is in keeping with the spirit of the provisions of the Geneva Conventions and the Protocol, in that the latter do not envisage "that such Powers should be present during the combat stage itself"²⁹.

Protection of persons from the removal of tissues or organs – Article 11

Article 11 protects persons who are deprived of their liberty as a result of an international armed conflict from any unjustified act or omission against their physical or mental health and integrity. Only acts which are indicated by the state of health of the person concerned and consistent with generally accepted medical standards are allowed (para. 1). The specific prohibition to carry out - even with the person's consent - the removal of tissues or organs for transplantation (para. 2(c)) is clearly intended to eliminate any risk of abuse in the practice of therapeutic transplants normally allowed in time of peace.³⁰ An exception may be made "in the case of donations of blood for transfusion or of skin for grafting", provided that certain conditions are met relating to respect for the will of the person concerned and medical ethics (para. 3). Lastly, any infringement of these rules that seriously endangers "any person who is in the power of a Party other than the one on which he depends" constitutes a grave breach of the Protocol (para. 4). Ireland and Canada declared that they did not intend to be bound by the prohibition of removal set out in paragraph 2(c), the former in the case of "donation of tissue, bone marrow or of an organ from a person who is detained, interned or otherwise deprived of liberty [...] to a close relative who requires a donation [...] from such a person for medical reasons, so long as the removal [...] is in accordance with Irish law and the operation is carried out in accordance with normal Irish medical practice, standards and ethics", the latter "with respect to Canadian nationals or other persons ordinarily resident in Canada who may be interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1, so long as the removal of tissue or organs for transplantation is

²⁶ "Reaffirming further that the provisions of the Geneva Conventions [...] and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict".

²⁷ Granville Glover, *op. cit.*, p. 223.

²⁸ Hamidou Coulibaly, "Le rôle des Puissances protectrices au regard du droit diplomatique, du droit de Genève et du droit de La Haye", in F. Kalshoven and Y. Sandoz (eds), *Implementation of international humanitarian law*, Martinus Nijhoff, Dordrecht, 1989, pp. 69-78, at pp. 75 ff.

²⁹ ICRC, *Draft Additional Protocols*, *op. cit.*, p. 9 (Art. 2(d) *in fine*); *Commentary*, p. 80, para. 189.

³⁰ W.A. Solf, "Development of the protection of the wounded, sick and shipwrecked under the Protocols Additional to the 1949 Geneva Conventions", in Swinarski, *op. cit.*, pp. 237-248, at pp. 240-242; *Commentary*, para. 478; Boudreaux, *op. cit.*, p. 116.

in accordance with Canadian laws and applicable to the population generally and the operation is carried out in accordance with normal Canadian medical practices, standards and ethics”.

Of course, these reservations could only apply in a limited number of cases, and they do not seem likely to give rise to a grave breach, as one is only applicable to Canadian citizens and residents and the other to transplants between close relatives. On such a sensitive issue, the experts nevertheless advise prudence. The World Medical Association thus recently declared: “Free and informed decision making is a process requiring the exchange and understanding of information and the absence of coercion. Because prisoners and other individuals in custody are not in a position to give consent freely and can be subject to coercion, their organs and tissues must not be used for transplantation except for members of their immediate family”³¹.

The Irish reservation provides a better response to these fears than the Canadian reservation.

Also in connection with Article 11, Ireland reserves, “[f]or the purposes of investigating any breach of the Geneva Conventions of 1949 or of the Protocols Additional [...] the right to take samples of blood, tissue, saliva or other bodily fluids for DNA comparisons from a person who is detained, interned or otherwise deprived of liberty as a result of a situation referred to in Article 1, in accordance with Irish law and normal Irish medical practice, standards and ethics”.

Ireland is right to consider that the removal of a DNA sample can constitute a breach of the integrity of a person protected under Article 11. This is why Irish law, like other statutes that provide for the removal of bodily substances for the purposes of criminal investigations, makes the practice subject to numerous guarantees, including the obligation to obtain the consent of the person concerned or at least court authorization.³² With its reservation Ireland seeks to ensure that it will be able to apply, without violating the Protocol’s provisions, the same system of inquiry to violations of international humanitarian law. In the absence of a generally recognized medical standard or a human rights principle that clearly provides the opposite, we must conclude that the reservation lies within the limits of the existing law.

Restrictions on the use of medical aircraft – Article 28(2)

Article 28 stipulates that the parties “are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse Party” (para. 1). This principle is valid not only for medical transports but also for any person or object benefiting from specific protection, and is one of the cornerstones of international humanitarian law. Paragraph 2 is more specific, and prohibits the use of medical aircraft “to collect or transmit intelligence data and [to] carry any equipment intended for such purposes”. The declarations of France and the United Kingdom echo that of Ireland on this point: “Given the practical need to make use of non-dedicated aircraft for medical evacuation purposes, Ireland does not interpret this paragraph as precluding the presence on board of communication equipment and encryption materials or the use thereof solely to facilitate navigation, identification or communication in support of medical transportation as defined in Article 8 (f).”

The declaration reflects the concern that led to the addition of the last sentence of Article 28(2), which specifies that “[t]he carrying on board of [...] equipment intended solely to facilitate

³¹ World Medical Association, *Statement on Human Organ & Tissue Donation and Transplantation*, 52nd General Assembly, Edinburgh, October 2000 (available at www.wma.net). See also D.J. Rothman, E. Rose et al., “The Bellagio Task Force Report on Transplantation, Bodily Integrity, and International Traffic in Organs”, *Transplantation Proceedings*, 1997, pp. 2739-45 (available on the ICRC website).

³² Criminal Justice (Forensic Evidence) Act, 1990. For an analysis of the American, British, Canadian and German legislation, see Deborah Crosbie, *Protection of genetic Information: An International Comparison*, Report to the Human Genetics Commission, United Kingdom, September 2000, pp. 80-87 (available at www.hgc.gov.uk/business_publications_international_regulations.pdf).

navigation, communication or identification shall not be considered as prohibited”. Whether such equipment may be legitimately transported or used thus depends solely on its purpose. It therefore does not seem superfluous to specify that equipment whose transportation is authorized on certain conditions, i.e. that it is not used “to attempt to acquire any military advantage over an adverse Party”, can logically also be “used” to meet those conditions.

Recognized emblems – Article 38

Canada is the only State to have declared that “in situations where the Medical Service of the armed forces of a party to an armed conflict is identified by another emblem than the emblems referred to in Article 38 of the First Geneva Convention of August 12, 1949, that other emblem, when notified, should be respected by the adverse party as a protective emblem in the conflict, under analogous conditions to those imposed by the Geneva Conventions of 1949 and the Additional Protocols of 1977 for the use of emblems referred to in Article 38 of the First Geneva Convention and Protocol I. In such situations, misuse of such an emblem should be considered as misuse of emblems referred to in Article 38 of the First Geneva Convention and Protocol I.”

This declaration originated in Canada’s aborted attempt to incorporate repression of the misuse of any non-recognized but habitually used emblem,³³ such as the red shield of David used by the Israeli military and civilian medical services, into the Protocol³⁴. Canada obviously cannot place further obligations on the other States party, be it in terms of the recognition of a new emblem or the repression of any misuse of such an emblem, but this does not appear to be its intention. In fact, Canada is merely stating what conduct - which we would be justified in imagining it would adopt - it would have liked the Diplomatic Conference to adopt. Lastly, it must not be forgotten that it is not the emblem in and of itself that confers protection; even when identified by a sign that is not officially recognized, the medical services of a party to a conflict are protected as such by humanitarian law, the purpose of the sign being to facilitate their recognition.

Emblems of nationality – Article 39(2)

The prohibition to make use of the flags or military emblems, insignia or uniforms of the adverse party applies, under the terms of Article 39(2), both “in attacks [and] in order to shield, favour, protect or impede military operations”. The prohibition to use the enemy’s emblems of nationality “in combat” has long been recognized.³⁵ However, both the wording of Article 23(f) of the 1907 Hague Regulations, which prohibits the “improper use” of the enemy’s uniform and insignia,³⁶ and the decision of the General Military Government court in the *Skorzeny* case³⁷ have helped sustain the uncertainty surrounding the rule’s application other than “in attacks”³⁸.

During the Diplomatic Conference, Canada, the United States and the United Kingdom unsuccessfully advocated that the scope of the rule should not be extended beyond the strict limits of combat.³⁹ Only Canada has declared, however, in accordance with its military manual, that it

³³ Leslie C. Green, “Rewriting the Laws of War: the Geneva Protocols of 1977”, *International Perspectives* (Ottawa), November-December 1977, pp. 36-43, at p. 39.

³⁴ *Commentary*, para. 1557, note 40; Boudreault, *op. cit.*, p. 116.

³⁵ 1863 Instructions for the Government of Armies of the United States in the Field (Lieber Code), Arts. 63 and 65.

³⁶ Article 8(b)(vii) of the Rome Statute of the International Criminal Court uses the same wording.

³⁷ Case No. 56, “Trial of Otto Skorzeny and others”, *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. IX, 1949, pp. 90-94.

³⁸ *Commentary*, paras 1573-1574.

³⁹ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)* (hereafter *Official Records*), vol. XIV, CCDH/III/SR.29, paras 14, 17 and 28.

did not intend to be bound by the prohibition “to make use of military emblems, insignia or uniforms of adverse parties in order to shield, favour, protect or impede military operations”⁴⁰.

It is hard to conclude that the reservation, which apparently continues to reflect the situation in customary law, is incompatible with the object and purpose of the Protocol. It concerns a rule that is effective only between enemy combatants, and therefore does not affect the persons and objects that benefit from special protection under the Protocol. It nevertheless seriously constrains the effect of Article 39(2), the wording of which has the merit of being clear. Canada should therefore emulate the United Kingdom, which, in spite of the reticence it expressed when the article was adopted, did not make it the subject of a reservation, and consider withdrawing its reservation.

Definition of the armed forces – Article 43

Argentina has declared that it interprets the provisions of Articles 43(1) and 44(1) of the Protocol “as not implying any derogation of [...] the concept of the permanent regular armed forces of a Sovereign State [and] the conceptual distinction between regular armed forces, understood as being permanent army units under the authority of Governments of Sovereign States, and the resistance movements which are referred to in Article 4 of the Third Geneva Convention of 1949”.

Indeed, Article 4(A)(1) of the Third Convention distinguishes members of the armed forces from members of resistance forces belonging to a party to the conflict, only the latter having to fulfil, in order to qualify as combatants and benefit from prisoner-of-war status, the four conditions the regular armed forces are presumed to have met (responsible command, having a distinctive sign, bearing weapons openly and observing the laws and customs of war). The Protocol, for its part, integrates into a single definition of armed forces all the armed and organized components of a party to the conflict, if they answer to a responsible command and are subject to an internal disciplinary system enabling them to comply with the law of armed conflicts (Art. 43). All members of the armed forces - except medical and religious personnel - are therefore “combatants” and have the right to participate in the hostilities (Art. 44).

Argentina no doubt wanted to indicate that it did not place the regular armed forces and resistance movements on an equal footing. It would seem, however, that the new definition of armed forces is based on considerations relating both to the new types of combatants and to the new methods of warfare used by regular troops.⁴¹

Only Belgium and France notified, when ratifying the Protocol and as invited to do so by Article 43(3), that their armed forces included respectively the Belgian *gendarmérie* and the French national *gendarmérie*. The notification by a State that it has incorporated into its armed forces “a paramilitary or armed law enforcement agency” is intended to avoid enemy confusion. It is suggested that all States that have not done so notify, if applicable, that such a situation applies to their armed forces or, on the contrary, that it does not.⁴²

Combatants and prisoners of war – Article 44

⁴⁰ *The Law of Armed Conflicts at the Operational and Tactical Levels*, 2004, p. 6-3, para. 607.

⁴¹ Bothe, Partsch, Solf, *op. cit.*, pp. 235-236.

⁴² In this respect, a Belgian law has had the effect of detaching the *gendarmérie* from the armed forces; see the law of 18 July 1991 amending the law of 2 December 1957 on the *gendarmérie* and the law of 27 December 1973 on the status of personnel of the active section of the operational corps of the *gendarmérie*, demilitarizing the *gendarmérie*, *Moniteur Belge*, 26 July 1991, p. 3017.

Declarations have been made only in respect of the second part of paragraph 3 of Article 44, which relates to the recognition of combatant status for guerrilla fighters and reads as follows: “Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.”

Ten States (Australia, Belgium, Canada, France, Germany, Ireland, the Netherlands, New Zealand, the Republic of Korea and the United Kingdom) consider that the provision is only applicable in cases of occupation and in conflicts of self-determination covered by Article 1(4). Spain and Italy limit the “situations” to cases of occupation alone. The interpretation of the majority seems to be in line with what was envisaged by the Diplomatic Conference.⁴³ It is reasonable, as one author explains, “in that there can be no justification for dissimulating the presence of guerrilla fights among the civilian population when the territory is not controlled by the enemy. While guerrilla war is legitimate under Protocol I, it continues to pose numerous problems from the point of view of protection of the civilian population: the fact that it is hard to distinguish guerrilla fighters from the rest of the population undermines the protection of civilians, who are viewed with suspicion. In circumstances in which an armed movement clearly controls a territory, i.e. when that territory is not subject to the enemy’s sovereignty, as is the case in wars of national liberation, or is not occupied, recourse to guerrilla tactics that are harmful to the civilian population must be precluded”.⁴⁴

All twelve States further interpret the term “deployment” in the broad sense, as referring, in the best interests of the civilian population, to “any movement towards a place from which an attack is to be launched”.⁴⁵ Australia and New Zealand interpret the expression “visible to the adversary” as visible with the aid of appropriate detectors. While the interpretation appears to be valid, the rule nevertheless seems hard to apply in practice.⁴⁶

Lastly, Argentina declared that it considered that, “[w]ith reference to Article 44, paragraphs 2, 3 and 4, [...] these provisions cannot be interpreted: a) as conferring on persons who violate the rules of international law applicable in armed conflicts any kind of immunity exempting them from the system of sanctions which apply to each case; b) as specifically favouring anyone who violates the rules the aim of which is the distinction between combatants and the civilian population; c) as weakening respect for the fundamental principle of the international law of war which requires that a distinction be made between combatants and the civilian population, with the prime purpose of protecting the latter”.

An interpretation in good faith of the provisions covered by the Argentine declaration should not have the consequences feared.

⁴³ Solf, in Swinarski, *op. cit.*, p. 248; Report of Committee III, *Official Records*, vol. XV, CDDH/407/Rev.1, p. 453, para. 18.

⁴⁴ Cyril Laucci, “La France adhère au protocole 1 relatif à la protection des victimes des conflits internationaux”, *Revue Générale de Droit International Public (RGDIP)*, 2001, vol. 3, pp. 677-704, at p. 691 [translated from the French].

⁴⁵ Bothe, Partsch, Solf, *op. cit.*, p. 254; *Commentary*, paras 1709-1712.

⁴⁶ See Bothe, Partsch, Solf, *ibid.*, pp. 254-255. Compare *Commentary*, para. 1712.

Mercenaries – Article 47

Four States have formulated a declaration pertaining to mercenaries. The Netherlands and Ireland simply recall that Article 47 in no way prejudices the application of Articles 45 (Protection of persons who have taken part in hostilities) and 75 (Fundamental guarantees). This is not the subject of any doubt: Article 45(3) clearly stipulates that any person who has taken part in hostilities but who is not entitled to prisoner-of-war status and does not benefit from more favourable treatment in accordance with the Fourth Convention has the right at all times to the fundamental guarantees set out in Article 75. The declarations of Algeria and Angola relate to the definition of mercenary contained in Article 47(2). Algeria reserved its position on the definition, which it “deemed restrictive”. Angola, for its part, affirmed that until such time as Angola became a party to the International Convention on Mercenarism⁴⁷, it would consider the crime of mercenarism to comprise both the activities of mercenaries carried out in Angola and abroad and those relating to their recruitment or the fact of allowing such activities in a territory under its control.

It is hard to gauge the impact of these declarations. Although they reflect the idea put forward at the Diplomatic Conference that the Protocol should incorporate a rigorous system of repression of mercenarism,⁴⁸ they nevertheless go further than Article 47.⁴⁹ Neither the Protocol nor the law of armed conflict considers the lawfulness of mercenary activity or seeks to establish the responsibility of the individuals, groups and States that engage in mercenarism. The Protocol simply defines the status of mercenary and its consequences in the event of capture, and the provision is worded so restrictively in order not to undermine the protection conferred on prisoners of war.⁵⁰ Thus, if the implementation of the Algerian and Angolan declarations could exclude from the benefit of the Protocol and the Conventions individuals who would otherwise be entitled to benefit, it could be argued that they are incompatible with the Protocol.⁵¹ To all appearances, however, Algeria and Angola are merely signalling that they do not wish to preclude a definition on the basis of which they intend to repress the crime of mercenarism.

Nuclear weapons

Nine States formulated declarations relating to nuclear weapons when they ratified the Protocol (Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, Spain, the United Kingdom), whereas only two did so when they signed it (United States, United Kingdom). Only Ireland actually linked its declaration to specific provisions of the Protocol: “Ireland accepts, as stated in Article 35 paragraph 1, that the right of Parties to the conflict to choose methods or means of warfare is not unlimited. In view of the potentially destructive effect of nuclear weapons, Ireland declares that nuclear weapons, even if not directly governed by Additional Protocol I, remain subject to existing rules of international law as confirmed in 1996 by the International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”.⁵² The

⁴⁷ Angola has signed but not yet ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which was adopted on 4 December 1989 and entered into force on 20 October 2001, and the OAU Convention for the Elimination of Mercenarism in Africa, which was adopted shortly after the Protocols and entered into force on 22 April 1985.

⁴⁸ *Commentary*, para. 1799, note 25.

⁴⁹ Boudreault, *op. cit.*, p. 113.

⁵⁰ Bothe, Partsch, Solf, *op. cit.*, p. 271.

⁵¹ Boudreault, *op. cit.*, p. 114.

⁵² Ireland also declared, in relation to Articles 35(3) and 55 (Protection of the natural environment): “In ensuring that care shall be taken in warfare to protect the natural environment against widespread, longterm and severe damage and taking account of the prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment thereby prejudicing the health or survival of the population, Ireland declares that nuclear weapons, even if not directly governed by Additional Protocol I, remain subject to existing rules of international law as confirmed in 1996 by the

eight other States affirmed, in more or less the same terms, that Protocol I was not intended to and indeed did not apply to nuclear weapons. France, to take the most recent declaration, thus declared: “Referring to the draft protocol drawn up by the ICRC and which served as the basis for the work of the 1974-1977 Diplomatic Conference, the Government of the French Republic continues to consider that the provisions of the Protocol concern exclusively conventional weapons and that they neither regulate nor prohibit the use of nuclear weapons, nor do they prejudice the other rules of international law applicable to other activities France must carry out in the exercise of its natural right to self-defence” [translated from the French].

The fact that the use of and restrictions on the employment of nuclear weapons were not covered by the Diplomatic Conference does not automatically answer the question whether Protocol I is nevertheless applicable to nuclear weapons. The International Court of Justice simply ruled, in its 1996 advisory opinion, that it was not necessary to answer that question: “Nor is there any need for the Court to elaborate on the question of the applicability of Additional Protocol 1 of 1977 to nuclear weapons. It need only observe that while, at the Diplomatic Conference of 1974-1977, there was no substantive debate on the nuclear issue and no specific solution concerning this question was put forward, Additional Protocol 1 in no way replaced the general customary rules applicable to all means and methods of combat including nuclear weapons. In particular, the Court recalls that all States are bound by those rules in Additional Protocol 1 which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol 1. The fact that certain types of weapons were not specifically dealt with by the 1974-1977 Conference does not permit the drawing of any legal conclusions relating to the substantive issues which the use of such weapons would raise”.⁵³

Professor Kalshoven is more direct and affirms that Protocol I “does not purport to prohibit the use of nuclear weapons, and neither does it lay down any further restrictions on such use than already result from pre-existent law of armed conflict (and which were re-affirmed in the Protocol)”.⁵⁴

The position of the German military handbook is equally clear: “The new rules introduced by Additional Protocol I were intended to apply to conventional weapons, irrespective of other rules of international law applicable to other types of weapons. They do not influence, regulate, or prohibit the use of nuclear weapons”.⁵⁵ According to the comment accompanying this excerpt from the handbook, the declarations that the United Kingdom and the United States made on signing the Protocol⁵⁶ are relevant to the interpretation of the Protocol’s field of application,

International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. Ireland will interpret and apply this Article in a way which leads to the best possible protection for the civilian population.”

⁵³ ICJ, Advisory Opinion of 8 July 1996 on the legality of the threat or use of nuclear weapons, *ICJ Reports*, 1996, para. 84. The *Commentary* does not provide a direct response either: “Whatever opinion one may have on the scope of application of Protocol I, [the general rules applying to all means and methods of warfare] remain completely valid and continue to apply to nuclear weapons, as they do to all other weapons. Thus it cannot be argued that by repeating such rules the Protocol excludes nuclear weapons from its scope of application” (para. 1852).

⁵⁴ Fritz Kalshoven, “Arms, Armaments and International Law”, *Recueil des cours*, The Hague Academy of International Law, vol. 191 (1985-II), pp. 183-341, at p. 283.

⁵⁵ Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict*, p. 429, No. 430.

⁵⁶ “It is the understanding of the United States of America that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons [...]” The United Kingdom, for its part, signed the Protocol “on the basis of the following understandings: (i) that the new rules introduced by the Protocol are not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons [...]”. The declaration was confirmed as follows: “(a) It continues to be the understanding of the United Kingdom that the rules introduced by the Protocol apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons.”

within the meaning of Article 31(1) and (2)(b) of the Vienna Convention⁵⁷. Consequently, even if the rules of the Protocol are not applicable as treaty-based rules to nuclear weapons, the customary rules reaffirmed in the Protocol's provisions are.⁵⁸

In fact, the ICRC's *Commentary* reaches the same conclusion when it states that the declarations pertaining to nuclear weapons do not contradict the Protocol: because they concern only the "new" rules introduced by the Protocol, the States do not lay open to doubt the application of the rules that are merely "reaffirmed" in it.⁵⁹ The same interpretation is valid for all the declarations relating to nuclear weapons. It has the advantage of reflecting the sentiment prevailing at the Diplomatic Conference and expressed in recent declarations to the same effect. It also respects the unanimous opinion of the International Court of Justice that the fundamental rules and principles of humanitarian law apply to nuclear weapons, in particular the principle of distinction between combatants and civilians, the prohibition to direct attacks against civilians, and the prohibition to use weapons that do not allow for the distinction between civilian and military targets or that cause superfluous or unnecessary suffering.⁶⁰

Protection of the natural environment – Articles 35 and 55

Articles 35(3) and 55(1) prohibit the use of methods of warfare and arms which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Like France, the United Kingdom "understands both of these provisions to cover the employment of methods and means of warfare and that the risk of environmental damage falling within the scope of these provisions arising from such methods and means of warfare is to be assessed objectively on the basis of the information available at the time".⁶¹

The two States probably seek to ensure that they cannot be held responsible for damage caused to the environment by the use of weapons, for example, whose potential to cause harm was not known at the time.⁶² The interpretation seems self-evident. The words "may be expected [...] to cause [...] damage" nonetheless imply that the risk of damages must be determined objectively, in good faith and, to be useful, before an attack is launched, as one of the general precautions to be taken in attack. Given the high threshold of damages that Articles 35 and 55 seek to prevent, it appears that it will usually fall to high-level decision-makers to determine the risks.⁶³

The expression "all feasible" – Articles 41, 56, 57, 58, 78 and 86

Ten States (Algeria, Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, Spain and the United Kingdom) have defined their understanding of the expression "all feasible" and other similar expressions used in Articles 41 (Safeguard of an enemy hors de combat), 56 (Protection of works and installations containing dangerous forces), 57 (Precautions in attack), 58 (Precautions against the effects of attacks), 78 (Evacuation of children) and 86 (Failure to act). The choice of terms, in particular their English and French equivalents, was discussed at length

⁵⁷ Stefan Oeter, in Fleck, *op. cit.*, p. 430, No. 430-5. See also Bothe, Partsch, Solf, *op. cit.*, p. 191, note 12.

⁵⁸ *Ibid.*, p. 430, No. 430-6.

⁵⁹ *Commentary*, para. 1853.

⁶⁰ ICJ, *op. cit.*, para. 78.

⁶¹ With the exception of the Irish declaration on the effects of nuclear weapons on the natural environment, see above.

⁶² Laucci, *op. cit.*, p. 693.

⁶³ Bothe, Partsch, Solf, *op. cit.*, p. 348. In any event, the State should have determined compatibility with Articles 35(3) and 55(1) "[i]n the study, development, acquisition or adoption of a new weapon, means or method of warfare" (P I Art. 36).

by the Diplomatic Conference.⁶⁴ Following the unanimous vote - with abstentions – in favour of the provisions concerned, several States voiced the importance they attached to the terms used and their interpretation of them.⁶⁵ The United Kingdom, for example, declared on signing the Protocol that the word “‘feasible’ means that which is practicable or practically possible, taking into account all circumstances at the time including those relevant to the success of military operations [...]”. This prompted the ICRC to caution that the expression should not be too broadly interpreted, for fear that invoking only the success of military operations would lead to the humanitarian duties set out in the various rules being ignored.⁶⁶ Fortunately, on ratifying the Protocol, all the States listed above, including the United Kingdom⁶⁷ but not Algeria, which had specified no such thing, invoked both military and humanitarian considerations. The same wording was used in Article 10 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996. Article 58 requires the States to behave in certain specific ways in order to protect the civilian population on their own territory or on a territory under their control: they have to endeavour to remove the civilian population, individual civilians and civilian objects from the vicinity of military objectives (paragraph a), and they have to avoid locating military objectives within or near densely populated areas (paragraph b). Switzerland⁶⁸ and Austria pointed out the extent to which the application of these provisions could be prejudicial to the national defence of States with high population densities, hence their joint reservation: “In view of the fact that Article 58 of Protocol I contains the expression ‘to the maximum extent feasible’, sub-paragraphs (a) and (b) will be applied subject to the requirements of national defence”.

Although termed reservations, these declarations do not necessarily modify the legal effect of Article 58; they afford an interpretation that is *a priori* reasonably adapted to the geography of Austria and Switzerland.⁶⁹ The evaluation of the application by those two countries of the obligations arising from the article will nevertheless be carried out case by case.

Rule for decision-making by commanders – Part IV, Section I

Thirteen States have refined the rule for decision-making by military commanders in the preparation and launch of attacks. The declarations are worded generally (Egypt, United Kingdom), refer to all of Section I of Part IV, which deals with general protection against the effects of hostilities (Belgium, Canada, Germany), more specifically to Articles 51 to 58 (Australia, Ireland, Italy, the Netherlands, New Zealand and Spain) or to the limited framework of paragraph 2 of Article 57 (Austria and Switzerland). The British declaration serves as an example: “Military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time”⁷⁰.

⁶⁴ *Commentary*, para. 2198, note 6. The expression “feasible” is variously translated in French as “pratique” (Art. 56), “pratiquement possible” or “possible dans la pratique” (Arts. 57, 58, 78 and 86) and “utile” (Art. 41), which in English also appears as “practical” (Art. 56(3)).

⁶⁵ *Official Records*, vol. VI, CDDH/SR.42, pp. 211-214, in particular paras 41, 59, 61, and [220-239](#).

⁶⁶ *Commentary*, para. 2198.

⁶⁷ The declaration was modified to read: “The United Kingdom understands the term ‘feasible’ as used in the Protocol to mean that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.

⁶⁸ Switzerland withdrew its reservations on 17 June 2005.

⁶⁹ One author affirms that “Switzerland’s reservations are merely interpretative in nature” (Maurice Aubert, “Les réserves formulées par la Suisse lors de la ratification du Protocole additionnel aux Conventions de Genève relatif à la protection des conflits internationaux (Protocole I)”, in Swinarski, *op. cit.*, at p. 145 [\[translated from the French\]](#)).

⁷⁰ An identical declaration had been made when the Protocol was signed.

The preparatory work reveals that the participants were sharply divided when it came to defining the responsibilities of military commanders, chiefly because of the wording, deemed to be imprecise, of Article 57 on precautions in attack.⁷¹ As we saw earlier, the rules on precautions in attack and against the effects of attacks require that those who prepare or decide attacks must do everything “which is practicable or practically possible, taking into account all circumstances at the time”, to ensure that the intended targets are military and that the means and methods used reduce the collateral damage to civilians and civilian objects to a minimum. This implies that the decision be based “on a reasonable and honest reaction to the facts and circumstances known to them from information reasonably available to them at the time they take their actions and not on the basis of hindsight”.⁷² The States’ declarations are all in this vein. Lastly, only Switzerland stated that the terms “those who prepare and decide on an attack” could burden lower-ranking officers with heavy responsibilities that normally fell to senior officers: “The provisions of Article 57 (2) are binding only on battalion or group commanders and higher echelons. The determinant factor shall be the information available to such commanders at the time of reaching a decision”.⁷³

It is to be feared that this reservation considerably limits the range of persons to whom Article 57 is intended to apply.⁷⁴

Definition of civilians and civilian population – Article 50

Article 50(1) stipulates that in case of doubt whether a person is a civilian, that person is to be considered a civilian. Only France and the United Kingdom, using the same terms, declared “the rule [...] applies only in cases of substantial doubt still remaining after the assessment referred to [...] above has been made, and not as overriding a commander's duty to protect the safety of troops under his command or to preserve his military situation, in conformity with other provisions of the Protocol”.

The French declaration was said not to narrow the scope of the presumption but merely to indicate that the doubt must be assessed in the light of all the circumstances.⁷⁵ As they are drafted, the declarations would seem to indicate that, in case of doubt, the “safety of troops” and the “preservation of the military situation” are decisive factors. The aim of the presumption is not to give precedence to troop protection over civilians, but rather the inverse;⁷⁶ any interpretation that does not promote recognition of the protection to which civilians are entitled is akin to a reservation that would, moreover, be hard to justify.

⁷¹ According to the *Commentary*, “[t]hese concerns were reinforced by the fact that, according to Article 85 (Repression of breaches of this Protocol), failure to comply with the rules of Article 57 may constitute a grave breach and may be prosecuted as such. Those who favoured a greater degree of precision argued that in the field of penal law it is necessary to be precise, so that anyone violating the provisions would know that he was committing a grave breach” (para. 2187). This explains why Austria, like Switzerland, further declared that “[f]or the purposes of judging any decision taken by a military commander, Articles 85 and 86 of Protocol I will be applied on the understanding that military imperatives, the reasonable possibility of recognizing them and the information actually available at the time that decision was taken, are determinative”.

⁷² Bothe, Partsch, Solf, *op. cit.*, at pp. 279-280.

⁷³ Switzerland had already declared on signing the Protocol that the “provisions in paragraph 2 of [Article 57] impose obligations only upon commanders at battalion or group levels and those of higher rank”.

⁷⁴ According to the *Commentary*, “it is clear that a very large majority of delegations at the Diplomatic Conference wished to cover all situations with a single provision, including those which may arise during close combat where commanding officers, even those of subordinate rank, may have to take very serious decisions regarding the fate of the civilian population and civilian objects. It clearly follows that the high command of an army has the duty to instruct personnel adequately so that the latter, even if of low rank, can act correctly in the situations envisaged” (para. 2197). See also Bothe, Partsch, Solf, *op. cit.*, p. 363. According to Maurice Aubert, the Swiss reservation is fully justified (*op. cit.*, p. 143).

⁷⁵ Marie-Hélène Aubert, *op. cit.*

⁷⁶ Laucci, *op. cit.*, p. 673.

Deciding on a person's status by taking account of his conduct, location and appearance⁷⁷ seems to be more in line with the object of the provision and the Protocol as a whole.

Military advantage – Article 51

Ten States (Australia, Belgium, Canada, France, Germany, Italy, the Netherlands, New Zealand, Spain and the United Kingdom) have declared that the expression “military advantage” employed in Articles 51 (Protection of the civilian population), 52 (General protection of civilian objects) and 57 (Precautions in attack) refers to “the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack”. Australia, like New Zealand, goes on to say: “[...] the term ‘military advantage’ involves a variety of considerations including the security of attacking forces. It is further the understanding of Australia that the term ‘concrete and direct military advantage anticipated’, used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved”.

Obviously, an attack launched in concerted fashion against many points must be judged as a whole⁷⁸ and the safety of the attacking forces is a relevant consideration in determining military advantage⁷⁹. The limits to the principle must not be forgotten, however, namely that “even in a general attack the advantage anticipated must be a military advantage and it must be concrete and direct; there can be no question of creating conditions conducive to surrender by means of attacks which incidentally harm the civilian population”.⁸⁰

Military objective – Article 52(2)

Nine States (Australia, Canada, France, Germany, Italy, the Netherlands, New Zealand, Spain and the United Kingdom) have formulated a declaration aimed at interpreting the concept of “military objective” defined in these terms in Article 52(2): “Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. With the exception of Australia, they all say that “a specific area of land” can constitute a military objective within the meaning of the provision. Six States (Australia, Canada, France, Italy, New Zealand and the United Kingdom) also specify that the first sentence of paragraph 2 is not intended to deal with the question of incidental or collateral damage resulting from an attack directed against a military objective. These declarations appear to be reasonable. A “specific area” is of limited size only, however, and the concept is not valid anywhere but in war zones⁸¹.

Reaction to an attack – Articles 51 and 52

In the law of armed conflict, reprisals are acts derogating from the law that are directed by a party to the conflict against another party to oblige the latter to stop violating the rules of the law.⁸² Long considered an essential means of coercion in the conduct of hostilities, reprisals gradually

⁷⁷ Bothe, Partsch, Solf, *op cit.*, p. 297.

⁷⁸ Fleck, *op. cit.*, p. 162, para. 444; *Commentary*, para. 2218.

⁷⁹ Bothe, Partsch, Solf, *op. cit.*, p. 311.

⁸⁰ *Commentary*, para. 2218.

⁸¹ *Commentary*, paras 1955 and 2025-2026.

⁸² Fritz Kalshoven, “Belligerent Reprisals Revisited”, *Netherlands Yearbook of International Law*, vol. XXI, 1990, pp. 43-80, at p. 44.

came to be prohibited: first against prisoners of war in the 1929 Geneva Conventions, then against various categories of protected persons and objects in the 1949 Geneva Conventions, and lastly against cultural property in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

Some of those participating in the Diplomatic Conference proposed to prohibit all forms of reprisal against persons and objects protected by the Protocol, whereas others insisted that there should be strict conditions for recourse to reprisals.⁸³ The result of a compromise, the Protocol contains a series of unconditional prohibitions that protect the wounded, sick, shipwrecked, medical and religious personnel (Art. 20), civilians (Art. 51(6)), civilian objects (Art. 52(1)), cultural property (Art. 53), objects indispensable to the survival of the civilian population (Art. 54(4)), the natural environment (Art. 55(2)) and works and installations containing dangerous forces (Art. 56(4)) from reprisals. The Protocol's added value lies essentially in the general protection afforded civilians and civilian objects.⁸⁴ The compromise did not settle the matter once and for all, to judge by the following declarations formulated by five States (Egypt, France, Germany,⁸⁵ Italy, United Kingdom): "The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation"; "The Government of the Republic of France declares that it shall apply the provisions of paragraph 8 of Article 51 insofar as their interpretation does not hinder the use, in accordance with international, of the means it deems indispensable to protect its civilian population from grave, obvious and deliberate violations of the Geneva Conventions and the Protocol by the enemy"; "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation"; "The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result".

Why would Egypt, Germany and Italy state that they wished to retain the right to react "against any violation by any party [...] with all means admissible under international law", given that

⁸³ *Ibid.*, pp. 48-49 and 60.

⁸⁴ As opposed to the protection afforded by GC IV Art. 33(3) only to civilians in the hands of a party of which they are not nationals and to their property.

⁸⁵ The German declaration is identical to the Italian and is therefore not reproduced here.

those means virtually cease to exist for a party acceding to the Protocol?⁸⁶ Professor Kalshoven considers that the Italian declaration could, in view of its vague wording, be interpreted in various ways and even constitute a true reservation to the prohibition of reprisals as set out in Articles 51 and 52.⁸⁷

The United Kingdom's reservation has the merit of being clear. It makes the use of reprisals, in accordance with the British military handbook,⁸⁸ subject to a list of strict conditions traditionally recognized by customary law. The French reservation is more ambiguous, and its anticipated effects are therefore less clear.

It becomes harder every day to justify recourse to violations of international humanitarian law - especially to the detriment of the very civilians the law is ultimately intended to protect - in order to obtain respect for the law. Indeed, the International Criminal Tribunal for the former Yugoslavia concluded in the *Kupreskic* case that a customary rule was emerging that prohibited any form of reprisal against civilians.⁸⁹ According to the Tribunal, the inherent barbarity of reprisals, their absolute incompatibility with fundamental human rights, the contemporary establishment of national and international systems of repression of war crimes and crimes against humanity, and State practice "seem to support the contention that the demands of humanity and the dictates of public conscience, as manifested in *opinio necessitatis*, have by now brought about the formation of a customary rule also binding upon those few States that at some stage did not intend to exclude the abstract legal possibility or resorting to reprisals [against civilians]". How, in that context, can one argue that reservations to the Protocol's unconditional prohibition of the use of measures of reprisal against civilians and their objects are compatible with the object and purpose of the Protocol?

Cultural objects – Article 53

Article 53 prohibits "[w]ithout prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments", a) acts of hostility against cultural objects, b) the use of such objects in support of the military effort, and c) the use of such objects as the object of reprisals. Six States (Canada, France, Ireland, Italy, the Netherlands and the United Kingdom) have declared that cultural objects used in support of the military effort in violation of paragraph b) thereby lose their protection under paragraph a). While Canada, Italy and the Netherlands limit the loss of protection in time, only Canada has added a reference to the concept of imperative military necessity: "a. such protection as is afforded by the Article will be lost during such time as the protected property is used for military purposes; and b. the prohibitions contained in subparagraphs (a) and (b) of this Article can only be waived when military necessity imperatively requires such a waiver".

Making the obligation to respect cultural property conditional on that property not being used in support of the military effort would appear to be widely accepted,⁹⁰ although this is not directly

⁸⁶ The otherwise unlawful use of certain weapons directed against enemy armed forces would constitute the only admissible measure of reprisal under the Protocol. See Gerald I.A.D. Draper, "War, Laws of, Enforcement", *Encyclopaedia of Public International Law*, p. 1383, and Kalshoven, *op. cit.*, pp. 79-80.

⁸⁷ Kalshoven, *ibid.*, pp. 66-67.

⁸⁸ *The Law of War on Land*, The War Office, 1958, p. 184, para. 644 and note 2.

⁸⁹ ICTY, *Prosecutor v. Kupreskic* (IT-95-16-T), 14 January 2000, paras 527-536.

⁹⁰ *Commentary*, para. 2077; Fritz Kalshoven, "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977", Part II, *Netherlands Yearbook of International Law*, vol. IX, 1978, p. 124.

stipulated in Article 53. Professor Solf also upholds that conclusion, in that Article 53 is “without prejudice” to Article 27 of the 1907 Hague Regulations, which stipulates that certain objects of cultural value must be spared, provided they are not being used at the same time for military purposes.⁹¹ It is nevertheless worth recalling that a violation of the prohibition to use cultural property in support of the military effort does not automatically entail the right to attack such property, because attacks must be strictly limited to military objectives (Art. 52), i.e. to objects that make an effective contribution to the military operation and whose total or partial destruction, capture or neutralization affords a definite military advantage. Thus, an object temporarily occupied by the enemy does not constitute a military objective once the enemy has withdrawn. The time limit introduced by Canada, Italy and the Netherlands is a better formulation in this sense. In addition, the principle of proportionality and the precautionary measures listed in Article 57 (verification of the objective, precautions against incidental damage) must be respected.⁹²

The second part of the Canadian declaration re-introduces the concept of military necessity set out in Article 4(2) of the 1954 Hague Convention. As Canada is a party to that Convention, its declaration cannot be qualified as a reservation.⁹³ The declaration recalls that Canada only intends to use cultural objects for military purposes or to attack any that may have been transformed into military objectives for reasons of “imperative military necessity, i.e. when no other choice is possible”.⁹⁴

Objects indispensable for survival – Article 54(2)

Article 54 prohibits the use of starvation as a method of warfare. The specific acts prohibited by paragraph 2 are limited to those undertaken with a view to “denying” the civilian population the objects that are indispensable to its survival (foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works), but the prohibition does not apply to objects used “as sustenance solely for the members” of a party’s armed forces (para. 3). What, therefore, is the point of the French and English declarations, given that they serve only to underscore certain aspects of those provisions? While it is true that lawful military action causing incidental damage to the civilian population is not the subject of Article 54, such action must nevertheless conform to the provisions of Article 57 (Precautions in attack).⁹⁵

Dangerous forces – Article 56

Once again, only France and the United Kingdom have formulated a declaration relating to Article 56, which affords special protection to works and installations containing dangerous forces. The declarations also mention Article 85(3)(c), which stipulates that it is considered a grave breach to launch an attack against such works and installations “in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii)”. More specifically, the two States declare that they cannot undertake to grant absolute protection to works and installations containing dangerous forces “which may contribute to the opposing Party's war effort” or to the defenders of such installations, but that they will take all the due precautions provided for in Articles 56, 57 and 85(3)(c).

⁹¹ Bothe, Partsch, Solf, *op. cit.*, pp. 332-333.

⁹² *Commentary*, para. 2079.

⁹³ Bothe, Partsch, Solf, *op. cit.*, p. 330, note 2.

⁹⁴ The principle was set out in Article 6 of the Second Protocol of 26 March 1999 to the 1954 Hague Convention.

⁹⁵ Bothe, Partsch, Solf, *op. cit.*, p. 339.

According to Article 56, the mere fact that a work or installation containing dangerous forces constitutes a military objective within the meaning of Article 52 does not justify making it the object of an attack when such attack can cause the release of those forces and consequent severe losses among the civilian population (para. 1). Such special protection is lost only: 1) if the works are used in regular, significant and direct support of military operations, 2) if such attacks are the only feasible way to terminate such support, and 3) for a dam or a dyke, only if it is used for other than its normal function (para. 2). It goes without saying that these conditions are much stricter than the criterion of “contribution to the war effort” of the adverse party invoked by the declaring States, and mark a return to the concept of military objective that the provision is intended to reinforce. The declarations therefore constitute serious reservations whose effect is to misread the special protection granted to installations whose destruction could cause serious harm to the civilian population and the environment.

Lastly, the question of “defenders of installations” is linked to paragraph 5 of Article 56.⁹⁶ Professor Kalshoven underscored the practical difficulty of finding an efficient means of defence that also met the conditions of this provision, and affirmed that it was to be hoped, at best, that “so long as the crew manages to avoid all misunderstandings as to the purpose of the defence installation, the adverse Party will be prepared to tolerate its presence”.⁹⁷

Obligation to cancel or suspend an attack – Article 57(2)(b)

This provision requires that an attack be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause excessive incidental loss of civilian life and damage to civilian objects. For France, the obligation “calls only for due diligence to cancel or suspend that attack, on the basis of the information available to the person deciding on the attack” [\[translated from the French\]](#). For the United Kingdom, the obligation “only extends to those who have the authority and practical possibility to cancel or suspend the attack”.

According to the ICRC, the obligation is incumbent not only on those who prepare or decide on an attack but also on those who execute it.⁹⁸ Thus, a regular soldier who realizes that his objective is clearly not military or that it benefits from special protection should suspend the attack. It would be hard, however, to require him to act in that way in cases in which it is no easy matter to gauge the military advantage or when the principle of proportionality has to be applied.⁹⁹ The interpretations of France and the United Kingdom do not appear to conflict with these considerations.

Civil defence – Article 62

Article 62 confers protection on “civilian civil defence organizations” (para. 1) and on “civilians” who, although not members of such organizations, respond to an appeal from the competent authorities and perform civil defence tasks under their control (para. 2). Canada and Ireland have declared that “nothing in Article 62 will prevent [them] from using assigned civil defence

⁹⁶ “[I]nstallations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations”.

⁹⁷ Frits Kalshoven, *Constraints on the waging of war*, ICRC, Geneva, 1987, p. 102.

⁹⁸ *Commentary*, para. 2220.

⁹⁹ Bothe, Partsch, Solf, *op. cit.*, pp. 366-367.

personnel or volunteer civil defence workers [...] in accordance with nationally established priorities regardless of the military situation”.

According to one author, Canada and Ireland thus intended to notify the other States parties that the personnel and network of volunteers attached to civil defence organizations within their countries constitute categories of individuals protected under Article 62.¹⁰⁰ It goes without saying that special protection can be granted to these categories only if the persons concerned in fact meet the criteria set out in Articles 61 ff.

Relief actions – Article 70

Article 70(1) provides that, if the civilian population of any territory other than occupied territory is not adequately provided with the supplies essential for its survival, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction are to be undertaken, subject to the agreement of the parties concerned. It is now accepted that such agreement cannot be arbitrarily refused.¹⁰¹

Obviously, a naval blockade, the classic method of warfare used to deprive the adversary of the supplies needed to conduct hostilities, could easily be in direct contradiction to the provisions of Article 70. This is probably why the French and British declarations state that the article “does not affect the existing rules of naval warfare regarding naval blockade, submarine warfare or mine warfare”.

It is nevertheless difficult to gauge the scope of the French and British declarations.¹⁰² The reference to “the existing rules of naval warfare” is not of much help, given the “troubling degree of uncertainty as to the content of contemporary international law applicable to armed conflicts at sea”.¹⁰³

It was to clear up that uncertainty that a group of experts incorporated a series of provisions into the *San Remo Manual on International Law Applicable to Armed Conflict at Sea* setting out both the customary rules and proposals for the gradual development of the law. The section of the Manual entitled “Methods of warfare” contains three clear rules on the protection of the civilian population from the effects of a maritime blockade, the most relevant of which in our case reads as follows: “If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to: (a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and (b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross”.¹⁰⁴

¹⁰⁰ Boudreault, *op. cit.*, p. 117.

¹⁰¹ *Commentary*, paras 2805-2808; Henry Merovitz, “Le Protocole additionnel I aux Conventions de Genève de 1949 et le droit de la guerre maritime”, *RGDI*, pp. 243-298, at p. 281; Bothe, Partsch, Solf, *op. cit.*, p. 434.

¹⁰² Asked to explain to a parliamentary committee the reservations and declarations France planned to make with a view to the Protocol's ratification, the foreign affairs representative indicated that the declaration “differentiated between the respective fields of application of the new instrument and the Hague Convention governing maritime operations. Indeed, Article 70 of Protocol I, relating to relief actions, will not harm the application of the existing conventions” [translated from the French]. See Marie-Hélène Aubert, *op. cit.*

¹⁰³ Louise Doswald-Beck, “San Remo Manual on International Law Applicable to Armed Conflict at Sea”, *IRRC*, November-December 1994, No. 309. See also *Commentary*, paras 2093 ff and 2232.

¹⁰⁴ The two other rules stipulate: “The declaration or establishment of a blockade is prohibited if: (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade”; “The

It is interesting to note that, like the recent Australian and Canadian manuals, which reproduce that excerpt from the San Remo Manual word for word,¹⁰⁵ the new French manual also mentions, with reference to Articles 23 of the Hague Convention (IV) and 70 of Protocol I, that “blockades are acts of war regulated by the law of armed conflicts. Said law nevertheless imposes the granting of free passage to relief supplies essential to the survival of the civilian population”.¹⁰⁶ It is surprising, to say the least, that France would formulate a declaration akin to a reservation on a rule that it fully acknowledges elsewhere. It would, lastly, be regrettable if France and the United Kingdom intended to reserve the application of a provision whose goal is substantially to strengthen the protection owed to civilians in the event of armed conflict.

Fundamental guarantees – Article 75

Article 75 lists the fundamental guarantees granted to “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol” (para. 1). The Diplomatic Conference left the provision’s field of application *rationae personae* open to uncertainty, and Finland therefore declared that “under Article 72, the field of application of Article 75 shall be interpreted to include also the nationals of the Contracting Party applying the provisions of that Article, as well as the nationals of neutral or other States not Parties to the conflict, and that the provisions of Article 85 shall be interpreted to apply to nationals of neutral or other States not Parties to the conflict as they apply to those mentioned in paragraph 2 of that Article”. While the first part of the declaration appears to be valid,¹⁰⁷ the second contains a proposal that, while honourable, was not adopted by the Conference: a grave breach committed by a party to the conflict against its own citizens does not constitute a grave breach within the meaning of Article 85. The other declarations have entirely to do with sub-paragraphs (e), (h) and (i) of Article 75(4), which sets out the minimum rules, based on the provisions of Article 14 of the 1966 International Covenant on Civil and Political Rights (the Covenant), that should apply to the conduct of penal proceedings for any breach committed in connection with a conflict.

• Sub-paragraph (e)

Five States (Austria, Germany, Ireland, Liechtenstein, Malta) have formulated a reservation to the provision stipulating that “anyone charged with an offence shall have the right to be tried in his presence”. Germany declared that the rules would be applied “in such manner that it is for the court to decide whether an accused person held in custody must appear in person at the hearing before the court of review”.

At the Diplomatic Conference, the German delegate had explained that, “in the case of penal proceedings occupying two or more instances, in which the purpose of the last instance was to review only the applicable law and not the findings of the previous instance, the court of review had to decide whether or not the accused had to appear before it at the hearing. The court of

blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted”.

¹⁰⁵ *Australian Defence Force Manual* (1994), para. 666; Canada’s *The Law of Armed Conflicts at the Operational and Tactical Levels* (1999), para. 68. The German, Argentine, New Zealand and Dutch military manuals also contain a provision along these lines.

¹⁰⁶ The French manual, p. 33 [translated from the French].

¹⁰⁷ *Commentary*, paras 2912-2916 and 3082; Bothe, Partsch, Solf, *op. cit.*, p. 457.

review could not impose a higher penalty in the absence of the accused, and the latter's rights as provided for in Article 65, paragraph 4(e) were therefore fully granted".¹⁰⁸

Understood in this way, the reservation would appear to respect the essentials, namely that the accused can be present at any hearings and that he can hear the witnesses and experts, ask questions and raise objections or make corrections. The four other States formulated a similar reservation (Ireland termed it a declaration), according to which sub-paragraph 4(e) would apply insofar as it was not incompatible with the provisions of "legislation providing that any defendant, who causes a disturbance at the trial or whose presence is likely to impede the questioning of another defendant or the hearing or another witness or expert witness, may be removed from the courtroom". While the interpretation according to which the conduct of the accused can be tantamount to renunciation of his right to be tried in his presence is in keeping with the intention of the Protocol's authors,¹⁰⁹ it would nevertheless seem that the exceptions to the principle – also laid out in Articles 14(3)(d) of the Covenant and 67(1)(d) of the Rome Statute of the International Criminal Court – must be strictly interpreted.¹¹⁰

- Sub-paragraph (h)

This provision sets out the principle of *res judicata*: "no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure".

Eight States (Austria, Denmark, Finland, Germany, Iceland, Liechtenstein, Malta, Sweden) have declared that the rule should not be interpreted in such a way as to render it incompatible with the provisions of internal law allowing the "re-opening" of proceedings that resulted in a final declaration of conviction or acquittal. Article 14(7) of the Covenant¹¹¹ has also been the object of numerous reservations.¹¹² The Human Rights Committee has noted in this respect that most States make a clear distinction between the resumption of a trial in exceptional circumstances – such as serious procedural flaws or the discovery of new evidence - and a retrial prohibited pursuant to the principle of *ne bis in idem*, and invites them to reconsider their reservations in that light.¹¹³

- Sub-paragraph (i)

This provision stipulates that "anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly". Liechtenstein undertook to comply with the provision if it was not incompatible "with legislation relating to the public nature of hearings and of the pronouncement of judgement".¹¹⁴

¹⁰⁸ *Official Records*, vol. XV, p. 205, CDDH/III/SR.58, para. 10.

¹⁰⁹ The report of Commission III affirms that "it was understood that persistent misconduct by a defendant could justify his banishment from the courtroom"; *Official Records*, *ibid.*, p. 462, CDDH/407/Rev.1, para. 48.

¹¹⁰ The wording of Article 63(2) of the Rome Statute is in the same vein: "If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required".

¹¹¹ Article 14(7) of the Covenant affords a greater guarantee to the accused, who can also invoke the principle of *ne bis in idem* in respect of a violation for which he was tried in another country.

¹¹² Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Kelh, Strasbourg, Arlington, 1993, p. 273.

¹¹³ *General Comment 13/21 of 13 April 1984 [Procedural Guarantees and Criminal Trials]*, para. 19.

¹¹⁴ A Finnish reservation to that effect, justified by the fact that "under Finnish law a judgement can be declared secret if its publication could be an affront to morals or endanger national security", was withdrawn in 1987.

In connection with Article 14(1) of the Covenant, the Human Rights Committee recalled that in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public.¹¹⁵ As it is drafted, Liechtenstein's reservation does not offer the judicial guarantees that the publication of judgement is intended to ensure.

Repatriation of prisoners of war – Article 85(4)(b)

In connection with Article 85 (Repression of breaches of this Protocol), the Republic of Korea declared that “a party detaining prisoners of war may not repatriate its prisoners agreeably to their openly and freely expressed will, which shall not be regarded as unjustifiable delay in the repatriation of prisoners of war constituting a grave breach of this Protocol”. The declaration revisits the oft debated issue of the interpretation of Article 118 of the Third Geneva Convention, which stipulates that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities”.¹¹⁶ The problem lay at the heart of the negotiations on the armistice at the end of the Korean War, as most prisoners from the People's Democratic Republic and from China did not wish to be repatriated.¹¹⁷ It is therefore not surprising that the Republic of Korea formulated, on acceding to the Geneva Conventions in 1966, a declaration that is similar to that quoted here. According to Claude Pilloud, this was an interpretative declaration in which the Republic of Korea indicated how it would treat its prisoners of war, without requiring reciprocal treatment from the adverse party.¹¹⁸

As was the case for the declarations made by the Republic of Korea, the interpretation of Article 118 according to which no prisoner of war may be repatriated against his will went uncontested. In the past decade, the principle has been expressly integrated into the agreements between the various entities of the former Yugoslavia.¹¹⁹ The widespread acceptance of the ICRC's conditions of participation in repatriation operations, including the requirement that it may ascertain each candidate's willingness to be repatriated in a private interview, is another indication of this.¹²⁰

As Professor Meron recently explained, “[p]ractice has in fact recast Article 118. Interpretation has drastically modified its categorical language, steering it to respect for individual autonomy.

¹¹⁵ *General Comment 13/21, op. cit.*, para. 6. See also *Commentary*, p. 909.

¹¹⁶ In general, see Jan P. Charnatz and Harold M. Wit, “Repatriation of prisoners of war and the 1949 Geneva Convention”, *Yale Law Journal*, vol. 62, 1953, No. 3, pp. 391-415; Yoram Dinstein, “The release of prisoners of war”, in Swinarski, *op. cit.*, pp. 37-45, at pp. 40 ff; Albert J. Esgain and Waldemar A. Solf, “The 1949 Geneva Convention relative to the treatment of prisoners of war: its principles, innovations and deficiencies”, *The North Carolina Law Review*, vol. 41, No. 3, Spring 1963, pp. 537-596, at pp. 589 ff; Howard S. Levie, *Prisoners of War in International Armed Conflict*, International Law Studies, vol. 59, pp. 417 ff; *Commentary on the Geneva Conventions of 12 August 1949*, published under the general editorship of Jean S. Pictet, vol. III, ICRC, Geneva, 1960, pp. 540 ff; Christiane Shields Delessert, *Release and repatriation of prisoners of war at the end of active hostilities: A study of Article 118, Paragraph 1 of the Third Geneva Convention relative to the treatment of prisoners of war*, Schulthess Polygraphischer Verlag, Zurich, 1977. See also Stéphane Jaquemet, “The cross-fertilization of international humanitarian law and international refugee law”, *IRRC*, September-October 2001, vol. 83, No. 843, pp. 651-674, at pp. 661-662, and Yoram Dinstein, *Israel Book on Human Rights*, vol. 12, 1982, at pp. 100-102.

¹¹⁷ The matter was settled by the Panmunjom Agreement of 8 June 1953, Agreement on Prisoners of War, reproduced in *American Journal of International Law (AJIL)*, vol. 47, issue 4, Supplement: Official Documents (Oct. 1953), pp. 180-186. The agreement provides that prisoners who did not exercise their right to be repatriated would be taken charge of by a neutral repatriation commission which, if they confirmed their refusal to be repatriated, would help them resettle in a third State.

¹¹⁸ Pilloud, *op. cit.*, pp. 215-216. That interpretation agrees with the United Nations General Assembly resolution adopted on 3 December 1952 on the settlement of the Korean problem: “Force shall not be used against the prisoners of war to prevent or effect their return to their homelands and no violence to their persons or affront to their dignity or self-respect shall be permitted in any manner or for any purpose whatsoever. This duty is enjoined on and entrusted to the Repatriation Commission and each of its members. Prisoners of war shall at all times be treated humanely in accordance with the specific provisions of the Geneva Convention and with the general spirit of that Convention”.

¹¹⁹ Agreements between Croatia and the Federal Republic of Yugoslavia of 1991, paras 6 to 8, and of 7 August 1992, Art. 1(4); agreements between the parties to the conflict in Bosnia-Herzegovina of 1992, Art. 3(6) and of 14 December 1995 (Dayton Agreement), Art. IX.

¹²⁰ On ICRC practice, see François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, ICRC and MacMillan, Geneva, 2003, p. 689.

This adjustment exemplifies the potential of developing law through interpretation and custom. Of course, respect for the POW's choice is predicated both on assurances that the detaining power will not abuse the system by unduly influencing that choice and on the readiness, at least of some governments, to allow the prisoners to enter and stay in their countries".¹²¹

The validity of the interpretation given by the Republic of Korea in its declaration is yet to be confirmed. Failure to repatriate prisoners of war refusing to return to their homelands at the end of the hostilities therefore does not constitute an "unjustified delay" that is tantamount to a grave breach within the meaning of Article 85(4)(b).

Mutual assistance in criminal matters – Article 88(2)

The States are obliged to cooperate on extraditions, under the terms of Article 88 (2), "[s]ubject to the rights and obligations established in the Conventions and in Article 85, paragraph 1 of this Protocol" and "when circumstances permit".¹²² According to the Conventions, the State holding on its territory and in its power a person suspected of having committed or of having ordered to be committed a grave breach may either try him before a national court or extradite him for trial in another State, the extradition being, moreover, subject to the conditions set out in the national legislation of the requested party.¹²³

The Chinese and Mongolian declarations are essentially affirmative: "At present, Chinese legislation has no provisions concerning extradition, and deals with this matter on a case-by-case basis. For this reason China does not accept the stipulations of Article 88, paragraph 2, of Protocol I"; "In regard of Article 88, paragraph 2 of [Protocol I] which states 'The High Contracting Parties shall co-operate in the matter of extradition', the Mongolian law which prohibits deprivation and extradition of its citizens from Mongolia shall be respected".¹²⁴

Given the flexible wording of the article to which they refer, these declarations can hardly be assimilated to reservations, in that they do not contain a renunciation of the obligation to repress grave breaches.¹²⁵ And the absence of a specific law in China should not *a priori* prevent it from responding positively to a request for extradition.¹²⁶

Responsibility – Article 91

Article 91 stipulates that a "Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces". The Republic of Korea added that the obligation to compensate existed "whether the damaged party is a legal party to the conflict or not".

We know that a State cannot use a reservation to impose obligations on the other parties that do not arise directly from the treaty. This does not appear to be the case here. According to the

¹²¹ Theodor Meron, "The Humanization of Humanitarian Law", *AJIL*, 2000, vol. 94, pp. 239-278, at p. 256.

¹²² Granville Glover, *op. cit.*, p. 226.

¹²³ Paragraph 2 *in fine* of common Article 49/50/129/146. See *Commentary*, para. 3565; Draper, *op. cit.*, p. 1383.

¹²⁴ In a note verbale of 26 February 1996 to the depositary, the Mongolian Government specified that the term "deprivation" referred to the "deprivation of one's rights as a citizen of Mongolia".

¹²⁵ "Most national laws and international treaties on the subject refuse the extradition of accused who are nationals of the State detaining them. In such cases Article 146 quite clearly implies that the State detaining the accused person must bring him before its own courts." *Commentary on the Geneva Conventions of 12 August 1949*, *op. cit.*, vol. IV, p. 592.

¹²⁶ For a dissenting view of the Chinese declaration, see Boudreault, *op. cit.*, p. 118.

Commentary, “[t]hose entitled to compensation will normally be Parties to the conflict or their nationals, though in exceptional cases they may also be neutral countries, in the case of violation of the rules on neutrality or of unlawful conduct with respect to neutral nationals in the territory of a Party to the conflict”.¹²⁷ In any event, the State suffering damages can always ask for compensation from the State at fault on the basis of the general rules governing State liability in the event of an unlawful international act.

Reservations and interpretative declarations relating to Protocol II¹²⁸

Definitions

Canada declared that “the undefined terms used in Additional Protocol II which are defined in Additional Protocol I shall, so far as relevant, be construed in the same sense as those definitions. The understandings expressed by the Government of Canada with respect to Additional Protocol I shall, as far as relevant, be applicable to the comparable terms and provisions contained in Additional Protocol II”. These declarations pose no problems, given that an “interpretation” constituting a reservation to Protocol I must be examined in the light of the object and purpose of Protocol II.

Scope – Article 1

Argentina states that it considers “that the term ‘organized armed groups’ which is used in Article 1 of [Protocol II] is not to be understood as equivalent to that used in Article 43, Protocol I, to define the concept of armed forces, even if the aforementioned groups meet all the requirements set forth in the said Article 43”. This is similar to Argentina’s declaration in respect of Article 43 of Protocol I and probably reflects the country’s vote against the adoption of Article 1 of Protocol II. The scope of Protocols I and II encompasses both personal and material aspects that are inseparable, the subjects of the law being defined depending on the type of conflict in which they clash. Thus, the fact that “organized armed groups” in an internal conflict covered by Protocol II also meet the criteria listed in Article 43 of Protocol I do not make that conflict international, the material element of the field of application of Protocol I – the existence of a situation of international armed conflict as defined in its first article – being absent.

Fundamental guarantees – Article 6(2)(e)

Article 6(2)(e) of Protocol II is identical to Article 75(4)(e) of Protocol I on the right of the accused to be present at his trial. Understandably, therefore, the same five States (Austria, Germany, Ireland, Liechtenstein, Malta) have formulated the same reservation in respect of both Protocols. The reader is invited to refer to the analysis above.

Conclusion

It is not surprising that only Protocol I has been the object of reservations, given the vastly more limited field of application of Protocol II. And it is reassuring to observe that of the 150-odd unilateral declarations formulated, at most thirty or so potentially constitute reservations as defined by the Vienna Convention. If we cannot be more precise, it is because several declarations are ambiguously worded – whether deliberately, because they were poorly translated or to reflect the dubious phrasing of the provisions to which they refer. It is also a source of

¹²⁷ *Commentary*, para. 3656.

¹²⁸ This section does not consider the declarations of non-recognition formulated by the United Arab Emirates and Oman, or the general declarations made by Egypt, Russia and the Holy See, which were mentioned earlier.

satisfaction that many interpretative declarations clarify certain points left open in Protocol I because the States were unable to reach an understanding or failed to realize the significance of the point concerned.

In almost all cases, the reserved provisions are not rejected outright; rather, it is the object of the provision or the conditions for its implementation that are affected, usually in that they are replaced by the corresponding provisions of internal law. Most often, the reserving State refuses to be bound by the “section” of the rule set out in the Protocol that constitutes an innovation in terms of customary law. It is inevitably difficult to assess the compatibility of a reservation that leaves customary developments intact in the light of the object and purpose of a treaty that both “reaffirms and develops” international humanitarian law. On the one hand, the basis of the rule – usually the need to protect persons not or no longer participating in the hostilities, first and foremost civilians – is “reaffirmed”. On the other, the refusal to be bound by the rule reinforcing already recognized protection seems contrary to the object and purpose of the Protocol, which is also to “develop” that protection.

This is a serious matter for reservations to the prohibition of reprisals against civilians and civilian objects (Arts. 51 and 52) and for the obligation to allow the free passage of relief items (Art. 70), but is of lesser import when it comes to respect for emblems of the enemy’s nationality outside situations of combat (Art. 39), a rule that benefits combatants. However, the reservations against certain provisions that clearly develop the law are not problem free, as for instance the framework of special protection granted to works containing dangerous forces (Art. 56).

People often remember only the unfortunate aspects of the reservations, which amputate international humanitarian law, the inequalities they create in the obligations between the parties or the insecurity they provoke in terms of the state of the law. They forget that reservations are also a necessary lesser evil, a breach in a treaty’s integrity that fosters universal participation in it, and that this is one of the essential objects of the Additional Protocols. In addition, reservations are not irreversible; they can be withdrawn at any time. It is to be hoped that the recent tendency of States to withdraw their reservations to the Geneva Conventions, a trend that should pick up pace in view of the pledges made at the 27th International Conference of the Red Cross and Red Crescent, will expand to encompass Additional Protocol I as well.