**Application of the codified principle to nuclear weapons.**

**Do the provisions of the Additional Protocol I of 1977 apply to nuclear weapons ?**

1. And so we come to what one might describe as our first truly ‘thorny’ issue. It is not as if the topic was not foreseen, indeed regarded by many as something of “ *the elephant in the room* “, at the time of the international diplomatic conference itself. As to a brief recapitulation of the relevant setting I think I can do little better than to refer the reader to the official commentary provided by the ICRC on the adoption of the additional protocols dated 1987, itself in relation to this very matter.

“ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

**ICRC Commentary**

Part IV : Civilian population

#Section I -- General protection against effects of hostilities**.[[1]](#footnote-1)**

**….**

1838 Before going on to study the articles which comprise this Section, it is appropriate to reflect for a moment on the question of nuclear weapons.

1839 The question had already been raised in 1949, but the Diplomatic Conference, presented with a proposal by the USSR delegation meant in particular to outlaw nuclear weapons, declared that it had no authority to deal with this, and the draft resolution was declared inadmissible by a large majority.

**….**

1843 In the introduction to the Commentary on the Draft Protocol the ICRC, explaining its position, stated that it had not included in its drafts, apart from some general provisions, a regulation of atomic, bacteriological and chemical weapons. These general provisions are those which already existed in a codified form or as customary law and which were confirmed in the Protocols. They consist mainly of the provisions of Article 33 of the Draft, the present paragraphs 1 and 2 of Article 35 ' (Basic rules) ' (dealing respectively with the fact that the right to choose methods and means of warfare is not unlimited, and with superfluous injury or unnecessary suffering), and the customary rule confirmed by Article 43 of the Draft, now Article 48 of the present Protocol ' (Basic rule) ' (dealing with general protection of the civilian population, distinction between the civilian population and civilian objects, on the one hand, and combatants and military objectives, on the other).

Obviously the Protocol could not restrict the scope of these already existing provisions. Moreover, in 1965, the International Conference of the Red Cross, as we saw above, had declared that "the general principles of the Law of War apply to nuclear and similar weapons". It was also [p.591] in this sense that the ICRC replied to a number of governments which had communicated with it on this matter.
1844 During the course of the four sessions of the Diplomatic Conference which produced the Additional Protocols, several delegations expressed their view on nuclear weapons. During the general debate, a series of governments were opposed to the Conference dealing with specific weapons. Other delegations urged the Conference to broach the question of nuclear weapons and to prohibit their use. Finally, four States urged the Conference not to enter into discussion on nuclear weapons.

1845 The United Kingdom and the United States confirmed their position when signing the Protocols. At the final meetings of the Conference France declared that it did not consider that the rules of the Protocol applied to nuclear weapons. (24)

1846 Finally, when the Conference adopted Article 33 (the present Article 35 -- ' Basic rules ') by consensus, the delegation from India declared that it had joined the consensus because, in its interpretation, the rules contained in this article applied to all categories of weapons -- nuclear, bacteriological, chemical or conventional, or any other categories of arms.
**….**

1851 Thus, there were no deliberations on the subject of nuclear weapons throughout the Conference, although one might have expected this subject to be broached at least marginally, in view of the positions adopted and the subjects dealt with. What can be deduced from this? There can be no question of a consensus in the current legal sense of the term, since no decision was taken. [p.593] Could it then be considered as a tacit understanding? Legally, silence is difficult to interpret. Was there an agreement outside the Conference between the principal States concerned? This is not the place to answer such question, but it does seem, nevertheless, that none of the States which possess nuclear weapons wished to discuss and examine during this Conference the regulation or the possible limitation of their use.

1852 What can be concluded from all this? In the first place, there is no doubt that during the four sessions of the Conference agreement was reached not to discuss nuclear weapons. Furthermore, there is no doubt that Protocol I of 1977 has not in any way nullified the general rules which apply to all methods and means of combat. As we saw above, these rules are in any case incorporated in the Protocol. These are, first of all, the provisions of the Hague Regulations of 1907, which are a reminder that belligerents do not have an unlimited right to choose the means of injuring the enemy, that it is prohibited to use weapons, projectiles or other devices of a nature to cause superfluous injury and unnecessary suffering.

The Protocol also repeats the customary rule which is at the very basis of the laws and customs of war, i.e., the rule that a distinction shall always be made between combatants and military objectives, on the one hand, and the civilian population and civilian objects, on the other hand. Whatever opinion one may have on the scope of application of Protocol I, these rules 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.

1853 The foregoing is in no way contradicted by the declarations made by the United Kingdom and the United States on signing the Protocol on 12 December 1977. The British declaration refers explicitly to ' new ' rules and therefore implicitly confirms that the rules ' reaffirmed ' in the Protocol apply to all arms; and it is in accordance with the British Military Manual. The American declaration is less clear on this point, though it should certainly be interpreted in the same way, as confirmed by the United States Military Manual.

1854 The exact limitations of what is prohibited by international humanitarian law as regards the use of nuclear weapons during armed conflict remains to be determined. This question does not really seem to have ever been resolved.

**….**

1859 As we saw above, no one could take the view that nuclear weapons are "outside" international humanitarian law, i.e., that armed conflicts carried out with conventional weapons are covered by international humanitarian law, while those using nuclear weapons are not. If the principles reaffirmed in the Protocol do not prohibit the use of nuclear weapons during an armed conflict, they nevertheless severely restrict such use. “

(emphases added)

1. As extensive as I have thought it fit to make this quotation from the official ICRC Commentary , nonetheless, I would still highly recommend the reader using the link at footnote 4 above to read the entire relevant commentary passage for themselves in order to better appreciate the full complexities and histories of the matter.
2. That being said, I think it would be fair to say in answer to the question posed at the outset of this segment that the consensus position at the time of this commentary would be to the effect that, whilst on the one hand nothing agreed upon or stated in the Protocol could be said to result in having outlawed or prohibited nuclear weapons, *per se*; equally, there was nothing agreed to or stated in the Protocol which could reasonably suggest that nuclear weapons were somehow or other outside of, or not covered by, the customary and general laws on the conduct of armed conflict, which it was the very purpose of the Protocol to codify, including most especially the principle of proportionality.
3. In my view, matters were however, moved significantly further forward by the judgement of the International Court of justice (ICJ) when in 1996 it gave its notorious Advisory Opinion on the “*Legality of the threat or use of nuclear weapons*“**[[2]](#footnote-2)** Advisory Opinion of 8 July 1996 - General List No. 95 (1995-1998) . It is important to note in this regard that the opinions of the ICJ, representing as it does the supreme judicial organ of the United Nations, must rank as constituting a very high order of “*opinio juris “,* comprising an authoritative source on the application of international law, second only to a final decision of the ICJ in a contentious case. The most relevant parts of the judgement stating as follows:

“ 84. 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.

85. Turning now to the applicability of the principles and rules of humanitarian law to a possible threat or use of nuclear weapons, the Court notes that doubts in this respect have sometimes been voiced on the ground that these principles and rules had evolved prior to the invention of nuclear weapons and that the Conferences of Geneva of 1949 and 1974-1977 which respectively adopted the four Geneva Conventions of 1949 and the two Additional Protocols thereto did not deal with nuclear weapons specifically. Such views, however, are only held by a small minority. In the view of the vast majority of States as well as writers there can be no doubt as to the applicability of humanitarian law to nuclear weapons.

86. The Court shares that view. Indeed, nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and al1 conventional arms. However. it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. In this respect it seems significant that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the latter, has not been advocated in the present proceedings.

On the contrary, the newness of nuclear weapons has been expressly rejected as an argument against the application to them of international humanitarian law :

"In general, international humanitarian law bears on the threat or use of nuclear weapons as it does of other weapons. International humanitarian law has evolved to meet contemporary circumstances, and is not limited in its application to weaponry of an earlier time. The fundamental principles of this law endure: to mitigate and circumscribe the cruelty of war for humanitarian reasons."

(New Zealand, Written Statement, p. 15, paras. 63-64.)

None of the statements made before the Court in any way advocated a freedom to use nuclear weapons without regard to humanitarian constraints. Quite the reverse; it has been explicitly stated,

"Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons"

 (Russian Federation, CR 95129, p. 52);

"So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the jus *in bello"*

(United Kingdom,CR 95134, p. 45);

"The United States has long shared the view that the law of armed conflict governs the use of nuclear weapons - just as it governs the use of conventional weapons"

(United States of America, CR 95134,p. 85).

87. Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons. “

(emphases added)

1. Hence, in my respectful submission, one ought now to be able to appreciate why I say that, certainly by the time the 1995 amending legislation, to update the 1957 Act so as to now include provision also in relation to the 1977 additional protocols, came into force in January 1998, it was really in my view by then unarguable but that the grave breaches provisions of that Protocol I were applicable also in relation to the use of nuclear weapons in the course of an international armed conflict, if only by reference to the international *opinio juris* on the importance and universality of the customary law norms which underpinned them and from which they were sourced.
1. <https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&documentId=F906C75AE929B32DC12563CD0043434F&action=openDocument> [↑](#footnote-ref-1)
2. <http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=95&code=unan&p3=4> [↑](#footnote-ref-2)