**Does the 1997 nuclear weapons reservation apply also to the 2001 Act ?**

**The effect of s.50(4)**

1. Subsection 50(4) & including subpara.4(*a*) of the 2001 Act could have been drafted in the following terms:

“The articles referred to in subsection (1) shall for the purposes of this Part be construed subject to and in accordance with any reservation or declaration made by the United Kingdom when ratifying any treaty or agreement, which Her Majesty may by Order in Council -

(a) certify has been made and the terms in which it was made : **…**”

Had it been so I contend that its effect would have been pretty much indistinguishable from that of s.7(3)(*b*) of the Geneva Conventions Act 1957 (as amended), and as set out at §20 above. However, it wasn’t. The all important word “relevant” has been inserted into the sentence before the expression “reservation or declaration made by the United Kingdom”, and again, *a fortiori*, the all important conditioning words “*relevant to the interpretation of those articles*” have been inserted at the end of the sentence. There is no use of the word “which” as a co-joining participle or pronoun. Instead, the power granted to Her Majesty, to be exercised by Order in Council, appears afresh in the next sentence, and is limited only to the power to certify the making of, and the terms in which, “*such reservations or declarations*” were so made.

1. Accordingly, in my submission, this language has the deliberate effect that it reserves to the Court the obligation to determine (a) whether, and if so which of, those said “certified” reservations or declarations made by the United Kingdom are in any given instance “relevant”, and in the second place (b) how they are so relevant, in any given instance, to “*the interpretation of those articles*” (meaning thereby the articles referred to in s.50(1) above).The Court is not required to blindly apply each and every one of the said reservations or declarations, in each and every instance.
2. In my further submission, in so doing, the Court is bound to adhere to and apply the common law rule as confirmed by Diplock LJ (as he then was) in *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, (as before) later at pp.144-145, as follows:

“… But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant***, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred.*** Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption.”

(***emphasis added***)

1. Considering then first the case of “reservations”, of course, one consideration that might reasonably be said to arise straight away, is to ask when a diplomatic “declaration” made upon the ratification of a treaty is also a “reservation”, and when it is merely a “declaration”. Conventionally speaking, the best source of law on this is the interpretation section of the Vienna Convention on the Law of Treaties (1969) – article 2 § 1(*d*), where it provides as follows:

“d. 'reservation' means 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; “**

**(emphasis added)**

1. It is widely accepted, as a rule of construction of treaties that, in the interpretation of this interpretation provision, where it says “*in the application to that State*” the exclusion or modification thereby affected need not be exclusive to that State, as in be expressly directed as being applicable to that State alone, so long as it has the effect of excluding or modifying certain of the treaty provisions “*in relation to that State*”. In other words, the declaration that

“ It continues to be the understanding of the United Kingdom that …, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons. “ **[[1]](#footnote-1)**

it is reasonably submitted, is manifestly a declaration having the effect of a “reservation”, because it has the direct and deliberate effect of modifying or excluding the provisions of the Protocol, so as not to apply to or ‘have any effect on or regulate’ the use of nuclear weapons, including those as possessed by the United Kingdom. Where otherwise, especially now in light of the nuclear weapons Advisory Opinion of the ICJ (1996 – as above) on the application of this Protocol, they would indeed otherwise have such an effect.

1. However, in this instance, the treaty (an international statute) to which this (domestic) Statue purports, at least in part, to give domestic law internal effect instead, as we have now seen (as above at para.23) makes the following simple and unambiguous provision at article 120, as follows:

**“Article 120 : Reservations**

No reservations may be made to this Statute.”

Consequently, it is submitted therefore that, as a matter of law, no reservations being permitted by this treaty, it follows then that no diplomatic statement having the character of a “reservation”, and made by the United Kingdom, in relation to a different treaty, with respect to which such reservations are permitted, can then be “relevant to the interpretation of the articles” in this treaty instead, where such reservations are simply expressly prohibited.

1. Considering next the case of “declarations”, although inexplicably not mentioned in the Order in Council, the United Kingdom in fact attached the following Declaration to its Instrument of Ratification, with respect to this treaty, as follows:

"The United Kingdom understands the term "*the established framework of international law"*, used in article 8 (2) (b) and (e), to include customary international law as established by State practice and *opinio iuris*. In that context the United Kingdom confirms and draws to the attention of the Court its views as expressed, *inter alia*, in its statements made on ratification of relevant instruments of international law, including the Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8th June 1977." **[[2]](#footnote-2)**

(emphasis added)

1. So fine. “*In that context*” then let us look carefully at the State practice and *opinio iuris* as adopted by the overwhelming majority of States comprising the community of civilised nations in this World, and at the most authoritative and highest expressions of judicial opinion within it ; and then let us compare that with the views as expressed by the Crown in the declarations made relative to its own previous earlier ratifications.
2. The First Additional Protocol to the 1949 Geneva Conventions (1977) has now been both signed and ratified by at least 174 Nation States, of whom precisely 3, ourselves, the French Republic and Canada, have entered reservations or understandings to the effect of seeking to exclude nuclear weapons from its scope. It has been signed, but as yet not ratified, by a further 3 Nation States, of whom one, the United States of America, has declared a similar such reservation upon the occasion of its signing**[[3]](#footnote-3).** 4 States out of 177 (2.25 %). International relevance of UK state practice = nil.
3. Turning then next to *opinio juris*  we have the view of no less an authority than the ICJ itself, as expressed in the 1996 Advisory Opinion on “*the legality of the use or threat of use of nuclear weapons*”, (as previously recited above) among other places e.g. at para.84, as follows:

“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.”

For that matter we even have the submissions in the case to the Court by the UK itself, as follows:

"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);

Number of statements of international judicial opinion favouring the view that the provisions of the Additional Protocol I (1977) do not apply to nuclear weapons = Nil.

Relevance of UK ratification reservations to international *opinio iuris –* NONE.

1. Final conclusion, as to the “*relevance*” of UK practice, with regard to its previous declaration of nuclear weapons exclusion reservations, when ratifying international treaties where such reservations were permitted; to the international State practice and *opinio iuris* on the interpretation of the expression "*the established framework of international law"*, as used at the outset in article 8(2)(*b*), instead *–* NONE. Consequently, relevance of those earlier reservations to the “*interpretation of*” that article, per s. 50 (4) of the 2001 Act, which provision when ratified by the Crown it did so on the explicit understanding that it may only so ratify without making any reservations whatsoever *–* NONE.
2. Bear in mind that when promulgating the domestic implementing legislation, namely the ICC Act (2001), it was always open to the Crown to present to Parliament in its Bill a provision, in relation to Article 8 (2) (*b*) of the Rome Statute, whereby it stipulated honestly and straightforwardly that the definition of a “war crime” as there in set out should not be regarded as applicable in relation to the case of the use of nuclear weapons. The consequence of such a candid stipulation being that, in spite of its contumacious affront to the spirit of the ‘no reservations’ provisions of the said treaty, so far as the Courts of the UK were concerned Parliament would have spoken and its intention would have been paramount, whether consistent with HMG’s international obligations or not. However, the Crown chose not to conduct itself in such an honest and open fashion, but instead has attempted to achieve its nefarious ambitions by means of the duplicitous and deceptive wordplay, referring instead to its ‘*understandings*’ of this expression and its ‘*interpretation***’** of that article, as employed in both its ratification Declaration and the interpretive provision in the Act itself.
3. So be it. Let it, nonetheless, now be judged openly and honestly on the true legal relevance of its declared ‘*understandings*’ and the valid legal *‘interpretation*’ and significance of its previous reservation practice, in relation to other treaty obligations, not legally permitted in relation to its ratification of the Rome Statute 1998 instead.

1. As per para.19 (above) [↑](#footnote-ref-1)
2. <https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=34213524F9312D84412566D600587078> [↑](#footnote-ref-2)
3. <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=D9E6B6264D7723C3C12563CD002D6CE4> [↑](#footnote-ref-3)