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

<http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&documentId=6D3FC1D09375910FC12563CD00434315&action=openDocument>

**….**

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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.

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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. (18)

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When the ICRC formulated its Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War in 1956, it included the following provision (Art. 14, para. 1):

"Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects -- resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents -- could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population."

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This provision was seen by several governments as a condemnation of nuclear weapons, and it is undoubtedly mainly for this reason that there was no concrete sequel to the ICRC draft.

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In view of the development of air warfare and the increasing resort to bombardment, the situation of the population remained a cause for concern, apart from the problem of nuclear weapons, particularly because of the absence of a restrictive definition of military objectives. This led the ICRC to present its draft articles for the Additional Protocols without approaching this problem. In the introduction to the draft of the present Protocol, the ICRC expressed itself as follows (page 2):

"Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Additional Protocols the ICRC does not intend to broach those problems. It should be borne in mind that the Red Cross as a whole, at several International Red Cross Conferences, has clearly made known its condemnation of weapons of mass destruction and has urged governments to reach agreements for the banning of their use."

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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. (19) 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.

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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. (20) Other delegations urged the Conference to broach the question of nuclear weapons and to prohibit their use. (21) Finally, four States urged the Conference not to enter into discussion on nuclear weapons. (22)

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The United Kingdom and the United States confirmed their position when signing the Protocols. (23) 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)

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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. (25)

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However, this silence should not be interpreted as approval: first, some of these statements are contradictory; secondly, some were not made during the meetings, but submitted at a later date; finally, the maxim that "silence is consent" is not convincing. None of the delegations which had proposed that the Conference should deal with nuclear weapons submitted official proposals, so that there was no discussion on this subject. The same happened when the Conference dealt with Article 56 ' (Protection of works and installations containing [p.592] dangerous forces), ' which lays down special protection for installations containing dangerous forces. The inclusion of nuclear electrical generating stations in the list of protected installations did not provoke any special discussion on nuclear weapons. Similarly, when Article 35 ' (Basic rules), ' paragraph 3 (protection of the natural environment), was adopted, there was no mention of nuclear weapons, although these are capable of profoundly affecting the natural environment. (26)

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The only time at which the Conference concerned itself with this problem was when it had to define the mandate given to an Ad Hoc Committee to study certain conventional weapons (27) which cause superfluous injury and unnecessary suffering. Two delegation proposed that the word "conventional" be deleted, so that the Committee's mandate would extend to nuclear, bacteriological and chemical weapons. The Conference approved the text of the mandate with the word "conventional" by 68 votes to 0, with 10 abstentions. (28)

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The Ad Hoc Committee expressed itself as follows in its report:

"Nuclear weapons and other weapons of mass destruction were, of course, the most destructive. In that connection, some delegations rejected the view that the debate on those weapons and their possible prohibition should be left to the disarmament discussions, and they urged that the Conference include them in its programme of work. Another delegation expressed its regret at the decision not to consider these weapons. Many other delegations, however, accepted the limitation of the work of this Conference to conventional weapons. As it was pointed out by some, nuclear weapons in particular had a special function in that they act as deterrents preventing the outbreak of a major armed conflict between certain nuclear powers." (29)

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The Diplomatic Conference formally recorded the Ad Hoc Committee's report without any discussion on this point, and it was not raised again while the Conference lasted. (30)

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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, (31) 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 a 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.

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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.

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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. (32) 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. (33) 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. (34)

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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.

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 In fact, the question of the lawful nature of certain uses of nuclear weapons in wartime was reopened in the Protocol, though its contents were not really modified. It is clear that this is a highly controversial problem. The fact that States did not wish to resolve it in the context of the CDDH is because it has implications [p.594] beyond the scope of international humanitarian law, as clearly stated in the above-mentioned report of the Ad Hoc Committee. However, it was perhaps also because they knew that the problem could not be solved in the short term, and that it would have paralyzed the adoption of the Protocols.

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Thus we are not going to end the debate in the context of the Protocol, but to position it as follows:

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The existing principles reaffirmed in the Protocol, particularly in Article 35 ' (Basic rules) ' and Article 48 ' (Basic rule) ' do not allow the conclusion that nuclear weapons are prohibited as such by international humanitarian law. Some writers certainly have good arguments for claiming that they are so prohibited, based in particular on the prohibition of poison and poisonous weapons, or even of chemical weapons. However, the other point of view is confirmed by first, the absence of a treaty specifically prohibiting or restricting the use of nuclear weapons, secondly the fact that the development of science makes it possible to create more accurate nuclear weapons with more circumscribed effects, and thirdly, and this final argument is based on the previous two arguments, the ' opinio juris ' of other legal experts, and above all, of governments which possess nuclear weapons. (35)

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The Protocol does not modify existing law with regard to the use of weapons during an armed conflict, but reaffirms and clarifies such law. Clearly, the hypothesis that States acceding to the Protocol bind themselves without wishing to -- or even without knowing -- with regard to such an important question as the use of nuclear weapons, is not acceptable. The desire not to broach it during the CDDH is a determining factor in this respect.

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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. The following principles and rules should in particular be taken into consideration:

- the prohibition "to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering" (Article 35 -- ' Basic rule, ' paragraph 2);
- the obligation of the Parties to the conflict to "at all times distinguish between the civilian population and combatants" (Article 48 -- ' Basic rule ');
- the prohibition or "indiscriminate attacks" (Article 51 -- ' Protection of the civilian population, ' paragraph 4) in particular "an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives, located in a city, town, village or other area containing a similar concentration of civilians of civilian objects" (Article 51 -- ' Protection of the civilian population, ' paragraph 5(a)), and "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" (Article 51 -- ' Protection of the civilian population, ' paragraph 5(b)).

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Within the scope of these rules, and in particular the principle of proportionality, it is difficult to accurately define the borderline between a use of nuclear weapons which may be lawful and a use which is unlawful: this could only be established by means of negotiations between States aimed at determining the scope and consequences, as regards nuclear weapons, of the principles and rules restated in the Protocols. For that matter, it was only possible to begin establishing such limitations with regard to conventional weapons after a diplomatic conference and the adoption of the Convention on the Prohibition or Restriction of the Use of Certain Conventional Weapons in 1980. (36)

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This uncertainty which exists regarding the scope of international humanitarian law with respect to the use of nuclear weapons is potentially harmful for such law and consequently all the victims that it aims to protect. This danger is all the greater as a first use of nuclear weapons, considered to be lawful by its user, could be considered as a violation by its victim, and clearly entails the risk of uncontrollable escalation. Therefore States ought to enter negotiations to remove such uncertainty.

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As emphasized in a passage of the above-mentioned report of the Ad Hoc Committee of the CDDH, "nuclear weapons in particular had a special function in that they act as deterrents preventing the outbreak of a major armed conflict between certain nuclear powers". (37)

This function, currently known as "the nuclear deterrence" is outside the scope of international humanitarian law. Therefore, the problem is not dealt with in the context of this commentary.

**Footnotes**

**….**

(18) [(18) p.589] Supra p. 585;

(19) [(19) p.590] ' Commentary Drafts, ' p. 2;

(20) [(20) p.591] O.R. V, p. 86, CDDH/SR.9; para. 28; p. 113, CDDH/SR.11, para. 64; p. 115, para. 73; p. 121, CDDH/SR. 12, para. 24; p. 150, CDDH/SR.14, para. 46; p. 179, CDDH/SR.17, para. 36; p. 192, CDDH/SR.18, para. 47;

(21) [(21) p.591] Ibid. p. 97, CDDH/SR.10, para. 36; p. 103, CDDH/SR.11, para. 13; p. 120, CDDH/SR.12, para. 18; p. 123, para. 32; p. 195, CDDH/SR.19, para. 5; O.R. IX, p. 258, CDDH/I/SR.60, para. 23; O.R. XIV, p. 70, CDDH/III/SR.8, para. 87; pp. 241-242, CDDH/III/SR.26, para. 31;

(22) [(22) p.591] O.R. V p. 134 CDDH/SR.13 para. 36, and O.R. VII, p. 303, CDDH/SR.58, para. 119; O.R. V, pp. 145-146, CDDH/SR.14, para. 21; O.R. VII, pp. 192-194, CDDH/SR.56, para. 3; p. 295, CDDH/SR.58, para. 82;

(23) [(23) p.591] The declaration of the United Kingdom reads as follows:
"[...] The Government of the United Kingdom of Great Britain and Northern Ireland declare that they have signed 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 of the United States reads as follows:
"[...] This signature is subject to the following understandings:
A) Protocol I
1. t 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. ]";

(24) [(24) p.591] O.R. VII, p. 295, CDDH/SR.56, para. 3, sub-para. 3;

(25) [(25) p.591] O.R. VI p. 115, CDDH/SR.39, Annex;

(26) [(26) p.592] Cf. commentary Art. 35, para. 3, supra, p. 414, for the relation between that paragraph and the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques of 10 October 1976;

(27) [(27) p.592] In French the expression "armes conventionnelles", which led to the confusion, was replaced by "armes classiques" in the 1980 Convention;

(28) [(28) p.592] O.R. V, pp. 82-90, CDDH/SR.9, paras. 12-54;

(29) [(29) p.592] O.R. XVI, p. 454, CDDH/47/Rev.1, para. 5;

(30) [(30) p.592] Cf. O.R. V, pp. 219-221, CDDH/SR.21, paras. 1-13;

(31) [(31) p.592] The definition of ' consensus ' contained in Article 4 of the Rules of Procedure of the Conference on Security and Cooperation in Europe is: "Consensus shall be understood to mean the absence of any objection expressed by a Representative and submitted by him as constituting an obstacle to the taking of the decision in question". Cf. also J. Monnier, "Observations sur quelques tendances récentes en matière de formation de la volonté sur le plan multilatéral", 31 ' ASDI, ' 1975, pp. 31-51;

(32) [(32) p.593] See supra, note 23;

(33) [(33) p.593] ' Manual of Military Law, ' 1958, Part III, para. 113: "There is no rule of international law dealing specifically with the use of nuclear weapons. Their use, therefore, is governed by the general principles laid down in this chapter.";

(34) [(34) p.593] ' The Law of Land Warfare, ' 1956, para. 35: "The use of explosive "atomic weapons", whether by air, sea or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment". In fact, by using the words "as such", the United States Manual affirms that the use of nuclear weapons by itself does not constitute a violation of international law, but does not exclude the possibility that indiscriminate use could constitute such a violation;

(35) [(35) p.594] See in particular R.E. Charlier, "Questions juridiques soulevées par l'évolution de la science atomique", 91 Hague Recueil, 1957/I, p. 213; G. Schwarzenberger, ' The Legality of Nuclear Weapons, ' London, 1958; N. Singh, ' Nuclear Weapons and International Law, ' London, 1959; United Nations, General Assembly, "Existing Rules of International Law Concerning the Prohibition or Restriction of Use of Specific Weapons", UN Doc. A/9215, 7 November 1973, vol. I, chapter II; Y. Sandoz, ' Des armes interdites en droit de la guerre, ' op. cit., Chapter IV, pp. 57-74; C. Pilloud, "Les Conventions de Genève de 1949 pour la protection des victimes de la guerre, les Protocoles additionnels de 1977 et les armes nucléaires", 21 GYIL, 1978, p. 169; H. Meyrowitz, "La stratégie nucléaire et le Protocole additionnel I aux Conventions de Genève de 1949", 83 RGDIP 4, 1979, p. 905; United Nations, General Assembly, "A Comprehensive Study of the Origin, Development, and Present Status of the Various Alternatives Proposed for the Prohibition of the Use of Nuclear Weapons", UN Doc. A/AC.187/71, 19 August 1977; GIPRI (Geneva International Peace Research Institute), ' Nuclear Weapons and International Law, ' Actes du colloque préparés par. Z. Mériboute, Turin, 1985;

(36) [(36) p.595] Convention on the Prohibitions or Restrictions of Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980. Three Protocols are annexed to that Convention: Protocol I on Non-Detectable Fragments; Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, and Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons;

(37) [(37) p.595] Cf. supra, note 29;