United Kingdom and Australia, Applicability of Protocol I

A. Article 1 of Protocol I: Declaration by the Delegation of the United Kingdom

[**Source**: *VI Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (CDDH), Geneva, 1974-1977, Federal Political Dept., Bern, 1978, p. 46]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[...]

82. Mr. FREELAND (*United Kingdom*) [...]

83. His delegation has abstained in the vote on Article 1 as a whole and would have abstained on paragraph 4 if a separate vote had been taken on it. At the first session of the Conference the United Kingdom delegation had voted against the amendment to include the paragraph now appearing as paragraph 4, partly because it had seen legal difficulty in the language used, which seemed to be cast in political rather than legal terms. The main reason for its opposition, however, was that the paragraph introduced the regrettable innovation of making the motives behind a conflict a criterion for the application of humanitarian law.

84. His delegation had nevertheless fully understood the wish of those who in 1974 had sponsored the amendment now appearing as paragraph 4 to classify as international armed conflicts various conflicts which by traditional criteria would have been considered internal but in which the international community was taking a keen interest. Those conflicts had been mentioned during the debates in 1974. They were conflicts

which had been of major concern to the United Nations, all of them outside Europe; some of them had fortunately come to an end since 1974.

[N.B.: The United Kingdom ratified Protocol I, with reservations, on 28 January 1998. *See* http://www.icrc.org]

B. Article 1 of Protocol I: Australia's Explanation of Vote on the Draft Article

[**Source**: *VI Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (CDDH), Geneva, 1974-1977, Federal Political Dept., Bern, 1978, Annex, pp. 59-60]

Article 1 of draft Protocol I

The Australian delegation voted in favour of Article 1 because it contains principles which are consistent with the purpose of this Protocol and because it extends international humanitarian law to armed conflicts which can no longer be considered as non-international in character. [...]

In applying Protocol I to armed conflicts involving national liberation movements, paragraph 4 is a significant development in international humanitarian law and one which my delegation supported at the first session of the Conference. This development of humanitarian law is the result of various resolutions of the United Nations, particularly resolution 3103 (XXVIII), and echoes the deeply felt view of the international community that international law must take into account political realities which have developed since 1949. It is not the first time that the international community has decided to place in a special legal category matters which have a special significance.

In supporting paragraph 4, the Australian delegation should not be understood as expressing an opinion on the legitimacy of any particular national liberation movement.

In supporting Article 1 as a whole, Australia understands that Protocol I will apply in relation to armed conflicts which have a high level of intensity. Furthermore, Australia understands that the rights and obligations under the Protocol will apply equally to all parties to the armed conflict, impartially to all its victims.

C. Reservations to Protocol I by the United Kingdom

[**Source**: 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, Reservation letter of 28 January 1998 sent to the Swiss Government by Christopher Hulse, HM Ambassador of the United Kingdom]

"(...) I also have the honour to lodge with the Government of the Swiss Federation, as the depository of Additional Protocol I the following statements in respect of the ratification by the United Kingdom of that Protocol: [...]

“(d) Re: Article 1, paragraph 4 and Article 96, paragraph 3

It is the understanding of the United Kingdom 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. (...)”

(m) Reservation: Articles 51-55

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”. [...]

Discussion

Article 1 of Protocol I

1. Do you agree with the United Kingdom delegation that Art. 1(4) of Protocol I uses political language rather than legal language? Does Art. 1(4) of Protocol I make “motives behind a conflict a criterion for application”? Are the criteria for applying it objective or subjective?
2. a. To which conflicts is the United Kingdom delegation referring in para. 84 above? Is Australia referring to the same “political realities”? Does Art. 1(4) of Protocol I only apply to such conflicts? If only so intended, is it of the same significance today as in 1977?
   b. Is the list of conflicts in Art. 1(4) of Protocol I exhaustive? Why were those conflicts listed? Does not the choice of listing these conflicts support the United Kingdom delegation’s concerns about the use of political language and the use of motives behind a conflict as a criterion for application?
3. Why did the United Kingdom delegation stress that all conflicts which led to the introduction of Art. 1(4) of Protocol I were situated outside Europe?
4. Why do you think that the United Kingdom and Australian delegation hold contrary positions concerning Art. 1(4) of Protocol I?
5. Was the addition of Art. 1(4) of Protocol I even necessary for the Conventions to apply to such conflicts? Could not Art. 2 common to the Conventions be read as applying to wars of national liberation? Does the term “Power” only refer to a State?

Reservations to Protocol I

1. Does reservation (d) mean the UK considers that the fight against terrorism never constitutes an armed conflict? That the UK could not detain terrorists as “enemy combatants”, as the US does? [**See** United States, Status and Treatment of Detainees Held in Guantanamo Naval Base]
2. Is reservation (m) really a reservation or does it simply interpret the obligations under Arts 51 and 55? Which specific provision is not accepted by the UK?
3. Is reservation (m) directed against the prohibition of reprisals? Or does the UK reserve the right to suspend (contrary to Art. 60(5) of the Vienna Convention on the Law of Treaties [**see** Quotation, Part I, Chapter 13. IX. 2. c) dd)]) the applicability of Arts 51 and 55 in the event of a substantive breach by the enemy?
4. Does the reservation correctly restate the limits set by customary international law for reprisals? Or is it more restrictive than customary law? Which elements go beyond customary law?
5. a. Is not reservation (m) largely without practical consequences as it contains an engagement not to violate the Conventions? And do not the Conventions prohibit reprisals against protected persons?
   b. What do the Conventions state in relation to reprisals? (GC I-IV, Arts 46/47/13(3)/33(3) respectively) Do the Conventions protect in a sufficient manner the civilian population against reprisals? Does the prohibition contained in Art. 33(3) of GC IV prohibit reprisals against the civilian population in the conduct of hostilities?
   c. What does Art. 51 of Protocol I add to the Conventions in relation to reprisals against the civilian population? Was the clarification given in Art. 51(6) of Protocol I necessary?
6. Does Art. 51(6) reduce the scope for reprisals? What kind of reprisals is still lawful under Protocol I?
7. Does reservation (m) to Arts 51 and 55 undermine Protocol I in its entirety, in particular its provisions on the protection of the civilian population?
8. Does reservation (m) reflect a pragmatic compromise between the concept of military necessity and the protection of the civilian population? Does it actually protect the civilian population by dissuading an enemy from violating Protocol I?