

## To What Extent Is Protocol I Customary International Law?

The Honorable Fausto Pocar

To what extent does Protocol I<sup>1</sup> reflect customary international law, such that it may be regarded as binding on non-party States? The question has been discussed since the early days following the entry into force of Protocol I, when the number of ratifying States was still rather thin.<sup>2</sup> Indeed the frequent involvement of non-ratifying States in international armed conflicts made an answer to that question urgent, in order to establish the scope of application of the principles that the Protocol enshrines in a given situation. Notwithstanding the increase in the number of States parties,<sup>3</sup> the problem continues to be topical, in particular because the countries that have not yet ratified the instrument, including some major actors in international relations, maintain serious reservations as to the binding force of one or more principles expressed and regulated therein.<sup>4</sup> In this context, it has to be pointed out that attention has mainly focused on Part III (Articles 35 to 47) of Protocol I, dealing with methods and means of warfare and with the status of combatants and prisoners of war, as well as on Part IV (Articles 48 to 79), concerned with the

1. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflicts, June 8, 1977, 1125 U.N.T.S. 3, DOCUMENTS ON THE LAWS OF WAR 422 (A. Roberts & R. Guelff eds., 3d ed. 2000) [hereinafter Protocol I].

2. Protocol I entered into force on December 7, 1978. By 1980 only 16 States had become parties to Protocol I; they were Bahamas, Bangladesh, Botswana, Cyprus, Ecuador, El Salvador, Finland, Gabon, Ghana, Jordan, Laos, Libya, Niger, Sweden, Tunisia and Yugoslavia.

3. 59 States were parties to Protocol I as of August 21, 2001.

4. India, Indonesia, Iran, Iraq, Israel, Japan, Pakistan, Turkey and the United States are some of the States which have not ratified Protocol I so far.

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protection to be afforded to civilian populations; these two parts of the Protocol being in many respects linked to each other.

It is undisputed that Protocol I is aimed both at codifying existing international law relating to the protection of victims of international armed conflicts and at developing such law in order to increase their protection. As the Preamble clearly states, the instrument is based on the necessity “to *reaffirm* and *develop* the provisions protecting the victims of armed conflicts.”<sup>5</sup> Thus, Protocol I itself explains that not all of its provisions simply codify existing law, though it declares at the same time that a number of them do so.

One is therefore confronted with a problem common to the interpretation of all so-called codification conventions, i.e., the problem of identifying the treaty provisions that reflect customary international law, as opposed to those that make innovations or contain additional elements, thus developing the law’s scope and content.<sup>6</sup> The former will have general value in that they reproduce customary rules, while the binding force of the latter will be limited to the States having ratified or acceded to the convention. This is in accordance with the general rule that treaties do not create either obligations or rights for a third State without its consent and that their effects are limited to State parties (*pacta tertiis nec nocent nec prosunt*).<sup>7</sup>

In making this assertion, however, some points must be borne in mind. First, the abovementioned status of a treaty provision as reproducing or developing customary international law may change according to the time at which its status is assessed. A provision that did not reflect customary law when it was drafted may subsequently become a customary rule through its general application by States. Similarly, although less frequently, a provision which codified principles forming part of customary law when it was drafted may not reflect them at a later stage due to changes in general State practice. In dealing with this issue, reference should therefore be made to the point in time at which the question of the binding force of a specific treaty provision for non-contracting States arises.

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5. Emphasis added.

6. See Richard Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 36 ff. (1970); Karl Zemanek, *Die Bedeutung der Kodifizierung des Völkerrechts für seine Anwendung*, in FESTSCHRIFT VERDROSS 565 (1971); Roberto Ago, *Nouvelles réflexions sur la codification du droit international*, 92 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 539 (1988).

7. According to Article 34 of the Vienna Convention on the Law of Treaties (May 23, 1969, 1155 U.N.T.S. 331), “A treaty does not create either obligations or rights for a third State without its consent.”

Secondly, even when a treaty provision can be considered as codifying a norm of customary law, it is the latter that finds application as regards non-party States and not the treaty provision as such. As the International Court of Justice clarified in the *Nicaragua* case,<sup>8</sup> the two norms derive from distinct sources of law and each continues to belong to a separate body of rules. Indeed, the Court stated:

Even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. . . . [T]here are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter ‘supervenes’ the former, so that the customary international law has no further existence of its own.<sup>9</sup>

Thus, their interpretation and application may be subject to different principles, although the treaty provision will have an impact in this context in that it constitutes an assessment of the relevant rule or principle made by the States which have entered into the treaty.

Thirdly, as the codification process necessarily requires an assessment of the customary rule or principle concerned as well as a written definition thereof, the resulting written text may be regarded as affecting its scope and content. Consequently, any precision or new element that may have been added—as is normally the case—by the treaty provision to the principle of customary law which it codifies must be checked carefully in order to establish whether it has come to be accepted as generally applicable. However, the addition of new elements by a treaty provision to a customary principle should be distinguished from specifications deriving by necessary implication from the accepted general customary principle. As it has been pointed out,<sup>10</sup> such specifications could not be regarded as requiring acceptance of the treaty in order to become applicable to a State. A different conclusion would result in allowing a limitation of the already accepted general principle that derives from

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8. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 94–5 (June 27) [hereinafter *Nicaragua* case].

9. *Id.* at 95.

10. See Georges Abi-Saab, *The 1977 Additional Protocols and General International Law: Some Preliminary Reflections*, in *HUMANITARIAN LAW OF ARMED CONFLICTS: CHALLENGES AHEAD, ESSAYS IN HONOUR OF FRITS KALSHOVEN 120* (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991), who mentions in this regard the rules concerning the protection of civilians against aerial bombardments in Protocol I.

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customary law. The inclusion of such necessary implications in a treaty provision cannot reduce in any way for non-party States the obligations they would have under the general principles from which those implications derive.

The elements and factors to be taken into consideration in assessing State practice for the purposes of establishing the existence of customary rules and principles have been widely discussed in international legal doctrine and case law. This paper does not aim at revisiting all the features and implications of the problems arising in this area, including the issue of defining State practice. The main principles governing the matter have been already laid down by the International Court of Justice in the *North Sea Continental Shelf* case<sup>11</sup> and in the *Nicaragua* case,<sup>12</sup> whereby the Court has stressed the respective role of the practice of States and *opinio juris* as factors for identifying a customary rule of international law, as well as the place of treaty provisions codifying customary law in this regard. Following these judgments, there is no doubt that for a rule to exist as a norm of customary international law both its recognition as a legal obligation by States and the latter's conduct which is consistent with the rule are required.<sup>13</sup>

Some issues deserve special consideration as far as the relationship between codified and customary rules is concerned. In this context, it has been discussed whether the practice of all States, including those which are parties to the treaty (in our case Protocol I), should be taken into account for the purposes of establishing the existence of a customary norm. A negative answer would diminish the number of States whose practice is relevant to this end and would make it more difficult to determine the status of customary law, as

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11. See *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

12. See *Nicaragua* case, *supra* note 8, at 97–8.

13. In particular, the Court in the *Nicaragua* case stated:

The mere fact that States declare their recognition of certain rules is not sufficient for the court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom 'as evidence of a general practice accepted as law', the Court may not disregard the essential role played by general practice. . . . The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice. . . . In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

*Nicaragua* case, *supra* note 8, at 97–8.

the acceptance of the treaty increases. However, such a conclusion (the so-called Baxter paradox<sup>14</sup>) would disregard both the fact that the treaty itself is an important piece of State practice for the determination of customary law, although its role in this regard must be carefully assessed,<sup>15</sup> and the impact that any subsequent practice of the contracting States in the application of the treaty which establishes their agreement or disagreement regarding its interpretation<sup>16</sup> may bear on the development of a customary norm. Therefore, it is submitted that customary international humanitarian law should not be determined on the sole basis of the practice of the States that have not ratified Protocol I.

In addition to the practice of State parties in their application of Protocol I and the behavior of other States vis-à-vis the Protocol itself, any other element being evidence of State practice may come into play. Special importance should however be attached to the case law, although limited, of international courts, such as the International Criminal Tribunal for the former Yugoslavia

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14. According to the Baxter paradox, “[A]s the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty.” In addition, “[a]s the express acceptance of the treaty increases, the number of states not parties whose practice is relevant diminishes. There will be less scope for the development of international law dehors the treaty. . . .” See Baxter, *supra* note 6, at 64, 73.

15. See Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 367 (1987), which points out that although acts concordant with a treaty obviously are indistinguishable from acts in the application of the treaty, the demonstration that an act by State parties is regarded by them as required not only by their conventional obligations but also by general international law would show the existence of an *opinio juris*, which should be given probative weight for the formation of customary law.

16. Cf. Article 31(3)(b) of the Vienna Convention on the Law of Treaties (*supra* note 7), concerning general rules of interpretation, which states: “There shall be taken into account, together with the context . . . [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” See on this provision Francesco Capotorti, *Sul valore della prassi applicativa dei trattati secondo la convenzione di Vienna*, in INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION. ESSAYS IN HONOUR OF ROBERTO AGO 197 ff. (A. Giuffrè ed., 1987); Fausto Pocar, *Codification of Human Rights Law by the United Nations*, in PERSPECTIVES ON INTERNATIONAL LAW 153 (Nandasiri Jasentuliyana ed., 1995).

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(ICTY) and the International Criminal Tribunal for Rwanda (ICTR).<sup>17</sup> As has been pointed out, the assessment of the customary nature of treaty provisions made by international courts has frequently proved to be regarded as determinative in subsequent debates.<sup>18</sup> However, even in respect of case law, it has to be stressed that previous decisions of international courts cannot be relied on as having the authority of precedents in order to establish a principle of law. The current structure of the international community, which clearly lacks a hierarchical judicial system, does not allow consideration of judicial precedent as a distinct source of law. Therefore, prior case law may only constitute evidence of a customary rule in that it may reflect the existence of *opinio juris* and international practice, but cannot be regarded per se as having precedential authority in international criminal adjudication. As has been pointed out, international criminal courts must always carefully appraise decisions of other

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17. The limited number of ICTY decisions dealing with the issue considered in this paper, i.e., whether Protocol I reflects customary law, depend on the consideration that the Protocol was referred to by the ICTY as conventional law rather than as evidence of customary international law. See e.g. Prosecutor v. Blaskic, Judgement, I.C.T.Y. No. IT-95-14-T, Mar. 3, 2000, ¶ 172 [hereinafter Blaškic case], where it is stated that Croatia and Bosnia-Herzegovina ratified Protocol I and Protocol II (which is applicable to non-international armed conflicts) in 1992 and that “consequently, as of January 1993, the two parties were bound by the provisions of the two Protocols, whatever their status within customary international law.” See also Prosecutor v. Kordic and Cerkez, Decision on the Joint Defence Motion to Dismiss for Lack of Jurisdiction Portions of the Amended Indictment Alleging “Failure to Punish” Liability, I.C.T.Y. No. IT-95-14/2-PT, Mar. 2, 1999, ¶ 13, where it is stated that “both the Republic of Croatia and Bosnia and Herzegovina are bound by Additional Protocol I as successor States of the Socialist Republic of Yugoslavia, which had ratified the Protocol on 11 June 1979.” In this context see also Prosecutor v. Delalic et al., Appeal Judgement, I.C.T.Y. No. IT-96-21-A, Feb. 20, 2001, ¶¶ 111–113, where it is stated that Bosnia and Herzegovina would have in any event succeeded to the Geneva Conventions of 1949 (to which Yugoslavia was a party) irrespective of any findings as to formal succession. The Appeals Chamber considered that “in international law there is automatic State succession to multilateral humanitarian treaties in the broad sense, i.e., treaties of universal character which express fundamental human rights” and that “in light of the object and purpose of the Geneva Conventions, which is to guarantee the protection of certain fundamental values common to mankind in times of armed conflict, . . . the Appeals Chamber is in no doubt that State succession has no impact on obligations arising out from these fundamental humanitarian conventions.”

18. See THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY INTERNATIONAL LAW 43 (1989). See also Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, in HUMANITARIAN LAW OF ARMED CONFLICTS, *supra* note 10, at 99, where it is noted that no decisions of the ICJ or of other authoritative international tribunals existed regarding Protocol I and points out that international decisions are rare in respect to any of the humanitarian law treaties, except for the decisions on war crimes cases issued after World War II. Later on, as mentioned in the text, the international criminal tribunals established by the Security Council have sometimes dealt with the Protocols.

courts before relying on their persuasive authority as to existing law.<sup>19</sup> Consequently, although judicial decisions of international courts may have a special weight, they must be regarded as one of the elements that have to be taken into account in the assessment of the existence of a customary rule.

Looking at the provisions of Protocol I from the perspective of existing customary international humanitarian law, it is certainly possible to identify different groups of norms. The first and largest group encompasses the rules whose customary nature is undisputed. It is widely recognized that much of the Protocol is a codification of general international law. Even States that hesitate to accept the instrument or have decided not to ratify it, such as the United States,<sup>20</sup> have expressed the view that many of its provisions are either settled customary international law or eligible for their ultimate recognition as customary international law.<sup>21</sup>

A customary status should clearly be accorded, in the first place, to the provisions that echo or restate the Hague Regulations annexed to the Fourth Hague Convention of 1907, which are generally regarded as reflecting

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19. See *Prosecutor v. Kupreskic et al.*, Judgement, I.C.T.Y. No. IT-95-16-T, Jan. 14, 2000, ¶ 542 [hereinafter *Kupreskic case*].

20. See Letter of Transmittal of Protocol II by President Reagan to the Senate, dated January 29, 1987, reprinted in 81 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 910 (1987), and Hans-Peter Gasser, *An Appeal for Ratification by the United States*, 81 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 912 (1987). See also George Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 1 (1991), where the difficulties encountered by the United States are discussed with a view to overcoming them by means of reservations.

21. Indeed, it has been noted that statements of United States officials following the announcement that the United States would not ratify Protocol I are evidence that “the United States regards Articles 37 (perfidy), 40 (refusal of quarter), 42 (on persons parachuting from a disabled aircraft), 59 (non-defended localities), 60 (demilitarised zones), 73 (refugees), 75 (fundamental guarantees) and 79 (journalists) as declaratory of custom.” See Greenwood, *supra* note 18, at 103. See also EDWARD KWAKWA, *THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION* 26 (1992); THEODOR MERON, *WAR CRIMES LAW COMES OF AGE* 179–80 (1998).

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customary law.<sup>22</sup> This applies, for example, to the basic rules that concern methods and means of warfare, such as those contained in Article 35(1), which declares that the right of the parties to a conflict to choose methods or means of warfare is not unlimited, and to Article 35(2), which prohibits the employment of weapons, projectiles and material and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering. These provisions basically follow Articles 22 and 23(e) of the Hague Regulations, which excluded the unlimited use of means of warfare and contained the prohibition on employing arms, projectiles or material calculated to cause unnecessary suffering. It is true that Protocol I uses, additionally, the term “methods of warfare” in order to define the scope of the prohibition and that the addition could be regarded as introducing a new element, which would only have the status of a treaty rule.<sup>23</sup> It is submitted, however, that the addition is a mere clarification of the already existing customary rule reflected in the Hague Regulations rather than a new rule aiming at its development. Indeed, the prohibition against employing certain means of warfare appears to include both the choice of weapons and the way in which weapons are employed.<sup>24</sup>

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22. It has to be noted that a Trial Chamber of the ICTY has considered that:

[I]t is the Hague Convention (IV) of 1907 respecting the Laws and Customs of War on Land (hereinafter “the Regulations of The Hague”), as interpreted and applied by the Nuremberg Tribunal, which is the basis for Article 3 of the Statute. Hence, although Article 3 of the Statute subsumes Common Article 3, it nevertheless remains a broader provision inasmuch as it is also based on the Regulations of The Hague which, in the opinion of the Trial Chamber, also undoubtedly form part of customary international law.

See *Blaskic case*, *supra* note 17, ¶ 168.

23. See Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977*, 299 INTERNATIONAL REVIEW OF THE RED CROSS 98 (1994), where it is stated that “while this rule derives from the principle expressed in HR, Article 23(e), international legislation was required to make it positive law.”

24. See Greenwood, *supra* note 18, at 104. It has to be noted in this context that Article 35 was adopted by consensus at the Geneva Diplomatic Conference and that some participating States made declarations that confirm the customary nature of paragraphs (1) and (2) of Article 35. In particular, the Federal Republic of Germany joined the consensus with the “understanding that paragraphs 1 and 2 reaffirm customary international law” and that paragraph 3 constitutes a new conventional rule. It should also be noted that the addition of the term “superfluous injury” to the term “unnecessary suffering” is to be regarded as simply aiming at rendering in English the expression “*maux superflus*” contained in the French text of Article 23(e). See Meyrowitz, *supra* note 23, at 104–5.

Similar considerations apply in this context to the provisions prohibiting acts that go beyond ruses of war and amount to perfidy (Article 37) or declarations that no quarter will be given (Article 40), and others that clearly follow the corresponding provisions of the Hague Regulations. Equally, most of the provisions concerning combatant and prisoner-of-war status (Articles 43 to 47) restate rules already expressed in the Hague Regulations or in the Geneva Conventions of 1949, which are largely considered as reflecting customary international law<sup>25</sup> even though the customary nature of some additions have been questioned in legal doctrine. This is the case, in particular, of the provision of Article 44(3) concerning the requirement that combatants distinguish themselves from the civilian population. While this requirement clearly reflects an existing principle, the provision differs from customary international law especially as regards the situation in which combatants are unable to distinguish themselves; therefore, the criteria set forth in Protocol I have to be regarded as new conventional rules.<sup>26</sup>

As regards the protection of civilians and the civilian population against the effects of hostilities, there is no doubt that the principle of distinction as set forth in Article 48 of Protocol I, both as regards the distinction between combatants and noncombatants and between civilian objects and non-civilian objects, reaffirms a general rule of international law that has never been questioned despite being frequently disregarded in State practice. The same applies in this context, at least in general terms, to the definition of civilians and the civilian population (Article 50) and to the general protection they shall enjoy against dangers arising from military operations (Article 51), in particular through the prohibition of indiscriminate attacks, as well as to the general rule on protection of civilian objects (Article 52). The specificity of these provisions appear mainly to be detailed clarifications of existing recognized rules rather than additions aimed at their development.<sup>27</sup>

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25. See e.g., Jean-Marie Henckaerts, *Study on Customary Rules of International Humanitarian Law: Purpose, Coverage and Methodology*, 81 *INTERNATIONAL REVIEW OF THE RED CROSS* 660 (1999).

26. See in particular L. Penna, *Customary International Law and Protocol I: An Analysis of Some Provisions*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES, IN HONOUR OF JEAN PICTET* 214–5 (Christophe Swinarski ed., 1984); and Greenwood, *supra* note 18, at 107, where it is also noted that Article 44(3) was one of the most controversial provisions inserted in Protocol I, and has been identified by the United States as a major reason for its decision not to ratify the Protocol.

27. As to the role of Protocol I in clarifying pre-existing customary law, see Hans-Peter Gasser, *Negotiating the 1977 Additional Protocols: Was it a Waste of Time?*, in *HUMANITARIAN LAW OF ARMED CONFLICTS*, *supra* note 10, at 85–6.

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It has to be noted in this regard that a Trial Chamber of the ICTY has, with respect to Articles 51(2) and 52(1) of the Protocol, expressed the view that these provisions “are based on Hague law relating to the conduct of warfare, which is considered as part of customary law.” The Chamber concluded that:

[T]o the extent that these provisions . . . echo the Hague Regulations, they can be considered as reflecting customary law. It is indisputable that the general prohibition of attacks against the civilian population and the prohibition of indiscriminate attacks or attacks on civilian objects are generally accepted obligations. As a consequence, there is no possible doubt as to the customary status of these specific provisions as they reflect core principles of humanitarian law that can be considered as applying to all armed conflicts, whether intended to be international or non-international conflicts.<sup>28</sup>

A similar consideration can be made as concerns the principle of proportionality as set forth in Article 51(5)(b), according to which an attack on a military objective is prohibited when it would cause excessive injury to civilians or damage to civilian objects in relation to the concrete and direct military advantage anticipated.<sup>29</sup> Admittedly, the extent to which these provisions correspond to customary law has been questioned, because the formulation adopted appears to contain a number of specifications that can not be found in previous declarations of the same principles. However, it has also been pointed out that such specifications are aimed at clarifying the scope of the principles rather than at adding new elements that would lead to the modification of their content or effects.<sup>30</sup> While it is possible that the interpretation of certain expressions used in Protocol I may lead to improvements that could result in a departure from existing customary law principles, it is certain that such improvements would be considered as forming part of the natural development of customary law rather than as constituting mere treaty provisions.

In the same line of reasoning, it may be assumed that the provisions of Articles 57 and 58, prescribing that precautionary measures should be taken in conducting an attack, as well as against the effects of attacks, are mere qualifications of the general principles of distinction and proportionality, although

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28. Prosecutor v. Kordic and Cerkez, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, I.C.T.Y. No. IT-95-14/2-PT, Mar. 2, 1999, ¶ 31.

29. See Greenwood, *supra* note 18, at 109; Penna, *supra* note 26, at 220.

30. As to the specifications contained in Article 51(5)(b), see, e.g., MERON, *supra* note 18, at 65.

they may be seen as going beyond customary law.<sup>31</sup> It is interesting to note that the customary nature of these provisions has been recently affirmed by a Trial Chamber of the ICTY, not only because they specify pre-existing norms, but also because they appear to be uncontested by States, even non-ratifying States. The Chamber went on to state that when a rule of international humanitarian law is somewhat imprecise, it must be defined with reference to the laws of humanity and dictates of public conscience espoused in the celebrated “Martens clause,”<sup>32</sup> which constitutes customary law. As a result, the Chamber concluded that the prescriptions of Articles 57 and 58, and of the corresponding customary rules, must be interpreted “so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.”<sup>33</sup>

While most of Protocol I can undoubtedly be regarded as essentially reflecting customary international law, there are areas where this conclusion is subject to debate for two reasons. First, Protocol I clearly sets forth some new rules. Secondly, the specificity of Protocol I’s provisions add new elements to principles that, while well established in customary law, leave margins of discretion to belligerent States. Belligerent States are then free to argue that such specifications will limit or may limit discretion if they are given certain interpretations. The scope and impact of these additions is therefore controversial and may be the basis for the hesitations of some States to ratify Protocol I. Indeed, Protocol I’s ratification would require that the interpretation of its principles should be conducted according to the relevant criteria of the law of treaties, which are not applicable to the corresponding rules as recognized in customary international law.

Some areas appear to be especially significant in this respect, in particular those relating to the protection of the civilian population and civilian objects. For instance, the presumption expressed in Article 50(1) that in case of doubt as to whether a person is a civilian, that person should be considered as having

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31. See Greenwood, *supra* note 18, at 111.

32. The Martens clause first appeared in the preamble to the Hague Convention (II) of 1899. It states:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the law of humanity, and the requirements of the public conscience.

33. Kupreskic case, *supra* note 19, ¶¶ 521–25. The issue was not considered on appeal. See Prosecutor v. Kupreskic et al., Appeal Judgement, I.C.T.Y. No. IT-95-16-A, Oct. 23, 2001.

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such status, and the provision of Article 52(3) that an object normally dedicated to civilian purposes shall, in case of doubt as to its being used to contribute to military action, be presumed not to be so used. These provisions do not seem to derive automatically—although it would certainly be desirable<sup>34</sup>—from the principle of distinction as settled in customary international law, which appears to leave it to the attacker to decide how to determine the status of the military objective.

There seems to be no doubt that the definition of military objectives contained in Article 52(2) corresponds to existing principles as reflected in customary international law and simply clarifies them. However, if the clarifications of the definition are considered as being open to different interpretations of the scope of the obligations imposed on the attacker, then that would be incompatible with a consideration of the provision as fully reflecting customary law. Expressions such as “effective contribution to military action” or “definite military advantage” may not be sufficiently precise for the purpose of establishing a safe basis for a rule of customary international law.<sup>35</sup> On the other hand, it has also been submitted that the definition enshrined in the second sentence of Article 52(2) is such that it should be deemed to include not only civilians, but combatants as well. If, indeed, the implicit *ratio legis* for such provision is the same that underlies the principle that superfluous injury or unnecessary suffering should be avoided, there is no reason why the provision should not apply to attacks against members of armed forces as well.<sup>36</sup>

Similarly, the obligation to protect the natural environment against widespread, long-term and severe damage, which includes the prohibition of the use of methods or means of warfare which are intended or may be expected to

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34. See in particular Frits Kalshoven, *Reaffirmation and Development of Humanitarian Laws Applicable in Armed Conflicts*, 9 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 112 (1978).

35. The possibility of a wide interpretation of legitimate objectives under Protocol I is underlined, among others, by Peter Rowe, *Kosovo 1999: The Air Campaign: Have the provisions of Additional Protocol I withstood the test?*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 147 (2000). See also Penna, *supra* note 26, at 219, who points out that Article 52(2) may be regarded as customary law, but recognizes that the definition of military objectives contained therein is far from being precise and that “customary international law at present allows belligerents to regard legitimate civilian objects serving directly or indirectly the enemy war effort as ‘military objectives’.”

36. For this approach see Meyrowitz, *supra* note 23, at 115, who states that “strictly speaking, the extension of the rule stated in Article 52(2) to combatants would not have the purpose of protecting them, but of excluding them, under certain circumstances, from the definition of military objectives that may lawfully be attacked.”

cause such damage (Article 35(3)), in particular when the health or survival of the population may be prejudiced (Article 55), finds no clear precedent in existing customary law, as was acknowledged by some States who participated in the drafting of Protocol I.<sup>37</sup> Although subsequent development of a customary principle of respect for the environment in warfare may be in progress,<sup>38</sup> its scope is certainly far from being assessed and recognized. It may be also noted, in this connection, that the said provisions appear to affirm a principle of protection in absolute terms, applicable irrespective of a reference both to the principles of proportionality and of distinction. It must be noted, in this respect, that Article 55 refers to population without the qualification “civilian.”

A final area that may deserve special attention, since it is subject to debate, concerns the prohibition of reprisals against civilians and protected objects, which are referred to in Articles 51 to 56 of Protocol I. It is well known that the controversy on this matter has been and still is important, and different views have been expressed both at the Geneva Diplomatic Conference where Protocol I was negotiated and subsequently. The dominant view is probably that the provisions of Protocol I neither reflect pre-existing customary law nor have subsequently reached that nature, but contain significant developments in this regard.<sup>39</sup>

Interestingly, the issue was considered by a Trial Chamber of the ICTY,<sup>40</sup> which discussed whether the Protocol’s provisions on reprisals against

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37. See Greenwood, *supra* note 18, at 101, where it is stated:

Article 35(3) . . . is more contentious and, unlike the rest of Article 35, was not based upon the provisions of earlier treaties. Nor could it be said that State practice prior to 1977 provided much support for the existence of such a rule. Although the Article was adopted by consensus, the Federal Republic of Germany stated that it participated in that consensus on the understanding that Article 35(3) introduced a new rule. Subsequent United States statements regarding Article 35(3) take the same position. . . . Article 55 is closely linked to Article 35(3) and should be regarded as having the same status.

38. See NATALINO RONZITTI, *DIRITTO INTERNAZIONALE DEI CONFLITTI ARMATI* 161 (2d ed. 2001).

39. For the state of international customary law before Protocol I, see FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 375 (1971), who concludes, after a thorough consideration of State practice, that belligerent reprisals have not so far come under a total prohibition, and further notes that “the power of belligerents to resort to belligerent reprisals can only be effectively abolished to the extent that other adequate means take over their function of law enforcement.” For a recent consideration of the issue, see RONZITTI, *supra* note 38, at 180.

40. Kupreskic case, *supra* note 19, ¶¶ 527–36. The issue has not been raised on appeal. See the Appeal Judgment, *supra* note 33.

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*To What Extent is Protocol I Customary International Law?*

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civilians in combat zones (Article 51(6)) and reprisals against civilian objects (Article 52(1)) have been subsequently transformed into general rules of international law. Assuming that the mentioned provisions were not declaratory of customary law, the Chamber expressed the view that the universal revulsion towards reprisals, as well as their trampling on the most fundamental principles of human rights, have contributed to the emergence of customary law on the matter. The Chamber also recalled the requirements of humanity and dictates of public conscience espoused in the Martens clause, stating that the pressure stemming therefrom has resulted in the formation of customary law on reprisals. It further maintained that *opinio juris* existed to support the view that these rules have become a part of customary law. It pointed to circumscriptions on reprisals in modern warfare contained in the military manuals of States, including the United States; the adoption by the United Nations General Assembly of a resolution in 1970 stating that civilian populations should not be the object of reprisals; and the ratification of Protocol I by a large number of States. It further pointed out that another Trial Chamber also held the view that reprisals against civilians must always be prohibited.<sup>41</sup> In addition, it stated that in the armed conflicts of the last fifty years, States have normally not asserted the right to undertake reprisals against enemy civilians in the combat area. Whatever consideration be given to this judgment,<sup>42</sup> it is undeniable that it may play an important role in assessing the legitimacy of reprisals against civilians and protected objects, and in developing customary international law that reflects the provisions of Protocol I in this area.

Other examples could be cited in examining the extent to which Protocol I reflects pre-existing customary international law and its contributions to clarifying the content and scope of customary law. However, at this stage it seems that some conclusions can be drawn in light of the present practice. A slow but continuous trend towards recognizing the general value of the provisions contained in Protocol I, especially as far as they are intended to set forth well established customary principles or improve their definitions, is largely

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41. See Prosecutor v. Milan Martić, Review of Indictment Pursuant to Rule 61, I.C.T.Y. No. IT-95-11-R61, Mar. 8, 1996, ¶¶ 10–18.

42. For the position that the invocation of the Martens clause can hardly justify the conclusion that the combined effect of the clause and *opinio juris* can transform the prohibition on reprisals against civilian objects into customary law binding on States that have not ratified Protocol I or have dissented from the prohibition of reprisals, see Theodor Meron, *The Humanization of Humanitarian Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 250 (2000).

discernible in international practice and legal doctrine.<sup>43</sup> The increasing number of State ratifications is corroborative of this growing trend, together with the emerging case law of international judicial bodies, which tends to more frequently underline human values in assessing the content of customary international law.

Except perhaps in some cases where it is clear that no customary rule exists, the areas in which Protocol I has encountered the most difficulty in developing into customary law appear to be the areas where the Protocol itself, because its provisions and the definitions contained therein are not sufficiently clear and well shaped, is subject to different interpretations. In other words, the diverging approach to such provisions lies in their interpretation. In this regard, it has to be noted that the resistance to ratify Protocol I may also lie in the different rules of interpretation that would apply in establishing the scope of the principles enshrined in the Protocol, should the latter be regarded as treaty provisions instead of principles of customary international law.

In light of these conclusions drawn twenty-five years after Protocol I was adopted, one can doubt whether it was drafted in a way intended to help the development of customary law. Unclear treaty rules can hardly develop into customary law and may frequently be opposed by States which may fear being bound by interpretations they would not be in the position to accept. By way of example, a list of military objectives would have helped the formation of customary law, at least as far as the list is concerned, even though it would have been necessary to recognize that the list was not exhaustive. The lack of such a list, due to only partially different views of States as to its scope, does not provide any help in this regard.<sup>44</sup> Although it cannot be denied that Protocol I has had an impact on pre-existing customary law,<sup>45</sup> it may be submitted that Protocol I could have made a far greater contribution to its development.

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43. In this connection, the potential impact of Protocol I on the state of customary law has been stressed by Gasser, *supra* note 27, at 87.

44. For a different view, see FRITS KALSHOVEN AND LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR* 101 (2001).

45. For a discussion of this issue, see Yoram Dinstein, *The New Geneva Protocols: A Step Forward or Backwards?*, 33 *YEAR BOOK OF WORLD AFFAIRS* 269 (1979); and, with regard to reprisals against civilians, *Commentaires au sujet du Protocole I*, 79 *REVUE INTERNATIONALE DE LA CROIX ROUGE* 553 (1997).