

BOOKS AND REVIEWS

COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949¹

The *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* has just been published by the ICRC. This impressive 1647-page work has been produced by a brilliant team of ICRC legal experts² under the formidable intellectual guidance of Mr. Jean Pictet, who supervised the publication of the four Commentaries on the 1949 Conventions.

As the custodian of humanitarian law, the ICRC is the appropriate body to make a fresh contribution to knowledge of this law. This book has been eagerly awaited by all those responsible for implementing and disseminating humanitarian law. Obviously, those who did not take part in the Diplomatic Conference when these Protocols were drawn up cannot always grasp the exact scope of the texts, often extremely complex or obfuscated by compromises achieved at the expense of clarity.

As the President of the ICRC, Mr. Alexandre Hay, points out in his foreword, this Commentary is first and foremost the outcome of a scholarly investigation and not a work intended to propagate the opinions of the ICRC. Nonetheless, this self-effacement must not cause us to forget that a work such as this also contributes greatly towards the interpretation of humanitarian law. Of course, the Commentary, like its predecessors, is not a definitive interpretation of the Protocols. Their interpretation is initially the responsibility of the Contracting Parties (acting alone or together in accordance with the procedure laid down in Article 7, Protocol

¹ The English edition is expected to appear during the current year; page references in this article are to the French edition.

² *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. **Authors:** C. PILLOUD, J. DE PREUX, Y. SANDOZ, B. ZIMMERMANN, Ph. Eberlin, H.-P. Gasser, C.F. Wenger (Protocol I); PH. EBERLIN (Annex I); S.-S. JUNOD (Protocol II), with the collaboration of J. PICTET. **Editing and co-ordination:** Y. SANDOZ, CH. SWINARSKI, B. ZIMMERMANN, the International Committee of the Red Cross, *Martinus Nijhoff Publishers*, Geneva, 1986 xxxv + 1647 pages.

I) and then of the International Court of Justice, the role of which should not be overlooked. In the latter case, the Commentary's key position must be heeded, both as the interpretation of highly qualified commentators and as an aid in elucidating the rules of international law, in accordance with Article 38 of the Court's Statutes.

First and foremost, the scholarly nature of the work is irrefutable. With its disciplined, clear and elegant layout, the Commentary makes for easy reference. Various developments are dealt with in the general introduction. The abundance of notes referring to the Conference documents and to the Principles, plus a selective but copious bibliography, make this work an indispensable tool, particularly for those doing research. Its cohesiveness derives from the perfect co-ordination amongst the various authors commenting on the articles. The mission has been fully accomplished. However, let us now go on and examine the interpretation aspect.

We are quite aware that a State which claims to respect the law but does not intend to apply it uses interpretation as a kind of privileged battlefield. The danger with the Protocols is all the greater, not only because of the political manœuvring which prevailed during the Conference but perhaps still more so because the Protocols (particularly Protocol I) have ramifications within different branches of law: the right of self-determination, the Law of The Hague, human rights. Either this is a cause for rejoicing, since such overlapping aims to improve the protection of mankind and the merging, albeit limited, of the law of armed conflicts makes it easier to interpret; alternatively, the confusion due to lack of differentiation is a cause for concern in that it might make it easier for States to usurp humanitarian law and use it for their own political ends. Nevertheless, it has to be pointed out that these different branches of the law of conflicts correspond to different thought processes. Depending on the logical context, this cannot fail to encourage conflicting interpretations. Likewise, the resounding reaffirmation of sovereignty, notably in Protocol II—the *quid pro quo* for the improved protection it affords—will not necessarily make its application easier, since sovereignty is always inclined to consider only the immediate and the particular and, if expedient, to reject the permanent and universal values of the human race. Hence, the Commentary constantly reminds us of the background against which the Protocols were drawn up and, bearing in mind why the Protocols exist, of the humanitarian purpose which must always govern interpretation of the rules; the reminder is important and it is in the light of these circumstances that the contribution of this volume must be assessed (owing to its scale, it cannot be described here in detail).

Undoubtedly, prudence and objectivity at times prevented the authors of the Commentary from spelling out which interpretation should prevail. President Hay has issued a timely reminder that the ICRC may have its own interpretation which, should the need arise, it has the right to have accepted by a State which has decided to interpret the law in a different fashion. Under such circumstances, the authors of the Commentary could

not reply to questions deliberately left unanswered: for example, what are the criteria which determine the racist nature of a political regime—the armed struggle against which then takes on the form of an international armed conflict? Nor could they give any guarantee to States reluctant to accept certain provisions in Protocol I, particularly as regards nuclear weapons. The unwillingness of States to negotiate concerning these weapons is indeed noted; yet, contrary to certain tenets which unswervingly proclaim the opposite, customary law leaves open the question of knowing to what extent the employment of nuclear weapons is lawful or not: “in fact, the debate on the legality, in war, of certain uses of nuclear weapons is reopened in the Protocol, but the circumstances have not really changed” (page 604).

On the other hand, when dealing with such an important and controversial question as the obligation on the State, in the interest of its citizens, to respect the fundamental guarantees provided for in Article 75 of Protocol I, the authors of the Commentary, after rigorous analysis, do not hesitate to state that this obligation exists, “unless there is a contrary indication in the Article itself” (page 860). Also, in opposing the excessive claims of Sovereignty, the Commentary on Article 18 of Protocol II issues a very timely reminder that a humanitarian body, when authorized to intervene, shares responsibility with the government; it must particularly ensure that assistance reach the beneficiaries and not be misappropriated.

These few remarks do scant justice to the richness of this work. Undoubtedly this Commentary is not the final word—the meaning of the new regulations laid down in the two Protocols will continue to be pondered upon. Indeed, those who expound the law must also endeavour to ensure that interpretations ever more consonant with the needs of humanity prevail. Through its lucid rigorousness and objectivity, this Commentary should help to speed up ratification of the Protocols which, beyond any shadow of a doubt, give better protection to all the victims of armed conflict.

With the publication of several first-rate works, 1986 has been a fruitful year for propagating knowledge of humanitarian law. We would like to see this as a sign that, despite all the deficiencies of this law, those who feel it their duty to heighten public awareness are not giving up the fight.

Maurice Torrelli *

* Maurice Torrelli is a professor at the Institute of Peace and Development Law of Nice University. Among his publications is *Le Droit international humanitaire*, Presses universitaires de France, Paris, 1985, Collection «Que sais-je?», n° 2211.