

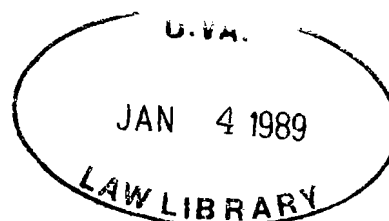
**CONFERENCE OF GOVERNMENT EXPERTS ON
the Reaffirmation and Development of
International Humanitarian Law Applicable
in Armed Conflicts**

Geneva, 24 May - 12 June 1971

VI

RULES APPLICABLE IN GUERRILLA WARFARE

**Submitted by the
International Committee of the Red Cross**



**Geneva
January 1971**

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LIST OF ABBREVIATIONS

Article 3	Article 3 common to the four Geneva Conventions of 12 August 1949.
Commentary III	Commentary on the Geneva Convention relative to the Treatment of Prisoners of War, Geneva, 1960.
Ist Gen. Conv. 1949	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.
IIInd Gen. Conv. 1949	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949.
IIIrd Gen. Conv. 1949	Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.
IVth Gen. Conv. 1949	Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949.
Document I	Introduction (CE/1).
Document II	Measures intended to reinforce the implementation of the existing law (CE/2).
Document III	Protection of the civilian population against the dangers of hostilities (CE/3).
Document IV	Rules relatives to behaviour of combatants (CE/4).
Document V	Protection of victims of non-international armed conflicts (CE/5).

Document VII	Protection of the Wounded and Sick (CE/7).
Document VIII	Annexes (CE/8).
FMAC	Fédération Mondiale des Anciens Combattants (World Veterans Federation).
G.A.	United Nations General Assembly.
Hague Regulations	Hague Convention No. IV, Annex. Regulations Respecting the Laws and Customs of War on Land. 18 October 1907.
ICRC	International Committee of the Red Cross.
Para.	Paragraph.
Protocol of Geneva	Protocol of Geneva, 17 June 1925, for the Prohibition of the use in war of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare.
Report of the ICRC on Reaffirmation	Report on Reaffirmation and Development of the Laws and Customs applicable in Armed Conflicts, Geneva, May, 1969. Report submitted by the International Committee of the Red Cross to the XXIst International Conference of the Red Cross, Istanbul, September, 1969.
Report Secretary-General A/7720	Report of the UN Secretary-General on Respect of Human Rights in Armed Conflicts, A/7720, 20 November 1969.

Report Secretary-
General A/8052

Report of the UN Secretary-
General on Respect of Human Rights
in Armed Conflicts, A/8052, 18
September 1970.

U.N.

United Nations Organization.

INTRODUCTION

"The Red Cross", wrote Max Huber, "concerns itself essentially with human beings in distress and victims of war, not States or their special interests. The fate of human beings is independent of the legal character which belligerents wish to give to their struggle. The Red Cross, the ICRC in the forefront, must always endeavour to extend the principles laid down by treaties to all circumstances analogous to war".

The activities undertaken by the ICRC and the Red Cross in general on behalf of the victims of guerrilla warfare go back a long way in time. In non-international conflicts (or "civil wars", as they used to be called) as much as in international (for instance the resistance movements fighting occupation forces during the Second World War), the ICRC has always endeavoured to ensure that certain essential humanitarian principles were respected, even before the 1949 Geneva Conventions had enshrined in law that which had been possible in practice. However, even the insertion of Art. 4 A (2), intended to grant prisoner of war status to members of resistance movements, was to prove inadequate. The ICRC, therefore, resolved, after having obtained the introduction of many concrete improvements during the conflicts that broke out after the adoption of the Geneva Conventions, and on the basis of its practical experience and of consultations with international experts, to include the question of guerrilla warfare in the whole vast undertaking of the reaffirmation and development of laws and customs applicable in armed conflicts (see document I, "Introduction").

Following the XXIst International Conference of the Red Cross (Istanbul, 1969), the ICRC arranged, on a private and personal basis, a series of consultations with various experts. The views expressed were in part incorporated in the "Preliminary Report on the Consultations of Experts concerning Non-International Conflict and Guerrilla Warfare" (D 1153), sent to the Secretary-General of the

United Nations early in August 1970. The ICRC would like once again to express its thanks to the experts who kindly helped it to clarify the delicate problems raised by the application of humanitarian law to guerrilla warfare; it also would like to thank the organizers of scientific discussion meetings, such as the Conference organized by the University of Brussels in January 1970 on the subject "Humanitarian Law and Armed Conflicts", which produced many new considerations on this theme.

It is not the object of this report to define guerrilla warfare 1/ - besides, neither its authors nor the experts have yet agreed upon a single and universally acknowledged definition - nor is it to propose specific rules applicable solely to guerrilla warfare. Its contents are more unassuming : some of the characteristics of this method of warfare, which has been employed since ancient times but which has developed considerably within the last few years, will at first be singled out, after which an attempt will be made to see how far the existing humanitarian rules may and should be applied in guerrilla warfare, and how far the adjustment of some of these rules may be necessary, in the interest of all the parties involved.

When considering the characteristics of guerrilla warfare, the following may be noted :

- the word "guerrilla" is not intended to signify a category of conflict, but a particular method of waging war which may be used in international as well as in internal conflicts;
- it is not a new form of fighting, since it was given the name of "guerrilla" during the Spanish people's resistance against Napoleon's armies. Its development during the Second World War led to the insertion of para. 2 in

1/ The term "guerrilla warfare", from the diminutive of "guerra" (Spanish for "war"), was chosen rather than other similar expressions, for instance "partisan war", "revolutionary war", "people's war", "war of insurrection", "subversive war", "resistance struggle", not to speak of variants in other languages, in the hope that a term as objective as possible, which would cover all the situations in which this method of fighting is employed today, might be adopted.

Article 4 of the Third Geneva Convention, at the time the Geneva Conventions were revised, to cover resistance movements. Since 1949, the majority of conflicts have included guerrilla operations, often within the framework of anti-colonial "wars of liberation", which are essentially nationalistic and ideological.

- guerrilla warfare cannot be contained within a single and universally accepted definition; it takes on different aspects in different regions, and even at different times during the same conflict. This diversity is also to be encountered at the level of the guerrilleros 2/, who may be representative of an entire range of very different kinds of combatants, operating, for example, as regular units, or regional or local forces, or isolated commando groups.

According to the ICRC report on Reaffirmation, the experts consulted in 1969 had already pointed out the difficulty of defining guerrilla warfare which is made up of a series of completely different stages in which the laws and customs of war are not always equally applicable 3/. This difficulty still subsists, and in this paper, it is not a legal definition of guerrilla warfare that will be attempted but rather the basic rules applicable in time of armed conflict so as to ensure the respect of the human being in the victims of guerrilla fighting, to whichever party they may belong. There has arisen an imperative need for the protection of the victims of this method of warfare. In the so-called conventional type of conflict, between regular armies, certain rules limiting the means to injure the enemy and ensuring a certain degree of protection to the victims have been drawn up, down to the details reached in the 1949 Geneva Conventions. Even if the special difficulties regarding guerrilla warfare, which would of course have to be taken into account when

2/ As already mentioned in the previous footnote, the term "guerrillero" was chosen for convenience's sake; "partisan" or "resistance fighter" may be considered to be equivalent terms. Guerrilleros often adopt or are given special names, such as "freedom fighters" in "wars of national liberation", or even in specific conflicts names such as "fedayeen", "Tupamaros", "Mau-Mau", etc...

3/ Report on Reaffirmation, p. 115. See also, for guerrilla warfare, pp. 112-121 and 078 (of the short bibliography).

drafting the proposed rules, were to be admitted, it should not be impossible, whatever might be the field of operations of the guerrilla, to state and to ensure the observance of certain basic humanitarian rules for the protection of victims. These rules will be examined under the following sub-headings :

- Combatants : with a view to ensuring better protection of all persons taking part in a conflict where guerrilla warfare is resorted to, the conditions of Article 4. A. (2) of the Third Geneva Convention of 1949 relative to the Treatment of Prisoners of War will be examined, and an interpretative Protocol of these conditions will be proposed;
- Civilians : application in guerrilla warfare of the general rules intended to protect the civilian population in the event of military occupation or against the dangers of hostilities 4/;
- Methods of warfare : problems arising from the application in guerrilla warfare of the laws and customs relative to the conduct of hostilities 5/;
- Conclusions and Proposals: model basic rules which the parties to a guerrilla conflict might undertake to respect.

The two essential points in this document are those considered in Section II ("Combatants") and Section VI ("Conclusions and Proposals"). In the section on combatants, the ICRC attempts to draw the broad outlines of an interpretative Protocol which, subject to certain reservations which will be mentioned, could be considered to be generally valid for both international and internal conflicts. In the conclusions and proposals, the ICRC submits

4/ On this subject, see also document III ("The Protection of the Civilian Population against the Dangers of Hostilities").

5/ On this, see also document IV ("Rules relative to Behaviour of Combatants").

to the experts some minimum humanitarian rules which, unlike existing instruments or other proposals presented in various documents, should not influence in any way either the qualification of the conflict or the legal status of the parties.

Whether or not its observations and proposals are accepted, the ICRC cannot insist too much on the fact that no conflict, no type of warfare, should be considered as outside the pale of law, especially of humanitarian law, and that no improvement in favour of one of the parties can fail to have favourable consequences for the victims of the other. It is in this sense that the present document, animated by the Red Cross principles of humanity and impartiality, has been written and should be understood.

II. COMBATANTS

1. Preliminary remarks

Several of the experts consulted by the ICRC considered that the term "combatant" was not appropriate, because it prejudged the legal status of the individuals engaged in the struggle. They proposed saying "those directly participating in military operations" or "protagonists in a conflict" 1/.

Some of the experts also stressed the importance of the category of persons who benefit from certain rights, but who are, above all, permissible targets. They consequently recommended prudence in the listing of such persons and the broadening of that category.

The ICRC began by pointing out the great diversity of persons taking an active part in guerrilla warfare :

- diversity as regards organization : armed forces constituted of regular and permanent units (both those of the established government and those of the insurgents), police forces engaged in the struggle, regional and local militia, individuals performing acts of sabotage or isolated attacks;
- diversity also as regards their nationality or allegiance : nationals, foreigners (engaged in regular units or as volunteers, military advisors, technical personnel), not to mention deserters and those who go over to the other side.

1/ Cf. also the resolution adopted by the United Nations General Assembly at its 25th session (A/Res/2675/XXV) on "Basic Principles for the Protection of Civilian Populations in Armed Conflicts", where a similar terminology is used, i.e. "Persons actively taking part in the hostilities".

- diversity as to their material means, which cannot fail to influence their respective methods of struggle; and finally,
- diversity in the geographical, political and juridical framework within which these persons combat, which often has a decided effect on their individual legal status.

One particular type of guerrilla warfare can occur in cases of wars of national liberation, concerning which the United Nations General Assembly has adopted numerous resolutions on behalf of the "freedom fighters" 2/. The latest report of the Secretary-General on respect for human rights in time of armed conflict does, however, consider "that, in order to benefit from the protection granted to so-called privileged combatants in international conflicts, freedom fighters have at present to fulfil the conditions laid down in article 1 of the Hague Regulations ..." 3/. One expert consulted by the ICRC on this matter thought that the Geneva Conventions should include members of national liberation movements among the "organized resistance movements" mentioned in Article 4, number 2 of Geneva Convention III of 1949. Others believed that number 3 of the same article ("members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power") could apply to movements having reached a certain state of organization. Some further suggested application of the Geneva Conventions in this type of conflict, invoking the 3rd paragraph of Article 2 common to the four Geneva Conventions of 1949 4/, the war of national liberation being, some

2/ Among the resolutions may be cited Resolution A/RES/2621 (XXV), adopted by the last General Assembly : "All freedom fighters under detention shall be treated in accordance with the relevant provisions of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 Aug. 1949."

3/ Report of the Secretary-General, A/8052, para. 213

4/ The text of this paragraph reads as follows :

"...Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

believed, an international and not an inter-State conflict, a struggle between a constituted State and a State to be constituted 5/. If the application of the Geneva Conventions as a whole were to be obtained, it is quite clear that this would benefit all the parties, whatever the political status assigned to them, as the latter could not have any effect on the individuals concerned 6/.

There may also be guerrilla warfare in a non-international conflict. Without wishing to seek here a definition of this type of conflict, or to deal with the application of the laws and customs of war in such conflicts, these being treated in a special report 7/, it may be interesting to point out that Resolution XVIII 8/, adopted by the XXIst International Conference of the Red Cross at Istanbul in 1969, states that "combatants and members of resistance movements who participate in non-international armed conflicts and who conform to the provisions of Article 4 of the Third Geneva Convention of 12 August 1949 should when captured be protected against any inhumanity and brutality and receive treatment similar to that which that Convention lays down for prisoners of war."

5/ A discussion of the legal characterisation of wars of national liberation does not come within the purview of this report; on this point, we may refer to the report on "Protection of Victims of Non-International Armed Conflicts" (Document V).

6/ Indeed, whatever party is qualified as the aggressor, we believe that the individuals captured should benefit equally from the humanitarian protection granted by international law; individual violations of the laws and customs of war (ius in bello) should not be confused with the eventual responsibility of the aggressor State (ius ad bellum). The latter must, in our opinion, be punished at a different level, politically or even economically.

7/ "Protection of Victims of Non-International Armed Conflicts" (Document V).

8/ "Status of Combatants in Non-International Armed Conflicts". The full text of this Resolution is appended to the present report.

Most of the experts consulted by the ICRC did, however, consider that the conditions listed in Article 4 of Convention III could not be respected in practice in an internal conflict.

It is none the less true that this Resolution reflects a tendency to seek to apply the same conditions to combatants in armed conflicts, whether international or not. The "status of the combatant" will be taken up from that point of view : even if the status of prisoner of war cannot always be conferred, the granting of an analogous treatment should be provided to combatants meeting certain criteria which we are going to analyse below.

Hence, it is as part of the international conflict that we intend first to examine the problem, but we shall see later on that most of the conclusions reached in this context are also valid and necessary for non-international conflicts.

2. Modification or elimination of certain conditions of Article 4 : 9/

Statement of the question

Number 2 of letter A of that Article lists several conditions to be met by combatants not belonging to the armed forces of a party to the conflict, if they are to be recognized as having the status of prisoners of war when captured or surrendering. These conditions are :

- a) that of being commanded by a person responsible for his subordinates;
- b) that of having a fixed distinctive sign recognizable at a distance;
- c) that of carrying arms openly;
- d) that of conducting their operations in accordance with the laws and customs of war.

9/ The full text of this article, as well as of Article 1 of The Hague Regulations are appended to this document.

In addition to these four conditions, taken from Article 1 of The Hague Regulations on the Laws and Customs of War on Land, 1907, the body of the text of Article 4 poses the two following conditions :

- necessity for the resistance movement to be organized; and also
- necessity that the movement "belong to a party to the conflict" (at least a de facto link with a belligerent State).

The experts' opinion

Generally speaking, the experts consider that the conditions of Article 4 must be adapted to the techniques of modern war and to new types of conflicts. The experts propose to modify these conditions by way of interpretation or by a new wording.

a) Belonging to a party to the conflict

This condition, which covers resistance movements in occupied territories, establishes the international responsibility of the State to which they are linked.

Certain recent conflicts have shown the difficulty of its application. One expert consulted by the ICRC thus proposed replacing this criterion by that of the political imperative found to be at the basis of the activity of the movement, in this way permitting it to be distinguished from armed groups seeking only their private interests. Hence, the term "party to the conflict" might, in certain cases, apply to the movement itself 10/

10/ This is, in particular, the opinion expressed in the second report of the Secretary-General A/8052, in paras 214, 230 and 231.

b) Fixed distinctive sign

In the report on Reaffirmation, the ICRC incorporated the conclusions of the FMAC 11/, according to which "this sign must be distinctive, thus permitting identification in contrast to the peaceful population ..., fixed, in the sense that the resistant should wear it throughout all the operation in which he takes part and ... recognizable at a distance by analogy to the uniforms of the regular army." We may point to the similar conclusions of the Secretary-General of the United Nations, when he writes : "Possibly, a fixed distinctive sign recognizable at a distance should be worn, at least in all circumstances where concealment would directly jeopardize the lives or liberty of civilians 12/." In its appeal to the parties in conflict in Vietnam on 11 June 1965, the ICRC recalled, in particular, that "all combatants captured in uniform or bearing a sign clearly indicating that they are part of the armed forces must have their lives spared and, as prisoners of war, be given humane treatment 13/."

Most of the experts consulted by the ICRC did, however, advocate abandoning the requirement of a fixed distinctive sign; some proposed replacing it by an analogous and broader criterion, namely that the struggle be carried on openly, without the combatants hiding their military status.

This requirement would thus be maintained as secondary or alternative to the one "openly carrying arms" : when this latter condition is not fulfilled, combatants would then have to wear a "fixed distinctive sign" to permit them to be distinguished from the civilian population. Furthermore, it must be agreed that this "sign" is to be interpreted broadly : it might be an armband, a head-dress, part of a uniform, etc.

11/ Fédération Mondiale des Anciens Combattants (World Veterans Federation). Conclusions and Recommendations adopted by the consultative group of experts meeting in Paris, Feb. 1967.

12/ Report of the Secretary-General A/8052, para 177. Same opinion in para 191 (iii) as well as in 230, letter (b).

13/ cf. ICRC, Annual Report 1965, page 8.

c) Carrying arms openly

The Reaffirmation report, on this point as on the previous one, adopted the conclusions of the FMAC, considering that "when the resistance fighter is engaged in operations, he shall carry the weapons in his possession in a similar way to members of the regular forces" 14/. The second report of the Secretary-General of the United Nations also accepts the conclusions of the FMAC, specifying that this condition, more important than the requirement of the fixed distinctive sign, which it could replace, might be more explicitly stated by saying that "all members of militias, volunteer corps and other organized movements should carry arms in a way which is similar to that utilized by members of regular armed forces, when they are engaged in operations which can reasonably be expected to require the use of weapons. This would cover actual combat and operations preparatory, in a direct manner, to the combat (for instance, infiltration into enemy lines), but not ancillary activities such as information-gathering and propaganda among civilians 15/."

14/ Reaffirmation Report, pp. 117 and 070. Cf. also Commentary of Convention III, Art. 4,2, c), p.61 :
 "although the difference may seem slight, there must be non confusion between carrying arms "openly" and carrying them "visibly" or "ostensibly". Surprise is a factor in any war operation, whether or not involving regular troops. This provision is intended to guarantee the loyalty of the fighting, it is not an attempt to prescribe that a hand-grenade or a revolver must be carried at belt or shoulder rather in a pocket or under a coat.

The enemy must be able to recognize partisans as combatants in the same way as members of regular armed forces, whatever their weapons. Thus, a civilian could not enter a military post on a false pretext and then open fire, having taken unfair advantage of his adversaries."

15/ Report of the Secretary-General A/8052, para 177 and 178. Cf. also para 191 iv) and 230 c).

As for the experts consulted by the ICRC, they too insist on the requirement, adapted of course to present-day combat conditions, that the guerrillas should be recognizable as combatants before opening fire, so as to protect the civilian population as far as possible, and to preserve a certain honourability in the combat.

d) Responsible person and organization

In the Reaffirmation report, we find it stated that "this requirement of a certain organization and of responsible leader seemed essential to the experts 16/". A footnote refers to the Commentary of the Geneva Conventions, volume III, pages 64-66, adding: "This is the most important condition, which in a way guarantees the legality of the armed struggle. It is moreover entirely compatible with the very nature of guerrilla warfare."

In an international conflict, the "responsible leader" establishes a link with the subject of international law, while constituting the guarantee of a certain order, a certain discipline ensuring respect for international law.

Certain experts consulted by the ICRC considered that it was not a matter of there being a unique organization, nor of knowing the names of the one or more responsible persons, but far rather, as the Secretary-General of the United Nations stated in his second report, of having a "command... capable of ensuring generally the execution of its orders, including, as far as possible, respect of the laws and customs of war ..." 17/. That, indeed is the essential aim of such a condition, which leads us to examining the final requirement, namely, respect for the laws and customs of war.

16/ Reaffirmation report, p. 116.

17/ Report of the Secretary-General A/8052 para. 176.
Cf. also 191 b) and 230 ii.

e) Respect for laws and customs 18/

Several experts brought out the fact that, while all belligerents are required to observe the laws and customs of war, this requirement is even greater for guerrillas, since for them alone it is the constitutive element to obtain the status of prisoner of war in case of capture. The members of the regular armed forces, in fact, when captured, retain their status as prisoners of war, this being in virtue of Articles 4, 5 and 85 of Geneva Convention III of 1949.

A further clarification, some experts add, is that the movement as a whole must fulfil this obligation, and that individual violations have an impact only on the status of the perpetrator 19/.

As the consultative group of experts convened by FMAC in 1967 stressed, such observance also presupposes that "the resistance fighter has been duly informed regarding the laws and customs of war" 20/.

18/ This problem will be studied in greater detail in the part of this report devoted to "FORMS OF STRUGGLE".

19/ To the same effect, Report of the Secretary-General A/8052, para 179 :

"It is generally agreed that this provision refers to the respect of the laws and customs of war by the movement of corps as a whole, whether or not individual members fulfil this condition. In case of grave breaches of the Conventions by individual guerrillas, these guerrillas may and should, of course, be punished, but after a trial giving all guarantees of due process and without losing the status of prisoner of war that they may have acquired."

20/ Reaffirmation report, p. 070.

The report on Reaffirmation, and also the experts consulted by the ICRC in 1970, insisted on the necessity of taking into account the special conditions of guerrilla warfare and of the evolution in customs of war, which now permit methods of combat once considered to be prohibited. This problem will be examined in greater detail in the part of this report entitled "FORMS OF STRUGGLE". However, we might mention here that the report on Reaffirmation called for respect of the essential humanitarian principles by guerrillas when it stated : "One of the fundamental general principles applicable in such warfare seems precisely to be the respect of prisoners of war and especially the prohibition against ill-treating or executing them." Such a principle had already been included in the wording of the draft of that article at the Stockholm Conference in 1948, and ruled out at the Diplomatic Conference in 1949, with a view to remaining strictly within the terms of the Hague Regulations 21/. This particular requirement is also highlighted in the second report of the Secretary-General of the United Nations 22/, where he further stressed that this obligation extends to respecting the "existing (and proposed) rules concerning the protection of civilians, the prohibition of the use of needlessly cruel or destructive weapons, the obligation to give quarter, respect for the lives and physical integrity of prisoners of war and respect for medical and relief personnel ..." 23/.

Conclusions of the ICRC

Although avoiding overextending the concept of "combatants", one which implies for those included quite as many obligations as rights, the ICRC nevertheless considers it necessary to clarify the guerrilla movement, with a view to contributing to a better observance of humanitarian law by all the parties to such warfare.

21/ Commentary on the Geneva Conventions, Vol. III, Art. 4, p. 61

22/ Report of the Secretary-General A/8052 para 230, letter d).

23/ *ibid*, para 191 v).

To this end, the ICRC proposes a liberal interpretation of the existing conditions of Article 4, number 2, of Geneva Convention III of 1949, relative to the treatment of prisoners of war. This interpretation could be made, without derogation of the texts of the Geneva Conventions 24/ by means of an interpretative Protocol of Article 4, number 2, of that Convention.

That interpretative Protocol could, on the one hand, specify certain conditions and, on the other, mark the ones among them that are really determinative for granting the status of prisoner of war.

To this end, the ICRC thinks that the accent should be placed on the two conditions set up for the "mass levies" in Article 2 of The Hague Regulations of 1907 respecting the laws and customs of war on land and repeated in number 6 of Article 4 of the 1949 Geneva Convention III. These conditions are that arms be carried openly and that the laws and customs of war be respected.

The condition of respecting the laws and customs of war is absolutely fundamental and should be given a top position in an interpretative Protocol. The ICRC also suggests that, in a preamble to this Protocol, certain fundamental humanitarian principles should be enumerated as examples 25/, the parties being urged to put into force, as far as possible, the international instruments concerning respect for victims of armed conflicts 26/ and the conduct

24/ Allaying in this way the concern not to risk losing the advantages it was possible to obtain in 1949.

25/ In such a listing there should also appear : respect for prisoners, for civilians, for health and medical personnel; respect of the prohibition of means likely to cause needless suffering and, in particular, respect of the prohibition of certain weapons, and lastly, respect of the general principles of the laws and customs of war, such as the obligation to give quarter, the respect of bearers of a flag of truce, etc.

26/ and primarily the four Geneva Conventions of 12 Aug. 1949.

of hostilities 27/.

The protocol should contain a provision stating that the guerrilla fighter must, throughout each military operation, clearly mark his status as a combatant, whether it be by a distinctive sign, part of a uniform or any other means, or again, by carrying arms openly; what is important is that the fact of being a combatant may be discerned immediately in the adversary, as distinguished from the civilian population, and that the conduct of that combatant not appear as perfidious.

As regards the other conditions, the ICRC proposes to interpret them in the following way :

- The condition of having a person responsible for his subordinates and of constituting an organized movement should be retained and incorporated only to the extent that it is compatible with the new forms of guerrilla warfare and effectively leads to respect for the laws and customs of war : in this way neither the clandestine nature nor the cellular structure of the guerrilla organization prevents the transmission of directives to all the members of the organization, or the reaching of agreements on humanitarian law by the parties to the conflict;
- the condition of belonging to a party to the conflict could also be interpreted in the following way :
 - either as requiring de facto liaison with a State; or
 - requiring the movement in question to obtain recognition by one or more States, or even by the international community.

27/ The Hague Conventions of 1907; Geneva Protocol of 1925; The Hague Convention of 1954 for the Protection of Cultural Property.

The Protocol should also state that these conditions must be met by the organization as such and that an individual violation does not, ipso facto, deprive all the members of the right to be treated as prisoners of war.

The interpretative Protocol could, finally, contain a provision concerning the combatants who do not fulfil these conditions (cf. the following considerations) and another provision rendering these conditions applicable to non-international armed conflicts 28/, except naturally that of "belonging to a party to the conflict", which is impracticable under these circumstances 29/.

3. Status and treatment of combatants not fulfilling the conditions of Article 4 : (as it stands, or as modified)

Statement of the problem

The fate of persons taking active part in the armed struggle without fulfilling the conditions of Article 4, number 2, of Geneva Convention III, cannot be left out of consideration 30/. This question will be examined in the context of international armed conflict.

28/ Within the meaning of Resolution XVIII (Status of Combatants in Non-International Armed Conflicts) adopted by the XXIst International Conference of the Red Cross (Istanbul, 1969).

29/ In the context of non-international conflict, as characterized in the report devoted thereto, this condition would correspond, for the movement, to carrying on an organized armed struggle with political objectives.

30/ Cf. Reaffirmation report, pp. 117 - 119:

"The ICRC had pointed out in its documentation that experience in recent conflicts had shown this provision of the Third Convention, whose conditions we have just examined, by no means protected all the combatants in this type of conflict. It can therefore legitimately be asked, continued the ICRC, what is to become of combatants who do not satisfy these conditions."

One of the means envisaged to protect the greatest possible number of combatants is precisely the Protocol interpretative of Article 4, number 2 of Geneva Convention III, projected above, which should extend the coverage of persons protected by Convention III. However, even if this Protocol was adopted, in all likelihood many combatants would not satisfy these conditions, despite a liberal interpretation, and these persons, while not being granted the status of prisoner of war, should still not be deprived of all humanitarian protection and left to the discretion of the detaining Power. For that reason, the ICRC suggests including, in this Protocol, a provision asking that these persons be afforded certain fundamental guarantees.

First of all, it is clear that these persons, like the other combatants, must have the benefit of quarter, i.e. have their lives spared when they surrender or are captured : this requirement is in conformity both with article 23, letters c) and d) 31/ of the 1907 Hague Regulations and with article 3 common to the four Geneva Conventions of 1949.

By itself, the principle of sparing the lives of these combatants is necessary, but not sufficient : in addition, these persons must be spared inhuman treatment of all sorts, while leaving open the matter of possible penal sanctions.

To be sure, there are already several provisions of humanitarian law which protect combatants not satisfying these conditions : thus guerrillas who do not meet these conditions and who operate in occupied territory are protected by Geneva Convention IV 32/, while those who operate in a non-international armed conflict are

31/ Cf. text of this article appended.

32/ The derogations provided in Article 5 of Convention IV which could apply to certain of these persons, nevertheless contain the very clear requirement of human treatment, referring in particular to Articles 74 to 76 of the same Convention.

accorded the guarantees of Article 3 common to the four Geneva Conventions, even if they do not satisfy these conditions 33/.

There is no lack of legal instruments that could also be relevant : thus the experts consulted by the ICRC suggested applying to these persons guarantees drawn from Article 3 of the Geneva Conventions, from a special penal legislation to be established, and from the Third 34/ or Fourth Geneva Convention of 1949 35/. As for the Secretary-

33/ In fact, Article 3 lists a certain number of minimal guarantees which are applicable to all victims of a non-international armed conflict, from the moment that they no longer take part in the combat, whether due to "sickness, wounds, detention, or any other cause". Resolution XVIII adopted by the XXIst International Conference of the Red Cross (Istanbul 1969) has a broader objective : it intends to grant a similar treatment to that which Convention III provides for prisoners of war, to combatants who conform to the provisions of article 4 of that same Convention III.

34/ And primarily of Article 5, para 2) of Convention III, which provides :
 "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

35/ Cf. Commentary, Fourth Convention, p. 50 :

"Members of resistance movements must fulfil certain stated conditions before they can be regarded as prisoners of war. If members of a resistance movement who fallen into enemy hands do not fulfil those conditions, they must be considered to be protected persons within the meaning of the present Convention. That does not mean that they cannot be punished for their acts, but the trial and sentence must take place in accordance with the provisions of Article 64 and the Articles which follow it."

Certain other basic provisions of the Fourth Convention, such as Articles 27 and 76 could also be applied.

General of the United Nations, his second report proposes in addition, the application of the international texts on human rights 36/ or of the minimum rules for the treatment of prisoners 37/.

Finally, the General Assembly of the United Nations, in its 25th session, adopted a resolution in which it "urges that combatants in all armed conflicts not covered by Article 4 of the Geneva Convention relative to the Treatment of Prisoners of War be accorded the same human treatment defined by the principles of international law applied to prisoners of war" 38/. However, the point cannot fail to come up in this connection that, at least legally, a distinction ought to subsist between combatants fulfilling the conditions of article 4 (as it now stands or as interpreted in the "Interpretative Protocol") who have a right to the status of prisoners of war, and the others who do not fulfil these conditions and hence can legitimately be refused the protection of that status. The detaining Power would naturally be free to grant them the treatment such status provides, if it so wishes.

None of these proposals are mutually exclusive. They indicate, for diverse reasons, a certain interest in seeing to it that these combatants are no longer delivered over to the arbitrary discretion of the detaining Power (which is not, in every case, the capturing Power). And, as a delegate at the most recent General Assembly of the United Nations pointed out, in all events they should not be treated with greater severity than common law criminals. The problem is precisely that, while a common law criminal, in ordinary circumstances, has the benefit of the constitutional and jurisdictional guarantees of the State detaining him, the same is not true of these combatants. In their case it has been possible to suspend constitutional guaran-

36/ Report of the Secretary-General A/8052, para 96.

37/ Ibid, para 156.

38/ A/RES/2676 (XXV), number 5, Resolution adopted by 67 votes for, 30 votes against and 20 abstentions. The full text is appended to this report.

tees, to paralyse jurisdiction, to remand human rights until some better time, to reserve the Geneva Conventions for an elite of combatants, so thoroughly that, in the end, no legal instrument, international or internal, and no court, governmental or not, will be able to protect these pariahs of humanitarian law.

This situation, which unfortunately is not purely hypothetical, is deplorable : the temptation to include in that category the maximum number of prisoners will be great for the detaining government, at a time when the efforts of humanitarian law now seek essentially to ensure that respect for the fundamental rights of the human being shall be accorded to every individual, no matter what crimes he may have committed.

For the belligerent States or entities, the principle of renouncing the death sentence and, even more, the execution of such prisoners should likewise form part of these fundamental guarantees. This was already called for by the ICRC in its Reaffirmation report :

"Prisoners, on either side should be treated humanely. Death sentences and still more executions (of prisoners) not conforming to the conditions of Article 4 of the Third Convention should be avoided" 39/.

Most of the experts consulted by the ICRC in 1970 had approved that proposal, which is, furthermore, fitted into the context of the non-international conflict 40/.

39/ Ibid, p. 121

40/ Document V : "Protection of Victims of Non-International Armed Conflicts", p. 65, b).

Conclusions of the ICRC

The ICRC considers that these combatants should have the benefit of the minimal guarantees of Article 3 common to the four Geneva Conventions. To go beyond the guarantees of article 3, the combatants would naturally have to respect the most essential rules of humanity in their struggle.

A certain number of provisions specifying these minimal guarantees or containing other guarantees, such as Article 13 of the Third Convention, or Articles 27 and 76 of the IVth, could be taken into consideration to determine this minimum treatment more exactly.

The ICRC submits to the experts, for their evaluation, some suggestions calling for broader guarantees, such as those listed by the Secretary-General of the United Nations in his second report (A/8052), advocating, in particular, the application of the "Minimum Rules for the Treatment of Prisoners".

Finally, the ICRC supports the principle of renouncing the death sentence and the execution of such prisoners, while, nevertheless, making reservations in regard to the repression of grave war crimes.

These fundamental principles and guarantees could be included in the Interpretative Protocol of Article 4 of the Third Geneva Convention, or at least in a Declaration or Resolution.

III. CIVILIANS

In its report on Reaffirmation, the ICRC points out that civilians are the main victims of guerrilla warfare. "Because guerrilla warfare by its infrastructure calls upon the whole population, there has often been a temptation to consider that in such a conflict there is no longer any distinction between combatants and non-combatants and to take this as a justification, stressed an expert, for the forces opposing the guerrillas not to apply the laws and customs of war.

Several experts, however, felt it should not be impossible to define the section of the population to be distinguished from armed units and which forms, and should continue to form, the civilian population, and which should not be deliberately attacked by the belligerents". 1/

Discussion on this point will be divided into two parts : in one part we shall try to define the civilian population in guerrilla warfare and in the other we shall examine the possibility of applying, in guerrilla warfare, the rules relative to the protection of civilian persons, particularly the Fourth Geneva Convention of 1949.

1. The Problem of defining the civilian population in guerrilla warfare.

In its report on Reaffirmation, the ICRC quoted the opinion of one of the experts who drew attention to the danger that individuals indirectly participating in the war effort (economically or politically, and not simply on the military level, as was the case until now) might be considered combatants 2/.

1/ Report on Reaffirmation, p. 120

2/ Ibid.

The indicative list of "civilian persons", given by the ICRC in the questionnaire it submitted to the experts in 1970, gave rise to many remarks, all of which were consistent in stressing the importance of the civilian population in guerrilla warfare, especially when this took the form of a "people's war". Although in a "people's war" or revolutionary war, sectors of the population traditionally classified as civilian, such as senior politicians and civil servants or certain sections of the police, may take a direct and even permanent part in military operations and therefore become "combatants" it is not possible, from the legal and humanitarian point of view, to consider all civilians involved in the struggle but not directly engaged in hostilities as "combatants".

On this point we would refer to the document on "The Protection of the Civilian Population against the Dangers of Hostilities" ^{3/} which points out certain general objective criteria which could and should be applied also in guerrilla warfare. We might briefly summarize those criteria :

- persons not belonging to the armed forces or any organization attached to them, and
- persons not participating directly in military operations,

are considered to be civilian persons and are the civilian population ^{4/}. We do not think that different criteria should be worked out for guerrilla warfare, whatever form

^{3/} Opuscule III "The Protection of the Civilian Population against Dangers of Hostilities".

^{4/} Cf. the report previously mentioned. The second report of the U.N. Secretary General (A/8052, paragraph 39) puts forward similar theories : "39. For the purposes of the applicability of standard minimum rules protecting civilians from the dangers of military operations it may be accepted that those not taking part in hostilities would be classified as civilians : members of the armed forces or of their auxiliary or complementary organizations; and persons not belonging to the forces referred to above but nevertheless taking part in the fighting or contributing directly to the conduct of military operations."

it may take 5/.

2. Application in guerrilla warfare of humanitarian rules for the protection of the civilian population against arbitrary decisions of an enemy power and against the dangers arising from hostilities.

a) Rules for the protection of the civilian population under military occupation.

Supplementing Articles 42 to 56 of the Regulations appended to the Fourth Hague Convention of 1907 (Section III : "Military Authority over the Territory of the Hostile State"), the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War is the main international treaty protecting the civilian popula-

5/ In this respect, remarks contained in the U.N. Secretary-General's Second Report (A/8052, paragraph 234) on war of national liberation might give rise to some confusion : "(...) "civilians" should include all persons who do not use weapons on behalf of either party to the conflict, as well as all persons who do not support any of the parties by deliberate actions such as sabotage, spying or recruiting activities, or by making propaganda upon instruction of or in liaison with either party to the conflict, the main element being to stress the intentional and deliberate character of the actions characterizing "participation in the conflict", and to protect as civilians, in particular, those who may only have family or social links with freedom-fighters and those who spontaneously express opinions (as distinct from directed propaganda and from public and specific incitement to violence) favourable to one party to the conflict." (...)

tion living under military occupation 6/.

The question arises whether the regulations of that Convention are practicable and legally applicable in guerrilla warfare, in the context of a non-international conflict.

The experts consulted by the ICRC underlined the difficulties of their application, due as much to new conditions of warfare as to legal, political and military considerations, namely :

- conflicts, in the opinion of some experts, were no longer waged only by sovereign States which recognize each other;
- guerrilla warfare today, according to other experts, was no longer the little war, but more and more frequently assumed the form of a war into which the whole population was drawn, nolens volens and found itself between the devil and the deep blue sea;
- others singled out the mobility of occupation in guerrilla warfare which was likely to give rise to a shifting patch-work of authority resulting in tragic consequences for the civilian population.

In spite of these difficulties, several experts consulted in 1970 stressed that the main objective was still the application in all circumstances of :

- all the provisions of the Fourth Geneva Convention in international conflicts;

6/ Some of the experts consulted by the ICRC did, moreover, point out that the prohibitions laid down in the Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously on 9 December 1948 by the U.N. General Assembly, and the charges specified in the definition of crimes against humanity in Article 6 (c) of the Statutes of the Nuremberg International Military Tribunal (and repeated in the "Nuremberg Principles", as formulated by the International Law Commission (Principle VI (c))), should be applied in all circumstances.

- as many as possible of its provisions in non-international armed conflicts between organized belligerents (Cf. Report on the Protection of Victims of Non-International Armed Conflicts; Document V).

Other experts, however, thought that rather than to seek to apply the Fourth Geneva Convention in circumstances where its application would be difficult, it would be better to embody, perhaps with different wording, the essential principals in a simplified treaty better adapted to the material possibilities available to parties engaged in guerrilla warfare.

Nevertheless, the ICRC considers that such a new wording 7/ could hardly do more than weaken the already recognized protection afforded by the Fourth Geneva Convention, and that emphasis should rather be laid on the need to apply in all international conflicts, whatever form they may take, the 1949 provisions supplemented, if necessary in order to remedy certain shortcomings 8/.

Such provisions of the Fourth Geneva Convention as Articles 16 - 17 (wounded and sick), 18 - 20 (protection of hospitals), 21 - 22 (transport of civilian wounded and sick), 23 (consignment of medical supplies, food and clothing to the civilian population), 24 (measures relating to child welfare), 25 (family news), 26 (dispersed families), 27 (general observations), 28 (the prohibiting of the use of protected persons to render certain points of areas immune from military operations), 31 and 32 (prohibition of coercion, corporal punishment, torture), 33 (prohibition of collective penalties and reprisals against protected persons and their property), and 34 (prohibition on the taking of hostages), which lay down general principles, should be applied in all circumstances no matter what material possibilities are available to belligerents.

7/ Except in the special case of non-international conflicts, dealt with in the Protocol to Article 3 common to the four Geneva Conventions; cf. the Report on the Protection of Victims of Non-International Armed Conflicts (Document V).

8/ Cf. Report on the Protection of the Civilian Population against Dangers of Hostilities (Document III).

These provisions are applicable both to the territories of the parties in conflict and to occupied territories; they obviate the need to determine whether there is "occupation" or not, which is not always easy in guerrilla warfare when the areas occupied, contested, and behind the front, and the front itself if there is one, change continually.

Also to be examined by the experts is the question of deportations and regroupings of civilian populations, which are measures frequently employed by the forces in conflict with guerrillas in order to "control the population" and isolate it from surrounded guerrilla units or from guerrilla propagandists. This problem is the subject of Article 49 of the Fourth Geneva Convention which, however, does not cover all cases of deportation, transfer or evacuation.

Although the experts did not consider it possible to prohibit "displacement by force" ^{9/} of civilian populations or individual members thereof as recently suggested in Resolution No 2675. ("Basic principles for the protection of civilian populations in armed conflicts") adopted by the twenty-fifth U.N. General Assembly, it is in any case necessary to consider how such measures are carried out and the results thereof. There is indeed no doubt that there are serious humanitarian, if not legal, problems involved: at best the population would consent to evacuation would take all its movable property and would be resettled in accommodation similar to that which it had had to leave but would be more easily subject to supervision by the anti-guerrilla forces; at worst, the population would flee from air-raids or shelling and swell the ranks of refugees which had settled as best they might near a town or a military camp. It is to be feared that the evacuated areas would be subject to indiscriminate attack, all persons and

^{9/} A/Res./2675 (XXV), point 7. "Force" may be direct or indirect : in the former case the civilian population would be displaced manu militari; in the latter, the displacement, because of indiscriminate military operations would be labelled "spontaneous". Cf. also Article 6 (c) of the Statute of the Nuremberg International Military Tribunal which included as a war crime the deportation for forced labour, or for any other purpose, of civilian populations in occupied territories.

property which might have remained there being considered as aiding the guerrilla forces.

It is therefore expedient to examine :

- whether the absolute prohibition of such deportations, transfers and evacuations is possible;
- if not, or in exceptional cases when such action would be tolerated, what practical arrangements, in addition to the third paragraph of Article 49 of the Fourth Geneva Convention, would enable the civilian population to be removed with the least inconvenience to it, both during the transfer and during resettlement.

b) Rules for the protection of the civilian population against the effects of military operations.

These rules are discussed at greater length in the opusculé on the protection of the civilian population against the dangers arising during hostilities 10/. We would like however to draw attention to the importance of these rules in guerrilla warfare.

The guerrilleros live and operate among the civilian population so that obviously the rules and principles of international law 11/ intended to shield the civilian popula-

10/ Document III.

11/ By the "rules" we mean particularly Articles 25 and 27 of The Hague Regulations and by "principles" those laid down and recognized by Resolution 28 of the XXth International Conference of the Red Cross (Vienna 1965) and repeated in Resolution No 2444 adopted by the twenty-third General Assembly of the United Nations, namely :

- b) "... it is prohibited to launch attacks against the civilian populations as such.
- c) "... distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible."

tion from the dangers of military operations will be more difficult to apply in such circumstances. Moreover, the populations' allegiance, rather than territorial domination, is often the main objective in guerrilla warfare, so that belligerents are tempted to exert pressure on the population by subjecting it to indiscriminate attacks. Experience in several conflicts however has shown that indiscriminate attacks against the civilian population, whether direct (i.e. against the civilian population as such) or indirect (i.e. against military objectives but recoiling excessively upon the civilian population) not only inflict great suffering but by no means achieve the military or political objective and may even compromise the chances of doing so for a long time. By alienating the civilian population in this way, the belligerent who hopes to conquer it in most cases only stiffens, or even provokes, its resistance.

Such attacks may be from both parties engaged in guerrilla warfare; although their methods may differ, the results are often the same, and in any case the essential principles should be applied equally by both parties. There is therefore no reason to differentiate between indiscriminate "terrorism" by guerrilleros against the population and the equally indiscriminate attacks perpetrated by the air force, artillery or infantry of the regular forces.

The fact that both parties to a conflict involving guerrilla warfare have recourse to such measures and claim them justifiable on the grounds of military necessity - which experience has shown to be open to considerable doubt - in no way reduces the opprobrium attaching to and the legal censure which may be levelled at the commission of such acts; often one or other of the parties will seek to cover up its own malpractices in expressions of reprobation against the other. It may therefore well be asked to what extent the reaffirmation and possibly the clearer reformulation of the rules and principles protecting the civilian population would enable each of the parties engaged in guerrilla warfare to refrain from indiscriminate attacks against the

civilian population 12/.

Here again, it seems that by imposing similar obligations on both parties it might be possible to hope that they will observe reciprocal and realistic limitations to the methods of carrying on the struggle.

12/ According to some experts, a distinction must be made between "selective terrorism" which is aimed at individuals considered to be traitors or collaborators with the enemy, and "blind terrorism" which strikes indiscriminately at the civilian population. On the other hand, the bombing of training camps, assembly camps and supply lines known to guerrilla forces would certainly be militarily, politically and economically more effective, than indiscriminate bombing even if restricted to certain areas suspected to conceal guerrilla fighters or to be dominated by them.

IV. METHODS OF WARFARE

General Remarks

"The right of belligerents to adopt means of injuring the enemy is not unlimited" - this is the statement of the fundamental principle which opens Chapter I, Section II of The Hague Regulations ("Means of Injuring the Enemy, Sieges, and Bombardments") 1/.

The problem of reciprocal limitation of means of injuring the adversary, which is also treated in another document 2/, arises in a particularly acute form in guerrilla warfare, where highly disparate forces confront each other :

- on the one hand, responsible for "maintaining order", are the "conventional forces" (of land, sea and air, with greater and greater emphasis being placed on the airborne element in the anti-guerrilla struggle);
- on the other hand, guerrilla or harrassment forces (principally, if not exclusively land forces and, at least at the beginning of the struggle, without heavy weapons), acting clandestinely, and seeking to undermine the State or local occupying apparatus by bringing about a condition of insecurity.

Each of the belligerents tries to wring a political advantage out of the alleged or real exactions imposed by the adversary.

Finally, the differences between the adversaries (which need not be only military and political, but which can also be ethnic) will prompt them to leave the beaten

1/ Articles 22 to 28.

2/ Document IV, "Rules Relative to Behaviour of Combatants".

path of traditional methods of warfare, to turn to new arms or methods of combat, also sometimes seeking to restore a certain balance artificially by means of reprisals.

1. The distinction between ruse and perfidy in guerrilla warfare

The distinction between permissible ruses of war and perfidious means ^{3/} is particularly difficult in guerrilla warfare ^{4/}, where the concept of "loyalty" in the struggle between adversaries has a very relative value.

As was stated in Document IV, in the Reaffirmation Report, the ICRC asked whether it would not be advisable to "reaffirm specifically the prohibition of every type of perfidious means, which bar the way to a cease-fire and consequently to the diminution of useless suffering or violate the basic laws of humanity ? It has frequently been observed that if it is wished to prevent conflicts from degenerating, the armies facing each other must behave with a minimum of reciprocal loyalty. For example, the abuse of the truce flag, i.e. the white flag of surrender, compromises the chances of using it and consequently the chances of peace; similarly, the breach of a local truce, for example, to collect the wounded. Is it possible to reaffirm, regenerate the rules concerning the prohibition of perfidy in this light ?" ^{5/}.

^{3/} According to Article 24 of The Hague Regulations, "Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible". Article 23, letter b), however, forbids treacherously killing or wounding individuals belonging to the hostile nation or army.

^{4/} Cf. Reaffirmation Report, p. 79 : "The ICRC pointed out that it is often difficult to draw a distinction between what is treachery and what is a ruse of war which is admissible (Article 24 of The Hague Regulations). This difficulty has certainly been increased by some modern methods of combat (commandos, guerrilla warfare, etc.)".

^{5/} Cf. Reaffirmation Report, p. 80

The following will therefore be considered as perfidious 6/ (hence as violations of the laws and customs of war) : the improper use of the enemy uniform or flag (at least in the course of combat), and naturally the improper use of the Red Cross emblem. Other examples could also be mentioned (it should, however, be recognized, as does the Commentary to the Third Geneva Convention, that the "concept of the laws and customs of war is rather vague and subject to variations, as the forms of war evolve" 7/; also, that what was "perfidious" at one time is perhaps no longer so today; and, as certain authors point out, regular troops have currently adopted forms of struggle to which only guerrilleros resorted in the past (ambushes, commando operations, etc.); and that, since these methods were known and adopted by both parties, they have lost their "perfidious" character).

It is none the less true that, even in guerrilla warfare, where ruse plays such a great part (especially on the side of the guerrilleros, who use it to compensate for their relative weakness in material) certain practices forbidden by Article 23, letter f) of The Hague Regulations, such as the improper use of the flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Conventions, should be prohibited.

2. "Terrorism"

The term has no legal acceptance. In the Reaffirmation Report, the ICRC quoted the definition given by Robert, Alphabetical and Analogical French Dictionary, translated as follows : "Systematic employment of violence to achieve a political aim.... and especially all acts of violence (individual or collective attacks against life, destructions....) on the part of the political organization to impress the population and create an atmosphere of insecurity".

6/ Cf., for example, Commentary, Third Convention to Article 4, p. 61 : "Thus a civilian could not enter a military post on a false pretext and then open the fire, having taken unfair advantage of his adversaries".

7/ Ibid. p. 61.

The problem of terrorism, considered from a legal point of view, was the subject of a lengthy analysis by one of the experts consulted by the ICRC in 1970. For this latter, the law of war cannot forbid terrorism as such, but it is likewise evident that the law cannot sanction it. The repression of illegal acts of terrorism is sufficiently assured in positive law, so that there is no need to have recourse to the concept of terrorism.

At the outset, two cases should be eliminated from the discussion, according to this expert :

- Acts perpetrated by persons not having the quality of legal combatants, according to Article 4 A of the Third Geneva Convention. Whatever may be the nature of the objective of the attack, whether military or civilian, these persons are to be prosecuted, not as "terrorists" or as "authors of acts of terrorism", but for committing aggressions against enemy persons or property without being entitled to do so in international law. Where appropriate, such prosecution would be subject to the provisions of the Fourth Geneva Convention.
- Acts directed against military objectives. Whether this be in occupied territory or on enemy territory, attempts against military objectives, persons or goods, carried out by legal combatants within the meaning of Article 4 A of the Third Convention, without resort to means forbidden by the law of war, are lawful. In no circumstances and under no pretext can these acts be repressed by qualifying them as "terrorism".

It is evident that acts of terrorism directed against enemy civilian objectives unquestionably represent infractions of the laws of war, regardless of who may be their authors (whether or not they are legal combatants).

Referring to terrorism in internal armed conflicts, the same expert believes that "... more frequent than in traditional conflicts between States, terrorism is also more cruel and murderous in non-interstate conflicts". Most acts of terrorism linked to guerrilla warfare, when deprived of their terrorist character, come within the purview of an explicit international interdiction, that which heads the list of prohibitions set forth in Article

3 common to the four Geneva Conventions : "Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture".

Other experts consulted by the ICRC in 1970 also emphasized how very improper this term was for an objective and specific legal examination of acts qualified as "terrorist" : acts of sabotage, attacks carried out by isolated combatants, assassinations, mutilations, indiscriminate attacks against the civilian population, or certain elements of the civilian population, political assassinations and executions, etc.

It therefore appears preferable to examine these acts under the categories already established, i.e. sabotage (Cf. Document IV pp. 16 and 17), protection of civilian populations (Cf. Document III), status of combatants (Cf. the present Document), etc., although one point, that of political assassinations and executions may be the subject of a special study. From the start, we may say that in guerrilla warfare the guerrilleros are far from having a monopoly on this practice, which is part and parcel of the special nature of this type of struggle, being more strongly characterized by political than by military aspects. It will often set up, as one of its first objectives, the elimination of political cadres, or of the most influential sympathizers of the adversary. To the extent that persons have actually taken direct part in military operations, they can be considered permissible objects of attack, although they do not formally belong to the armed forces. There are borderline cases, but in other instances reference should be made to the principle of prohibiting direct attacks against civilians, these having, all the same, become standard practice on both sides in a number of conflicts.

3. Torture 8/

In the face of the clandestine and sometimes "terrorist" character assumed by guerrilla warfare, certain experts believed that the use of torture could be justified for obtaining, at any price, information as to the disposition of enemy forces, the composition of its network, the location of fighting units and stores of weapons, the identity of leaders, etc. This argument has been carried so far as to claim that there is a humane aspect to torture, that "some maltreatment to discover a terrorist network was preferable to the death of tens of innocent victims"...

Apart from the fact that torture is strictly forbidden by the Geneva Conventions 9/ and by numerous other national or international legal instruments 10/, we cannot fail to point out the moral opprobrium which it properly evokes against the belligerent employing it. Not only does its use give rise to distinct political disadvantages, but even its military effectiveness may well be questioned : avowals extracted under torture may prove inexact, and even if they do not, the cell structure of clandestine organizations often affords an adequate

8/ Robert, Alphabetical and Analogical French Dictionary, gives the following definition of this word :
"violence to a person to compel him to admit what he refuses to reveal, and by which physical suffering is inflicted in such manner that he is forced to yield in order to put a stop to his suffering".

For the same purpose ("obtaining information of any kind whatever", according to the formulation of the Geneva Conventions) are threats of torture or moral coercion (for example, threats of reprisals against persons close to the prisoner).

9/ Cf. particularly Art. 3 common to the four Geneva Conventions of 1949 : 12 and 50 of the First; 12 and 51 of the Second; 14, 17 and 130 of the Third; 27, 21 and 147 of the Fourth Convention.

10/ Art. 5 of the Universal Declaration of Human Rights; Art. 7 of the International Covenant on Civil and Political Rights; Art. 3 of the European Convention of Human Rights.

defence. Lastly, the use of torture by one Party often incites the adverse Party to have recourse to reprisals (Cf. below).

There can be no doubt but that the most sensitive moment for the strict observation of the prohibition against torture is the period between the surrender (or the arrest) of the prisoner and his entry into a prisoner of war camp, or even into an ordinary prison. The temptation may be great, in the heat of combat, or immediately afterwards, to have recourse to prohibited methods to obtain specific and rapid information about the adversary. The value that the use of such methods may appear to offer does not withstand a thoroughgoing analysis of the question :

- on the short term basis : torture may sometimes represent an advantage, but there are also better means of obtaining information without restraint;
- over a medium period of time, recourse to torture, at first only sporadic, rapidly becomes generalized, as experience proves, and brings about a profound and lasting moral degradation of those persons who practice or tolerate torture;
- the opprobrium properly attached to the practice of torture invariably smirches the honour of a force making use of it and of the authorities who tolerate it. Without taking into account the repercussions it may have on national or international public opinion.

4. Taking of hostages

The Commentary of the IVth Geneva Convention, Article 34, stipulates, "The taking of hostages is pro-

hibited" 11/ and proposes the following definition :
 "The word "hostage" has stood for rather different con-
 ceptions. It is not, therefore, easy to give a definition
 of it valid for every case. Generally speaking, hostages
 are nationals of a belligerent State who, of their own
 free will or through compulsion, are in the hands of the
 enemy and are answerable with their freedom or their
 life for the execution of his orders and the security of
 his armed forces" 12/.

In guerrilla warfare, both of the Parties can
 have recourse to the taking of hostages : the Occupying
 Power, to prevent disorders or attacks on occupation
 troops, to obtain the denunciation of the authors or an
 attack, to guarantee the delivery of foodstuffs and
 supplies, to prevent attacks on convoys or trains, etc.
 As for the guerrilleros, they have sometimes resorted
 to the taking of hostages to guarantee the life of persons
 themselves held as hostages by the adverse Party, to
 obtain for their captured companions the treatment of
 prisoners of war, and lastly to obtain the liberation of
 detained persons.

Most frequently, hostages have been chosen from
 among natives, whether civilian or military, of the
 adverse Party. Recent examples have shown that nationals
 of neutral countries, or those who were not directly in-
 volved in the conflict, and even diplomats, have also
 been liable to be taken as hostages.

11/ This article, placed at the end of the common pro-
 visions, has an absolute nature. It applies to the
 persons protected under Art. 4 of the Fourth
 Convention, both on territory of the belligerents and
 unoccupied territory, in case of conflict, whether
 international or not. It completes Art. 33 of the
 same Convention, which codifies the principle of
 individual responsibility, as well as the prohibition
 against collective penalties and measures of reprisal.
 From a more general point of view, and for non-inter-
 national conflicts in particular, Art. 3, No 1, letter
 b), common to the four Geneva Conventions, likewise
 prohibits the taking of hostages.

12/ Commentary, Fourth Convention, p. 229.

Whereas, in the past, it was rather the power opposed to the guerrilleros, the occupying or colonial power, which, in guerrilla warfare, had recourse to the taking of hostages, more recently various guerrilla movements have resorted to the taking of hostages in order to obtain a variety of concessions from governments. Confronted with a marked recrudescence of such taking of hostages, certain States have proposed that the International Community adopt specific international legal instruments : the first is the "Convention for the Repression of the Illicit Capture of Aircraft", signed at The Hague, 15 December 1970, by the representatives of 74 countries, during the General Assembly of the International Civil Aviation Organization (I.C.A.O.). The second is a draft inter-American convention, aiming to repress the attacks perpetrated against diplomats or international figures; according to this draft, the contracting States should "take all measures that they consider effective, under their respective legislations and under these established by this Convention, to prevent and punish kidnapping, homicide and other attacks against life, the bodily integrity of persons to whom the State has the duty to accord special protection, in conformity with international law."

These drafts serve only to strengthen, at the international level and in times of peace, the prohibition against the taking of hostages, already contained, among other provisions, in Article 3, common to the four Conventions, and in Article 34 of the Fourth Geneva Convention. It is worth stressing, in this connection, that in such cases, the action of the Red Cross (ICRC or National Society) in no way invalidates the condemnation so frequently expressed against the taking of hostages 13/ and only takes place if required for imperative humanitarian reasons, and in the sole interest of the victims.

13/ Cf. in this respect, Resolution No 2 "The Red Cross, A Factor of Peace", adopted by the IXth Inter-American Conference of the Red Cross, (Managua, December 1970), the text of which is given as an annex to the present Document.

Cf. also the address of Mr. Naville, President of the ICRC, "The ICRC and the Taking of Hostages", printed in the International Review of the Red Cross, October 1970, pp. 558 - 560.

Just as in the case of torture, a question may be raised as to the value of taking hostages, for the Party resorting thereto : recent examples show that the immediate effect is largely offset by the medium or long-term disadvantages.

5. Reprisals 14/

Considered as a means of obtaining respect for the law by the adverse Party, reprisals (illicit measures resorted to by one Party in order to obtain the cessation of a violation of law committed to its detriment by the other Party) have unfortunately been extensively employed in guerrilla warfare, whether it be by the regular troops to struggle against an elusive enemy, or by the guerrilleros to escape from being crushed by a power without limits.

The question of reprisals in guerrilla warfare is, moreover, closely linked to that of hostages, of torture, of "terrorism", and could appear to afford a convenient means of re-establishing equilibrium between two belligerents who often are not fighting at the same level.

It is thus that, on the side of the regular troops, hostages have been taken and executed following upon attempted assassinations or sabotage; that as a consequence of attacks by guerrilleros, civilian populations have been bombarded. For their part, guerrilleros, in several conflicts, have executed or threatened to execute prisoners of war following the execution or the threat to execute

14/ This point is dealt with chiefly in Document II ("Measures intended to Reinforce the implementation of the Existing Law"); special considerations on reprisals will also be found in Documents III ("Protection of the Civilian Population against Dangers of Hostilities") and V ("Protection of Victims of Non-International Armed Conflicts").

captured guerrilleros. 15/ Certain guerrilleros likewise have resorted to the taking of hostages as reprisals for the bad treatment inflicted on prisoners or to prevent the execution of those sentenced to death.

Without wishing to prejudge more general conclusions in this point 16/, it appears appropriate to make the following remarks :

- generally speaking, in virtually all cases reprisals represent regrettable measures which are not only ineffectual, more often than not, but which bring about a deterioration in the respect for humanitarian rules;
- it will only be possible to prohibit reprisals absolutely and effectively 17/ in guerrilla warfare by re-introducing into it a certain "minimum humanitarian legality", to be observed by both Parties. Regulating problems of status (or even only of treatment) of the captured combatants, of means of struggle, of torture, of "terrorism", and also of the establishment of effective control procedures, called for both in theory 18/ and in practice, by the interested Parties 19/ themselves, might facilitate the prohibition of reprisals.

15/ Cf. the execution of 80 German prisoners by the FFI in 1944, (Report of the ICRC on Its Activities During the Second World War, Vol. I, p. 522), the execution of three French prisoners by the ALN in Algeria in May 1958 (ICRC Annual Report, 1958, p. 10), the execution of two American prisoners by the South Vietnam NLF in September 1965. These facts show clearly that, when the insurrection takes on a certain scope, the balance is established between the Parties to the conflict.

16/ Cf. Document II ("Measures intended to Reinforce the Implementation of the Existing Law").

17/ It will be recalled that Articles 46 of the First Geneva Convention of 1949, 47 of the Second, 13 of the Third, and 33 of the Fourth, forbid reprisals with regard to persons and goods protected by these respective Conventions.

18/ Report of the Secretary-General, A/8052, paras 185-186.

19/ At least this is what emerges from the consultation by the ICRC in 1970 with several parties to current guerrilla conflicts.

6. Weapons

"Methods of warfare cannot be discussed without taking up the problem of weapons employed by the Parties to the conflict. Here it must be recognized that the guerrilleros, quite as much as their adversaries, have worked out feats of ingenuity, on the one side, to obtain and manufacture arms which are both simple and effective, on the other side to test an arsenal that would not be appropriate for use against regular troops. Often guerrilla warfare, and even more so, the anti-guerrilla struggle, have provided a testing ground for new weapons and techniques which have thereafter been widely utilized in conventional conflicts between regular armies. For that reason the ICRC believes it to be all the more necessary to call the experts' attention to certain weapons employed in past or present guerrilla conflicts.

To be sure, the question of weapons related to the problem of disarmament does not primarily concern the Red Cross. Other bodies, particularly within the United Nations, have dealt with this problem and are studying the means of limiting or even prohibiting certain weapons. Nevertheless, as the ICRC already stressed in its Reaffirmation Report : "The Red Cross cannot remain indifferent to the means of combat employed by belligerents ... it has taken up position against certain weapons on several occasions" 20/. The general position of the ICRC in regard to weapons is stated in Documents III ("Protection of the Civilian Population against Dangers of Hostilities") and I ("Introduction"); the following considerations must be understood in this context, and hence will bear more particularly on the question of weapons in guerrilla warfare.

As the ICRC points out in the documents mentioned, and as it had already pointed out in its Reaffirmation Report, two principles govern the employment of weapons in addition to the specific prohibitions :

20/ Reaffirmation Report, pp. 47-64, "Prohibition of "Non-Directed" Weapons or Weapons Causing Unnecessary Suffering".

- the weapons employed should permit a selective use, allowing distinctions to be made between persons taking part in the hostilities and the civilian population 21/;
- the weapons must not cause unnecessary suffering 22/.

a) Weapons causing indiscriminate effects

Bacteriological (biological) and chemical weapons require all the more attention since their use in guerrilla warfare raises deeply troubling humanitarian problems 23/ :

- 21/ Principle confirmed by Resolution XXVIII of the XXth International Conference of the Red Cross (Vienna 1965) and by Resolution 2444, unanimously adopted by the XXIIIrd General Assembly of the United Nations on 19 December 1968.
- 22/ Cf. on this subject the Declaration of St. Petersburg of 1868 to the Effect of Prohibiting the Use of certain Projectiles in Wartime according to the terms of which "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy", and that "this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable."
- 23/ Witness the following remarkable studies, extracts of which are to be found annexed to Document III, "Protection of the Civilian Population against Dangers of Hostilities" :
- UN Report of the Secretary-General on Chemical and Bacteriological (Biological) Weapons and the Effects of Their Possible Use (A/7575), 1 July 1969;
 - World Health Organization (WHO) : Health Aspects of Chemical and Biological Weapons. Report of a WHO Group of Consultants, Geneva, 1970.
 - Stockholm International Peace Research Institute (S.I.P.R.I.) : The Problem of Chemical and Biological Warfare. Stockholm 1970.

to be sure bacteriological (biological) weapons have not been employed in recent conflicts, or at least, there are no proofs of their use ; recent history and history pre-dating anti-guerrilla struggles provide examples of the use of chemical arms 24/, and today we witness their new and disquieting expansion. In addition to the explicit prohibition contained in the Protocol of Geneva 25/, both the Secretary-General of the United Nations 26/ and the World Health Organization 27/ emphasize the unpredictable and indiscriminate nature of these weapons. Nor should we fail to mention also numbers 7 and 8 of Resolution I, adopted by the Institute of International Law at its Edinburgh session (4-13 September 1969), according to which :

7. "Existing international law prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-generating weapons), as well as of "blind" weapons."

8. "Existing international law prohibits all attacks for whatsoever motive or by whatsoever means for the annihilation of any group, region or urban centre with no possible distinction between armed forces and civilian populations or between military objectives and non-military objects." 28/

24/ Cf. S.I.P.R.I. op. cit., Part I, History.

25/ Protocol of Geneva, 17 June 1925, For the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare.

26/ Op. Cit., (A/7575), para. 377.

27/ Op. Cit., p. 11.

28/ Institute of International Law, Edinburgh Session, Resolution I (The Distinction Between Military Objectives and Non-Military Objects in General, and Particularly the Problems Associated with Weapons of Mass Destruction"). Cf. complete text of this Resolution, appended to Document III.

Lastly, the use of chemical (or bacteriological) weapons, intended for the large-scale destruction of crops, whether or not food crops, not to mention secondary effects on the population living in zones of destruction 29/ should be subjected to critical examination in the light of provisions such as Article 53 (forbidden destruction) and Article 147 30/ of the Fourth Geneva Convention, of Article 23, letters a) and g) of The Hague Regulations 31/.

Among the other "blind" weapons, we may make special mention of the self-generating weapons (mines, booby traps, etc.) cited in the Resolution of the Institute of International Law, the use of which, as such, is not prohibited by any international instrument. Just as for other admissible weapons and procedures, and even to a greater extent, since a priori, they are incapable of making a distinction between combatants and civilians, the use of such weapons becomes inadmissible to the extent that they endanger the civilian population or indiscriminately injure combatants and civilians. 32/

29/ Certain of these products can actually have serious effects on the health of members of the civilian population (pregnant women, children, the aged).

30/ This Article lists, among "grave breaches": "... extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

31/ Forbidding :

"a) to employ poison or poisoned weapons; "

"g) to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."

32/ Cf. Reaffirmation Report, p. 62, "Conclusions of the ICRC".

b) Weapons causing unnecessary suffering

The best known of these weapons are the "dum-dum" bullets, which not only put the enemy hors de combat but also inflict unnecessarily cruel injuries. In addition to the general prohibition set forth in Article 23, letter e) of The Hague Regulations, and to the principles contained in the Declaration of St. Petersburg, these projectiles were forbidden by the "Declaration of The Hague of 29 July 1899 concerning the Prohibition of Using Bullets which Expand or Flatten Easily in the Human Body".

This is not the place to pass in review the latest developments of techniques of armaments; we cannot, however, refrain from wondering whether certain projectiles employed in present day conflicts, shot out of guns, or contained in bombs, mines, or booby traps, should not be subjected to critical examination in the light of the unnecessary suffering they can cause : the "fragmentation bombs", certain ultra rapid "darts", gun bullets provoking wounds similar to dum-dum bullets, mines filled with glass splinters or rusted nails, or the whole range of weapons classified as "anti-personnel". These have apparently not yet been considered by the Disarmament Conference or by the United Nations as such.

In any event, the principle of Article 23, letter e) of The Hague Regulations applies to the use of these new weapons as it does to any other means of war.

Finally, the question of incendiary weapons, and in particular of napalm, frequently assimilated to bacteriological and chemical weapons in studies devoted to disarmament, should likewise be taken into consideration.^{33/}

Conclusion of the ICRC

Referring to the proposals presented in Document III, "Protection of the Civilian Population Against Dangers of Hostilities", the ICRC expresses its concern over the development and the utilization of certain weapons in

^{33/} Cf. concerning napalm, Reaffirmation Report, pp. 60-63.

guerrilla warfare. It emphasizes that the fundamental principles of international law by which the licit character of a weapon and its usage can be evaluated, apply in guerrilla warfare just as in any other form of war.

These principles are :

1. The right of belligerents to adopt means of injuring the enemy is not unlimited.
2. Belligerents should refrain from using weapons :
 - of a nature to cause unnecessary suffering;
 - which, on account of their imprecision or their effects, harm civilian populations and combatants without distinction.
3. Belligerents should take special precautions in the choice of weapons, when their employment, even against military objectives, presents undue danger of affecting individuals hors de combat.

V CONCLUSIONS AND PROPOSALS

General Remarks

In the introduction of this document we stressed the diversity of the situations in which guerrilla warfare is waged, and also the difficulty of finding a legal common denominator applicable to all such situations of armed conflict. That is why, after reviewing what it considered to be the main humanitarian problems in guerrilla warfare, the ICRC proposes the drafting of standard minimum rules which would be applicable in all conflicts not corresponding entirely to the conventional definition envisaged in Articles 2 and 3 of the Geneva Conventions and which - and herein lies the original aspect of such rules - would in no way influence the designation of the conflict or the legal status of the parties.

These rules, the basic principles of which are given below, should be of such a nature that they could be the subject of undertakings by belligerents (whether they be established governments or insurrectional movements) which should be communicated to the ICRC 1/ who would notify the adverse party and, for information, all signatories of the 1949 Geneva Conventions accordingly.

The acceptance of these rules, we would state once more, would in no way affect the designation of the conflict or the legal status of the parties involved 2/. All too frequently, indeed, one of the parties to the conflict will designate it as international, i.e. as a conflict entailing the application of the Geneva Conventions as a

1/ Thereby avoiding the inconvenience of the "special agreements", mentioned, inter alia, in Art. 3 of the Geneva Conventions, between parties who do not recognize each other and even strive to deprive each other of any legal status.

2/ Cf. the last paragraph of Art. 3 : "The application of the preceding provisions shall not affect the legal status of the parties to the conflict".

whole, consistent with Article 2 thereof, whilst the other party will classify the conflict as non-international, thereby conceding the application only of Art. 3 of the Conventions.

The rules would take their place alongside the Geneva Conventions and, like the penultimate paragraph of Art. 3, could make provision for the application, by means of special agreements - even tacit and unilateral - for the application of all or part of the 1949 Geneva Conventions, in accordance with the practical possibilities available to the parties to the conflict.

The rules could also contain :

1. A definition of combatants and their treatment in the event of capture or surrender 3/.
2. A definition of civilian population and its protection in the event of military occupation or against the dangers arising from hostilities 4/.
3. Principles and rules of behaviour between enemy combatants 5/.
4. Procedures for the implementation of the rules 6/.

3/ Cf. Part 2, "Combatants", of the present document.

4/ Cf. Part 3, "Civilians", of the present document and document III ("Protection of the Civilian Population Against the Dangers of Hostilities").

5/ Cf. Part 4, "Methods of Warfare", of the present document and document IV ("Rules relative to Behaviour of Combatants").

6/ Cf. Notes 18 and 19 of Part IV of the present document and also document II ("Measures Intended to Reinforce the Implementation of the Existing Law").

1. Definition of combatants and their treatment in the event of capture or surrender

Persons belonging to the armed forces or organizations attached thereto and participating directly in military operations should be considered as combatants.

Apart from the members of the armed forces and of the organizations attached thereto, other combatants should be treated as prisoners of war, consistent with the Third Geneva Convention, provided that, in their operations, they :

- a) observe the essential principles of the laws and customs of war;
- b) clearly display their combatant status by openly bearing their arms and by making clear their distinction from the civilian population either by wearing a distinctive sign or by any other means;
- c) are subject to the orders of a responsible chief within the framework of an organization 7/.

Combatants not fulfilling these conditions should, if taken by the enemy, at least be granted, in all circumstances, the minimum safeguards provided for in the common Art. 3 of the four Geneva Conventions of 1949 8/.

For the duration of hostilities the parties to the conflict would discontinue capital punishment except of persons found guilty of serious war crimes by a regularly

7/ These conditions are taken from Art. 4 (2) of the Third Geneva Conventions as interpreted in Part II (2), "Modification or elimination of certain conditions of Art. 4" (pp. 9 ff.). All these conditions would require to be fulfilled.

8/ Cf. Part II (3), "Status and Treatment of Combatants not fulfilling the conditions of Art. 4....", of the present document (pp. 18 ff.).

constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples 9/.

2. Definition of civilian population and its protection in the event of military occupation or against the dangers arising from hostilities

Persons not belonging to the armed forces or any organization attached thereto and who do not participate directly in military operations should be considered as members of the civilian population 10/.

The parties should endeavour to apply in all circumstances the principles set forth in Arts. 16 to 34 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War 11/.

In their military operations, the parties should respect the principles 12/ according to which :

- a) it is prohibited to launch attacks against the civilian population as such;
- b) a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.

9/ Cf. *ibid*, for the question of the death sentence, and also Art. 3 (1) (d) for the judicial guarantees.

10/ Cf. Part III of the present document on problems of defining the civilian population during guerrilla warfare, pp. 24 ff.

11/ Cf. p. 28 of the present document.

12/ Cf. Resolution XXVIII of the XXth International Conference of the Red Cross (Vienna, 1965) and resolution 2444 adopted by the twenty-third U.N. General Assembly in December 1968.

3. Principles and rules of behaviour between enemy combatants

Recognizing that their right to inflict injury on an enemy is not unlimited, the parties would agree to observe in their hostilities the customary principles which emerge from Arts. 22 to 41 of The Hague Regulations.

In particular, they would abstain from recourse to :

- any weapon or method forbidden by international law, either by a specific regulation or because it could cause unnecessary suffering or because it could not be used with discrimination;
- any measure of reprisals against the persons and property protected by the 1949 Geneva Conventions and the present **rules**;
- the taking of hostages, the application of collective punishment and the persecution of a person for an offence not committed by that person;
- any measure infringing the essential principles of protection for the civilian and military wounded and sick.

4. Procedures for the implementation of these rules

The parties would agree that the ICRC could offer its services for the benefit of conflict victims, particularly in order to visit detainees and to provide civilian populations and detained persons with relief supplies.

The parties could, by common consent, entrust international observers to verify objectively alleged

violations of these rules according to a procedure to be determined.

5. Final provision

Acceptance of these regulations should in no way be construed in such a manner as to exclude the application of other provisions of national or international law which would better protect conflict victims.

DOCUMENTARY ANNEX

DOCUMENTARY ANNEX

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A. INTERNATIONAL CONVENTIONS

ANNEX I

ANNEX TO THE HAGUE CONVENTION
OF OCTOBER 18, 1907
(Convention No. IV of 1907)
REGULATIONS CONCERNING THE LAWS
AND CUSTOMS OF WAR ON LAND

SECTION I

BELLIGERENTS

CHAPTER I

The Qualifications of Belligerents

ARTICLE 1

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions :

- (1) To be commanded by a person responsible for his subordinates ;
- (2) To have a fixed distinctive emblem recognizable at a distance ;
- (3) To carry arms openly ; and
- (4) To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination " army ".

ARTICLE 2

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

ARTICLE 3

The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

CHAPTER II

Prisoners of War

ARTICLE 4

Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

They must be humanely treated.

All their personal belongings, except arms, horses, and military papers, remain their property.

ANNEX II

THE GENEVA CONVENTIONS OF AUGUST 12, 1949a.) ARTICLES 1, 2 AND 3 COMMON TO THE FOUR
GENEVA CONVENTIONS OF AUGUST 12, 1949

GENERAL PROVISIONS

ARTICLE 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.	Respect for the Convention
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ARTICLE 2

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.	Application of the Convention
---	-------------------------------------

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

ARTICLE 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions :	Conflicts not of an international character
---	--

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

ANNEX II

b.) THIRD GENEVA CONVENTION RELATIVE TO THE
TREATMENT OF PRISONERS OF WAR
OF AUGUST 12, 1949

ARTICLES 4 AND 5

ARTICLE 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy : Prisoners
of war

- (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions :
 - (a) that of being commanded by a person responsible for his subordinates ;
 - (b) that of having a fixed distinctive sign recognizable at a distance ;
 - (c) that of carrying arms openly ;
 - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
- (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention :

- (1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.
- (2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

ARTICLE 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Beginning
and end of
application

ANNEX II

c.) FOURTH GENEVA CONVENTION RELATIVE TO
THE PROTECTION OF CIVILIAN PERSONS
IN TIME OF WAR OF AUGUST 12, 1949

ARTICLES 5, 27 to 34

ARTICLE 5

Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Derogations

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

SECTION I

PROVISIONS COMMON TO THE TERRITORIES
OF THE PARTIES TO THE CONFLICT
AND TO OCCUPIED TERRITORIES

ARTICLE 27

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Treatment
I.
General
observations

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

ARTICLE 28

The presence of a protected person may not be used to render certain points or areas immune from military operations.

II.
Danger
zones

ARTICLE 29

The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.

III.
Respon-
sibilities

ARTICLE 30

Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.

Application to
Protecting
Powers and
relief
organizations

These several organizations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.

Apart from the visits of the delegates of the Protecting Powers and of the International Committee of the Red Cross, provided for by Article 143, the Detaining or Occupying Powers shall facilitate as much as possible visits to protected persons by the representatives of other organizations whose object is to give spiritual aid or material relief to such persons.

ARTICLE 31

No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.

Prohibition of
coercion

ARTICLE 32

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

Prohibition of
corporal
punishment,
torture, etc.

ARTICLE 33

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

Pillage is prohibited.

Reprisals against protected persons and their property are prohibited.

Individual
responsibility,
collective
penalties,
pillage,
reprisals

ARTICLE 34

The taking of hostages is prohibited.

Hostages

B. RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY
OF THE UNITED NATIONS

General Assembly
United Nations
A/Res. 2676 (XXV)
9 December 1970.

ANNEXE III

RESPECT FOR HUMAN RIGHTS IN ARMED CONFLICTS

The General Assembly,

Recalling that the Preamble of the Charter of the United Nations affirms faith in the dignity and worth of the human person,

Recalling that the United Nations has as one of its purposes the achievement of international co-operation in solving international problems of a humanitarian character and the promotion of respect for human rights,

Reiterating the obligation of Member States for the urgent termination of all armed aggression as envisaged in Articles 1 and 2 of the Charter and in other relevant documents of the United Nations,

Noting the obligation of Member States under the Charter to promote universal respect for, and observance of, human rights,

Recalling resolutions 2444 (XXIII) of 19 December 1968 and 2597 (XXIV) of 16 December 1969 requesting the Secretary-General, in consultation with the International Committee of the Red Cross, to continue to study, inter alia :

- (a) Steps that could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts,
- (b) The need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts,

Believing therefore that the treatment accorded to victims of war and armed aggression is a concern of the United Nations,

Noting resolution XI, adopted by the twenty-first International Conference of the Red Cross at Istanbul, calling upon all parties to the 1949 Geneva Convention relative to the treatment of prisoners of war to ensure that all persons entitled to prisoner-of-war status are treated humanely and

given the fullest measure of protection prescribed by the conventions, and that all parties involved in an armed conflict, no matter how characterized, provide free access to prisoners of war and to all places of their detention by a protecting Power or by the International Committee of the Red Cross,

Considering that the direct repatriation of seriously wounded and seriously sick prisoners of war and the repatriation or internment in a neutral country of prisoners of war who have undergone a long period of captivity constitute important aspects of human rights as advanced and preserved under the Geneva Convention and the Charter of the United Nations,

1. Calls upon all parties to any armed conflict to comply with the terms and provisions of the Geneva Convention relative to the treatment of prisoners of war of 12 August 1949 so as to ensure humane treatment of all persons entitled to the protection of the Convention and, inter alia, to permit regular inspection, in accordance with the Convention, of all places of detention of prisoners of war by a protecting Power or humanitarian organization, such as the International Committee of the Red Cross;
2. Endorses the continuing efforts of the International Committee of the Red Cross to secure the effective application of the Convention;
3. Requests the Secretary-General to exert all efforts to obtain humane treatment for prisoners of war especially for the victims of armed aggression and colonial suppression;
4. Urges compliance with article 109 of the Convention, which requires repatriation of seriously wounded and seriously sick prisoners of war and which provides for agreements with a view to direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity;
5. Urges that combattants in all armed conflicts not covered by article 4 of the Geneva Convention relative to the treatment of prisoners of war be accorded the same humane treatment defined by the principles of international law applied to prisoners of war;
6. Urges strict compliance with the provisions of the existing international instruments concerning human rights in armed conflicts, and urges those who have not yet done so to ratify or accede to the relevant instruments in order to facilitate in all aspects the protection of the victims of armed conflicts.

C. RESOLUTIONS ADOPTED BY INTERNATIONAL
RED CROSS CONFERENCES

ANNEX IV

XVIIth International Red Cross Conference
Stockholm, 1948

RESOLUTION XX

PERSONS PROSECUTED OR DETAINED FOR POLITICAL
REASONS

The XVIIth International Red Cross Conference wishes to draw the attention of the Diplomatic Conference, which will be called upon to study the revised or new Conventions for the protection of war victims, to the importance of applying humanitarian principles to persons prosecuted or detained for political reasons.

expresses the hope that the Governments of the High Contracting Parties ensure to such persons the protection afforded by the said principles.

XXth International Red Cross Conference
Vienna, 1965

RESOLUTION XXXI

Protection of Victims of Non-International Conflicts

The XXth International Conference of the Red Cross,

considering that during armed conflicts not of an international character and internal disturbances occurring in recent years, it has not been possible to ensure sufficient protection for the victims of these conflicts and in particular the prisoners and detainees,

considering further that the Geneva Conventions of 1949 contain in Article 3, common to them all, the provisions applicable to these conflicts,

having taken note of the report of the Committee of Experts convoked by the International Committee of the Red Cross to meet from 25 to 30 October 1962,

urges the ICRC to continue its work with the aim of strengthening the humanitarian assistance of the Red Cross to victims of non-international conflicts,

recommends that Governments of States parties to the Geneva Conventions and National Societies support these efforts in their respective countries.

XXIst International Red Cross Conference
Istanbul, 1969

RESOLUTION XVII

Protection of victims of non-international armed conflicts

The XXIst International Conference of the Red Cross,

considering that since the conclusion of the Geneva Conventions in 1949 non-international armed conflicts have been on the increase and have caused much suffering,

whereas Article 3 common to the four Geneva Conventions has already rendered great service in protecting the victims of these conflicts,

considering however that experience has brought out certain points on the basis of which this Article could be made more specific or supplemented,

asks the ICRC to devote special attention to this problem within the framework of the more general studies it has started to develop humanitarian law, in particular with the co-operation of Government experts.

XXIst International Red Cross Conference
Istanbul, 1969

RESOLUTION XVIII

Status of Combatants in Non-International Armed Conflicts

The XXIst International Conference of the Red Cross,

considering Resolution No. XXXI, in which the XXth International Conference of the Red Cross urged the ICRC to continue its work with the aim of strengthening the humanitarian assistance of the Red Cross to victims of non-international armed conflicts and recommended that Governments of States parties to the Geneva Conventions and National Societies support these efforts in their respective countries,

whereas, since the adoption of the Geneva Conventions of 1949, non-international armed conflicts have become increasingly extensive and have already caused millions of victims,

considers that combatants and members of resistance movements who participate in non-international armed conflicts and who conform to the provisions of Article 4 of the Third Geneva Convention of 12 August 1949 should when captured be protected against any inhumanity and brutality and receive treatment similar to that which that Convention lays down for prisoners of war,

requests the ICRC to make a thorough study of the legal status of such persons and take the action in this matter that it deems necessary.

**FOURTH REGIONAL MEETING
OF RED CROSS SOCIETIES IN MEXICO**

18-22 November 1969

Political Detainees

The National Red Cross Societies of the United States, Mexico, Central America and Panama,

- a) *express their gratitude to the ICRC for its humanitarian action in various parts of the world for the benefit of persons deprived of freedom for offences or reasons which are political or ideological.*
- b) *recommend National Societies to give their support to future actions undertaken by the International Committee in this field and to seek to participate as much as possible and on a regular basis in that action and at the same time to request the ICRC's material assistance in case of need.*

ANNEX IX

IX INTER-AMERICAN RED CROSS CONFERENCEMANAGUA, 1 - 5 DECEMBER 1970Resolution IIThe Red Cross as a Peace Factor

- I. The IX Inter-American Red Cross Conference considers that, with no harm to the precepts established in Art. 3 of the Geneva Agreements of August 12, 1949, when in any country's territory social, political, religious or any type of disturbances arise, even in the form of urban or rural guerillas, from which bloody consequences derive; individual or collective kidnappings in air, land or sea, and whenever victims of any type exist, both the authorities and the rebels are bound to respect the victims' inherent rights as human beings. To this effect, the National Red Cross or the International Red Cross Committee by means of its delegates, shall exhort the conflicting parties toward observance and respect to human rights.
- II. The IX Inter-American Conference considers that when events to which the afore-mentioned Article refers arise, the National Red Cross or the ICRC, by means of its delegates, shall make itself present at the scene of the events to lend to all victims, with no discrimination whatsoever, the quick and efficient human assistance to which they are entitled; being able, in case of kidnapping, to offer and to lend their assistance to the kidnapped person(s) and to his family to help them in all possible ways and even to serve as intermediary in his rescue, keeping such secrecy and discretion as the case requires.

- III. The IX Inter-American Conference considers that in the specific case of kidnappings on sea, or air, the National Red Cross or the ICRC, by means of its delegates, shall offer its mediation and lend assistance to passengers of the kidnapped vessels and inform the passengers' families of their condition through their respective Red Cross.
- IV. The IX Inter-American Conference considers that the National Red Cross or the ICRC, by means of its delegates, can and shall visit prisoners resulting from events hereby consigned, lending them all necessary assistance and demanding from their captors or keepers the humanitarian treatment to which they are entitled and the privileges granted to their condition by International Treaties.
- V. The IX Inter-American Conference considers that the Red Cross role in favor of the victims of the events hereby consigned shall never be taken as an attempt to lessen the States' sovereignty nor against free determination of the peoples or as partial interference favoring any of the conflicting parties, and in these as well as all those cases in which it shall intervene, its function is strictly humanitarian and absolutely neutral.
- VI. The IX Inter-American Conference considers that in order for the Red Cross to be a real peace factor in face of growing violence over the entire world, the International Red Cross Committee shall take into account the present, and all those, considerations tending toward this goal so as to find the States the reach and importance of its humanitarian mission.