



# OFFICIAL RECORDS

OF THE

DIPLOMATIC CONFERENCE  
ON THE REAFFIRMATION AND DEVELOPMENT  
OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE  
IN ARMED CONFLICTS

GENEVA (1974 -1977)

VOLUME XIV

## INTRODUCTORY NOTE

Volume I contains the Final Act, the resolutions adopted by the Conference, and the draft Additional Protocols prepared by the International Committee of the Red Cross. Volume II contains the rules of procedure, the list of participants, the *Désignation aux différents postes de la Conférence\**, the *Liste des documents\**, the report of the Drafting Committee and the reports of the Credentials Committee for the four sessions of the Conference. Volumes III and IV contain the table of amendments. Volumes V to VII contain the summary records of the plenary meetings of the Conference. Volumes VIII to X contain the summary records and reports of Committee I. Volumes XI to XIII contain the summary records and reports of Committee II. Volumes XIV and XV contain the summary records and reports of Committee III, and volume XVI contains the summary records and reports of the *Ad Hoc* Committee on Conventional Weapons. Volume XVII contains the table of contents of the sixteen volumes.

The Official Records of the Conference are published in all the official and working languages of the Conference. In the Russian edition, as Russian was an official and working language of the Conference only from the beginning of the second session, the documents of which no official translation was made in Russian are reproduced in English. The Arabic edition of the Official Records contains only the documents originally issued in Arabic and those translated officially into Arabic after Arabic became an official and working language at the end of the third session. The Final Act only has been translated into Chinese.

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\*Document circulated in French only.

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**VOLUME XIV**

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**DIPLOMATIC CONFERENCE  
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**CONVENED BY THE SWISS FEDERAL COUNCIL  
FOR THE PREPARATION OF TWO PROTOCOLS ADDITIONAL  
TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949  
PROTOCOL I RELATING TO THE PROTECTION OF VICTIMS  
OF INTERNATIONAL ARMED CONFLICTS  
PROTOCOL II RELATING TO THE PROTECTION OF VICTIMS  
OF NON - INTERNATIONAL ARMED CONFLICTS**

**HELD AT GENEVA ON THE FOLLOWING DATES:**

**20 FEBRUARY – 29 MARCH 1974 (FIRST SESSION)  
3 FEBRUARY – 18 APRIL 1975 (SECOND SESSION)  
21 APRIL – 11 JUNE 1976 (THIRD SESSION)  
17 MARCH – 10 JUNE 1977 (FOURTH SESSION)**



PREPARATION  
OF THE TWO PROTOCOLS ADDITIONAL  
TO THE GENEVA CONVENTIONS OF 1949,  
PROTOCOL I RELATING TO THE PROTECTION OF VICTIMS  
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PROTOCOL II RELATING TO THE PROTECTION OF VICTIMS  
OF NON-INTERNATIONAL ARMED CONFLICTS

REAFFIRMING AND DEVELOPING THE FOLLOWING FOUR GENEVA CONVENTIONS:

GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITONS OF THE WOUNDED  
AND SICK IN ARMED FORCES IN THE FIELD OF AUGUST 12, 1949

GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED,  
SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA OF AUGUST 12, 1949

GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF  
AUGUST 12, 1949

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





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FIRST SESSION

(Geneva, 20 February - 29 March 1974)

COMMITTEE III

SUMMARY RECORDS OF THE FIRST TO TWELFTH MEETINGS

held at the International Conference Centre, Geneva,  
from 8 to 26 March 1974

Chairman: Mr. H. SULTAN (Arab Republic of Egypt)

Rapporteur: Mr. R. BAXTER (United States of America)



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SUMMARY RECORD OF THE FIRST MEETING

held on Friday, 8 March 1974, at 10.10 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

ORGANIZATION OF WORK (CDDH/III/1/Rev.1)

1. The CHAIRMAN announced that, in view of the limited number of meetings that could be held at the first session of the Conference, the officers of the Committee had prepared some suggestions (CDDH/III/1/Rev.1) on the order of work to save the Committee's time. They suggested that the Committee should first take up draft Protocol I, chapter by chapter, and then the corresponding articles of draft Protocol II. The subject covered would be the general protection of the civilian population against the effects of hostilities, including the basic rules and definitions in articles 43 to 46 of draft Protocol I and article 24, paragraph 1 to article 26 of draft Protocol II; civilian objects, dealt with in articles 47 to 49 of draft Protocol I and articles 27 and 28 of draft Protocol II; precautionary measures, in articles 50 and 51 of draft Protocol I, and article 24, paragraph 2 of draft Protocol II; localities under special protection, in articles 52 and 53 of draft Protocol I; and prohibition of forced movement of civililians in article 29 of draft Protocol II. The Committee might deal with methods and means of combat and the new category of prisoners of war at a future session. A possible fourth subject would be the treatment of persons in the power of a party to the conflict, which appeared last on the agendas of both Committee I and Committee III: it had not yet been determined which of those Committees was competent to deal with the item.

The subjects for discussion listed in document CDDH/III/1/Rev.1 were approved.

2. The CHAIRMAN said that the suggestion of the officers of the Committee was that the articles of draft Protocol I should be discussed first and those of draft Protocol II afterwards, to eliminate possible confusion. That procedure had already been adopted by Committees I and II.

3. Sir David HUGHES-MORGAN (United Kingdom) said that although his delegation did not object in principle to the suggestion of the officers of the Committee, the articles of draft Protocol II could not be discussed until the scope of that Protocol had been determined, and it was uncertain whether Committee I would have settled that point before the time came for Committee III to discuss the articles. He therefore suggested that the discussion be postponed until Committee I had finished its work on the scope of the Protocol.

4. Mr. TIEN Chin (China) drew attention to his delegation's observation during the general debate in plenary meeting that the concept of so-called "non-international armed conflict" was vague and ambiguous and capable of different interpretations. Since it touched on the questions of civil war and State sovereignty, many countries were doubtful about it. It would be necessary to study the matter further and see whether draft Protocol II was needed. His delegation therefore proposed that both the Conference and the Committee should concentrate on draft Protocol I and leave the second aside for the time being.
5. Mr. HAKSAR (India) said that, although the point made by the United Kingdom representative deserved serious consideration, it was unnecessary to take clear-cut decisions on the Committee's procedure at that stage. He suggested that the Committee should decide on how to proceed further.
6. Mr. NBAYA (United Republic of Cameroon) recalled that a similar problem had arisen in Committee II, where the same arguments had been put forward. The Chinese suggestion was tantamount to adjourning discussion of Protocol II sine die. Yet, draft Protocol II would in no way affect the sovereignty of States or involve interference in their internal affairs, and was merely designed to protect basic human rights in a situation of crisis. The Committee must not become embroiled in political questions and lose sight of its true, humanitarian aim.
7. In his delegation's view it would be best to deal with the two Protocols concurrently. Although the suggestion to deal with articles 43 to 53 of draft Protocol I would enable the Committee to save time, it would be better to decide on the principle first, for that would save more time in the end.
8. Mr. LONGVA (Norway) supported the Chairman's suggestion on the organization of work. He could not see how the definition of the scope of application of draft Protocol II could change any delegation's attitude towards the basic question of protecting the civilian population. The articles to be discussed by the Committee were to a large extent re-statements of principles of international law already unanimously recognized by the General Assembly of the United Nations as being applicable in armed conflicts.
9. The problem mentioned by the United Kingdom representative would arise at a later stage during the discussion of the last items on the Committee's agenda. If Committee I had not yet provided the necessary clarification, any delegation with difficulties could revert to the matter at that stage. He therefore proposed that the Committee should adopt the programme of work put forward by the Chairman on that understanding.

10. Mr. GENOT (Belgium) endorsed the views of the two previous speakers.
11. Mr. EL IBRASHY (Arab Republic of Egypt) supported the Chairman's suggestions on the method of work, and endorsed the proposal of the Norwegian representative. However, the point raised by the United Kingdom representative should also be taken into account. The Committee should start by examining articles 43 to 46 of draft Protocol I, by which time Committee I would have finished dealing with article 1 of draft Protocol II. Committee I could in any case be requested to give priority to that article.
12. Mr. AL-ADHAMI (Iraq) said that his delegation was in favour of first discussing draft Protocol I and then the relevant articles of draft Protocol II.
13. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) said that his delegation supported the suggestion of the officers of the Committee, namely, that the relevant articles of draft Protocols I and II should be discussed together.
14. Mr. OHLSEN (Canada) supported the suggestion for simultaneous consideration of the relevant articles of draft Protocols I and II. His delegation was most concerned that draft Protocol II should be considered at the current session of the Conference, with a view to ensuring humanitarian protection for the victims of non-international conflicts. While partly sharing the concern expressed by the United Kingdom delegation, it agreed with the Norwegian representative that the best course would be to deal with practical considerations of that kind as and when they arose.
15. Mr. CRETU (Romania) said that it would be preferable for the Committee to reach agreement on all the relevant articles of draft Protocol I before proceeding to study draft Protocol II.
16. Mr. TEIXEIRA STARLING (Brazil) said he agreed with the United Kingdom representative that draft Protocol II should not be considered until its field of application had been clearly defined.
17. Mr. BLIX (Sweden) said that his delegation agreed with the views expressed by the representatives of the United Republic of Cameroon, Norway and the Arab Republic of Egypt, and supported the procedure suggested by the officers of the Committee. It understood the hesitations of the representatives of China and the United Kingdom and agreed that there would be an element of uncertainty in discussing draft Protocol II without knowing exactly its scope. However, the Committee could base its discussions on the assumption that draft Protocol II would have the scope proposed by the ICRC unless Committee I took any decision to the contrary.
18. Mr. BRETON (France) said he shared the concern expressed by other delegations about the difficulty of discussing the contents of draft Protocol II without knowing its exact scope and field of application.

19. His delegation considered that the question of protection of journalists engaged in dangerous missions should be included in the Committee's agenda.
20. The CHAIRMAN observed that it was for the Conference meeting in plenary to decide which questions should be allocated to the various Committees.
21. Mr. ABADA (Algeria) said he agreed with the delegations which considered that the Committee should concentrate its efforts on draft Protocol I. His delegation had serious reservations about the provisions of draft Protocol II, the field of application and scope of which had yet to be defined.
22. Mr. KABUAYE (United Republic of Tanzania) said he supported the views expressed by the representatives of Algeria and China.
23. Mr. MENCER (Czechoslovakia) said that his delegation supported the suggestions of the officers of the Committee as set out in document CDDH/III/1/Rev.1.
24. Mr. CASTREN (Finland) said he was in favour of the compromise suggestion made by the Indian representative.
25. Mr. ALLAF (Syrian Arab Republic) said that he shared the views expressed by the representatives of the United Republic of Cameroon, the Arab Republic of Egypt, Norway and Sweden, while sympathizing with the concern expressed by some other delegations regarding the scope of draft Protocol II. His delegation could see no reason why the Committee should not consider the relevant articles of draft Protocol II in so far as they related to purely humanitarian concepts, on the understanding that any decision taken by the Committee would be conditional upon the outcome of the discussions held in Committees I and II and upon the final agreement reached regarding the scope of that draft Protocol. He therefore considered that the Committee should proceed along the lines suggested by the Chairman.
26. Mr. OULD MINNIH (Mauritania) said he agreed with the views expressed by the Algerian representative; the Committee should first deal with draft Protocol I.
27. Mr. AJAYI (Nigeria) said he thought that the course of action suggested by the officers of the Committee would facilitate the Committee's task and enable it to complete its work in good time. Nigeria, which had experienced civil war, attached considerable importance to draft Protocol II.
28. Mr. SHAH (Pakistan) said that his delegation shared the view of the Chinese and Algerian representatives that the draft additional Protocols should be dealt with separately. In the absence of any decision on the scope and field of application of draft Protocol II, any discussion on it at that stage would be somewhat academic. Moreover, the language of the two draft Protocols differed considerably and there might be confusion in the drafting of amendments if they were considered together.

29. Mr. FLEMMING (Poland) said that, in his delegation's view, the doubts that had been expressed about the order of work proposed by the officers were unjustified. Those proposals, which his delegation supported, were well-balanced and would contribute greatly to orderly discussion.
30. Mr. EL IBRASHY (Arab Republic of Egypt) said that Committees I and II had adopted the proposals of their officers for their methods of work and that Committee III might do well to follow their example.
31. Mr. HAKSAR (India) said that Committee II had adopted no such procedure. It had simply decided to discuss a certain set of articles in draft Protocol I, leaving any decision on further procedure to be taken after that had been done. That was why he had suggested that for the time being Committee III might simply decide to discuss articles 43 to 46 of draft Protocol I. When that had been done, the progress made in Committees I and II might help the Committee to reach a decision on its further course of action.
32. Mr. MBAYA (United Republic of Cameroon) said that Committee II had so far taken no decision on the subject: it had postponed the matter until Monday, 11 March.
33. Mr. ROECK (Austria), Mr. LECHUGA (Cuba), Mr. FISCHER (German Democratic Republic), Mr. KANNAWAT (Thailand) and Mr. ALVAREZ-PIFANO (Venezuela) said that their delegations supported the officers' suggestions.
34. Mrs. MANTZOULINOS (Greece) said that her delegation attached great importance to the effective protection of the victims of non-international conflicts. In view of certain ambiguities about the definition and field of application of such conflicts, however, it would like the Committee to limit its present consideration to draft Protocol I.
35. Mr. TRANGGONO (Indonesia) said his delegation shared the view that draft Protocols I and II should be considered separately.
36. The CHAIRMAN said that, in making their suggestions, the officers of the Committee had taken three factors into consideration. The first was the time factor. The Committee had only some ten to fifteen meetings at its disposal and could hardly hope to complete its consideration of the question of protection of the civilian population at the current session. That was the only part of the draft Protocols which was divided into chapters. It might be possible to conclude consideration of four or five chapters, leaving the remainder to be dealt with at the second session. In those circumstances, it would be desirable to consider the corresponding parts of both draft Protocols.

37. The second factor was that of co-ordination. Although the Cameroonian representative had rightly stated that Committee II had so far taken no decision on whether or not the two draft Protocols should be considered together, Committee I had decided to discuss them concurrently. The questions with which that Committee was to deal were closely related to those within the purview of Committee III, and the work of the two Committees should be co-ordinated as closely as possible to avoid confusion.

38. The third factor was that of flexibility. The Syrian representative had rightly observed that the Committee's suggestions would be ad referendum. The procedure suggested by the officers was not intended to be rigid: it could be adapted as necessary in the light of developments in Committee I.

The suggestions of the officers of the Committee (CDDH/III/1/Rev.1) on the order of the Committee's work were adopted.

39. Mr. TIEN Chin (China) said that his delegation maintained its position on the order of work of the Committee.

40. The CHAIRMAN said that it might prove necessary in the course of the Committee's work to establish a small co-ordination committee, a drafting committee or a working party. He suggested that, in such an event, the various regional groups should be represented in limited numbers.

It was so agreed.

The meeting rose at 11.30 a.m.

SUMMARY RECORD OF THE SECOND MEETING

held on Tuesday, 12 March 1974, at 10.15 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1)

Draft Protocol I: Article 43 - Basic rule (CDDH/1; CDDH/III/9, CDDH/III/10, CDDH/III/14)  
Article 44 - Field of application (CDDH/1; CDDH/III/10)

Draft Protocol II: Article 24, paragraph 1 - Basic rules

1. The CHAIRMAN invited the expert of the International Committee of the Red Cross (ICRC) to introduce the articles to be considered by the Committee.

2. Mr. MIRIMANOFF-CHILIXINE (International Committee of the Red Cross) said that the credibility of international humanitarian law applicable in armed conflict had suffered greatly in recent years because the rules concerning protection of the civilian population against the effects of hostilities were not always clear and precise. Those rules, which in the main formed part of international customary law or were contained in The Hague Regulations of 1907 respecting the Laws and Customs of War on Land <sup>1/</sup>, had been subject to so many violations in that the way in which they were considered had frequently been distorted. However, the principles underlying those rules were still valid, as witness the numerous resolutions adopted by international organizations, in particular United Nations General Assembly resolutions 2444 (XXIII) and 2575 (XXV) and resolution No. XXVIII of the XXth International Conference of the Red Cross.

3. In the two draft Protocols, the ICRC had sought to bring certain rules of international law up to date and to make certain rules of international customary law more precise or suited to new situations.

4. The draft Protocols were designed to provide the civilian population with legal immunity in two ways: - first by a complete ban on military attacks or operations against civilian populations and civilian objects as such and, secondly, by limiting the effects of military operations which, although directed against military objectives, might incidentally or accidentally endanger the civilian population and civilian objects in the vicinity.

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<sup>1/</sup> Annexed to The Hague Convention No. IV of 1907 on the Laws and Customs of War on Land.

5. The drafts contained firm provisions for the first case and flexible provisions for the second case, in order to take account of the realities of modern armed conflict and in the light of earlier efforts at codification in that sphere. Many writers thought that the draft Rules of Air Warfare prepared by a Commission of Jurists at The Hague in 1922 and 1923 had failed through lack of such a dual approach.

6. In presenting the drafts of particular articles, the only documentary material referred to would be the relevant parts of the report on the study by the XXIInd International Conference of the Red Cross of the draft additional Protocols to the Geneva Conventions of August 12, 1949 (CDDH/6) and the Memorandum dated 31 December 1973, submitted by the non-governmental organizations' Working Group on the Development of Humanitarian Law.

7. The two parts of draft article 43 of draft Protocol I required belligerents to use selective means or methods of combat in their military operations "in order to ensure respect for the civilian population". The first part reaffirmed the second paragraph of the preamble to the Declaration of St. Petersburg of 1863; the second part developed the same idea, since the concept of military objective had appeared only in the first quarter of the present century. The rule concerning a distinction was derived from the work of the Institute of International Law (session held at Edinburgh, September 1969), and it used wording similar to that of the United Nations General Assembly resolutions 2444 (XXIII) and 2675 (XXV). The rule was the basis of most of the provisions of parts II and IV of draft Protocol I.

8. Certain articles gave definitions, such as "civilian population" (article 45), "civilian objects" (article 47, paragraph 2, and articles 48 and 49) and "military objectives" (article 47, paragraph 1). There were other concepts of which some explanation was given in the ICRC Commentary on the Draft Additional Protocol to the Geneva Conventions of 12 August 1949 (CDDH/3), such as "hostile acts" (or direct participation in hostilities), which meant acts of war that by their nature or purpose struck at the personnel and matériel of enemy armed forces; "military operations", or movements of attack or defence by the armed forces in action; and "war effort", that was to say all national activities which by their nature or purpose would contribute to the military defeat of the adversary.

9. Introducing article 44 of draft Protocol I, he said that the Fourth Geneva Convention of 1949 covered, in a very unequal manner, two situations arising in armed conflict. The more developed part of that Convention, part III, concerned the status and treatment of persons in the power of a party to the conflict, and the less developed part, part II, concerned general protection of the population against certain effects of war.



10. With regard to future law, the proposals were designed primarily to strengthen the protection of the civilian population against the effects of hostilities (articles 43 to 53 of draft Protocol I) and secondly, but in a lesser degree, to supplement the protection of persons in the power of a party to a conflict (articles 63 to 69 of draft Protocol I).
11. Paragraph 1 of article 44 covered only civilians, and civilian objects on land. If the Conference went no further than the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts in resolving the problems of humanitarian rules at sea and in the air, it would be desirable for it at least to adopt a resolution inviting parties to a conflict to apply those rules by analogy.
12. Regarding paragraph 2, the number of provisions where the word "attack" was used was so great that the ICRC had thought it necessary for that idea to be defined.
13. In paragraph 3 the term "international rules" embodied international customary law, whether codified or not, and international treaty law.
14. Introducing article 24 paragraph 1 of draft Protocol II, he drew attention to the comments on page 155 of the ICRC Commentary (CDDH/3). He emphasised that the relevant international resolutions which mentioned the duty of all belligerents to make a distinction between the civilian population and combatants, and between civilian objects and military objectives, related to all armed conflicts and had been adopted unanimously or almost unanimously - for example United Nations General Assembly resolutions 2444 (XXIII) and 2675 (XXV).
15. Mr. CASTREN (Finland) said that the draft articles represented a good basis for discussion and he would propose amendments mainly for clarification or drafting. Article 43 of draft Protocol I and article 24, paragraph 1 of draft Protocol II were acceptable to his delegation.
16. Mr. EL IBRASHY (Arab Republic of Egypt) proposed that in paragraph 1 of article 44 the word "warfare" should be replaced by the words "military operations", to conform with the French "operation militaire" which was the original.
17. Mr. CRETU (Romania) introduced the amendments contained in document CDDH/III/10.
18. Mr. ALLAF (Syrian Arab Republic) said that he supported the Romanian amendments (CDDH/III/10) and the amendment proposed by the representative of the Arab Republic of Egypt. He proposed that in the second line of article 43 the word "resources" should be replaced by the word "targets", since the former was open to wider and wrong interpretation.

19. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) felt that articles 43 and 44 of draft Protocol I and article 24 of draft Protocol II constituted a sound basis for discussion; the Soviet Union delegation would reserve its position on proposed amendments until they had been presented in writing.

20. Mr. FISCHER (German Democratic Republic), introducing the amendment to article 43, in document CDDH/III/9, said that its sponsors believed it would ensure respect for the civilian population. He agreed also with the amendments proposed by the representative of Romania (document CDDH/III/10) referring to article 44, paragraph 1.

21. Mr. HAKSAR (India) said that he believed articles 43 and 44 were inseparable from articles 45 to 49 on which the Indian delegation would wish to comment later. Apart from that reservation, he found articles 43 and 44 generally suitable but supported deletion of the words "on land" in article 44, paragraph 1. He reserved his delegation's position on article 24 of draft Protocol II since there existed no precise definition as to the scope of Protocol II.

22. Mr. DUGERSUREN (Mongolia) supported in principle the amendments proposed in document CDDH/III/9; he did so especially because the amendment had deleted from article 43, paragraph 1, the phrase "shall confine their operations to the destruction or weakening of the military resources of the adversary", since that phrase seemed unsuitable to a Protocol devoted to humanitarian law. Care should be taken to avoid similar expressions which might create the impression that the Conference was legislating norms of the "law of war" in the documents on humanitarian law. He supported the Romanian proposal to delete the words "on land" from article 44 (CDDH/III/10).

23. Mr. SALEM (United Arab Emirates) supported the amendments submitted by the representatives of the Arab Republic of Egypt and the Syrian Arab Republic and that proposed by Romania.

24. Mr. REZEK (Brazil) said that the members of his delegation had devoted special attention in their preparatory studies to the words "on land" in article 44, paragraph 1. They had felt that such restrictive terms should be based on specific reasons, possibly linked to the consideration of the rules of the Law of the Sea. He thought that it would be useful to have some enlightenment on that subject from the experts of the ICRC.

25. Mr. MIRIMANOFF-CHILIKINE (International Committee of the Red Cross) explained that neither the text of 1971 nor that of 1972 had contained those words which had been added at the explicit request of some delegations at the first and second sessions of the Conference of Government Experts, so as not to interfere with any of the provisions of the Law of the Sea.

26. Mr. ALDRICH (United States of America) said that while articles 43 and 44 constituted a generally sound approach, his delegation would have some drafting amendments. He believed the ICRC had been correct in inserting the limitation "on land" in article 44 since the vast majority of civilians were in fact on land. Although the article applied to attacks on land from the sea or air, the law of sea warfare was too complex to be dealt with at the Conference. Deletion of the words "on land" might inadvertently modify the Law of the Sea.

27. Mr. TRANGGONO (Indonesia) agreed with the proposal by the representative of the Syrian Arab Republic to change "resources" to "targets" and with the deletions from article 43 proposed by the representative of Mongolia.

28. Sir David HUGHES-MORGAN (United Kingdom) stated that he regarded the ICRC version of article 44, paragraph 1 as suitable. He agreed with the views put forward by the United States representative against deleting the words "on land", since to do so would be likely to cause confusion. Draft Protocol I was to amplify the Geneva Conventions and The Hague Law and not modify international law with regard to warfare at sea.

29. Mr. ALLAF (Syrian Arab Republic) replying to the United States and United Kingdom representatives, said that he believed the deletion of the words "on land" to be unambiguous. He introduced a new draft to replace article 43 taking into consideration comments expressed during the meeting (CDDH/III/14).

30. Mr. FLECK (Federal Republic of Germany) said his delegation accepted articles 43 and 44 of draft Protocol I as they stood and while article 43 reaffirmed the second paragraph of the preamble to the St. Petersburg Declaration, he could not support the deletion proposed by the Romanian delegation in document CDDH/III/10 and the deletion suggested by the representative of Mongolia.

31. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) asked for an adjournment, so that representatives might receive written texts of the amendments proposed.

It was so agreed.

The meeting rose at 11.45 a.m.



SUMMARY RECORD OF THE THIRD MEETING

held on Tuesday, 12 March 1974, at 3.40 p.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

TRIBUTE TO THE MEMORY OF PROFESSOR MILAN BARTOŠ

On the proposal of the Chairman, the members of the Committee observed a minute's silence in tribute to the memory of Professor Milan Bartoš of Yugoslavia, a distinguished and long-serving member of the United Nations International Law Commission.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I: Article 43 - Basic rule (CDDH/1; CDDH/III/9, CDDH/III/10, CDDH/III/14, CDDH/III/20) (continued)

Article 44 - Field of application (CDDH/1; CDDH/III/10, CDDH/III/16, CDDH/III/19, CDDH/III/21) (continued)

Draft Protocol II: Article 24, paragraph 1 - Basic rules (CDDH/1; CDDH/III/15) (continued)

1. The CHAIRMAN invited the Committee to discuss the amendments to articles 43 and 44 of draft Protocol I and article 24, paragraph 1 of draft Protocol II.
2. Mr. MENCER (Czechoslovakia) said that his delegation was a co-sponsor of the amendment to article 43 of draft Protocol I in document CDDH/III/9. The basic rule of that article must clearly express two fundamental humanitarian principles, namely, the need to distinguish between the civilian population and combatants, and the need to protect the civilian population and civilian objects against the dangers of hostilities. The phrase "the Parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary", which appeared in the ICRC draft (CDDH/1) of article 43 was not a humanitarian rule and had therefore been omitted from the amendment. The sponsors had submitted a similar amendment (CDDH/III/15) to article 24, paragraph 1 of draft Protocol II.
3. Mr. HERCZEGH (Hungary) said that he supported the amendment to article 43 of draft Protocol I in document CDDH/III/9 and fully endorsed the views expressed by the delegations of the German Democratic Republic and Czechoslovakia in that connexion. His delegation would be prepared to accept the insertion of the word "clear" before "distinction" proposed by the Romanian delegation (CDDH/III/10, para. 1), and considered that article 24 of draft Protocol II should be amended along similar lines.

4. With regard to article 44 of draft Protocol I, he supported the Romanian proposal to delete the words "on land" at the end of paragraph 1 (CDDH/III/10, para. 2).
5. Mr. BADIALI (Italy) drew the Committee's attention to the use of the word "operations" in article 43 and of the words "operations militaires" in the French text of article 44. The term "military operations" was not defined in either of the draft Protocols. It was described in the Commentary on article 3 of draft Protocol I as "offensive and defensive movements by armed forces in action" (CDDH/3, page 10), but that definition was likely to give rise to confusion. The problem of defining the term was all the more serious since it was used in the basic rule on protection of the civilian population. It would be undesirable to attempt to conceal the divergency of delegations' positions by using ambiguous terminology. The Conference was in duty bound to ensure that the texts were clear, since that was a prerequisite for their correct and effective application.
6. Mr. ALLAF (Syrian Arab Republic) observed that the Romanian amendment to article 43 (CDDH/III/10) had been superseded by amendment CDDH/III/14, which Romania had co-sponsored.
7. His delegation supported the general spirit of amendment CDDH/III/9, but considered that amendment CDDH/III/14, of which it was a sponsor, was clearer and more comprehensive.
8. The Ghanaian amendment (CDDH/III/20) was not very different from the original ICRC draft. The word "resources" was unacceptable, as it was too sweeping and vague. Furthermore, the idea of destruction or weakening of any objectives, even military ones, should have no place in international humanitarian law, and his delegation agreed with the views expressed at the second meeting by the Mongolian representative on that subject.
9. He supported the Romanian proposal to delete the words "on land" at the end of paragraph 1 of article 44 (CDDH/III/10). On the other hand, the amendments to that article proposed by Australia (CDDH/III/21) and Belgium and the United Kingdom (CDDH/III/16) were not acceptable to his delegation.
10. Replying to a question by the CHAIRMAN, he said that the sponsors of amendment CDDH/III/14 had not yet discussed its possible applicability to article 24, paragraph 1, of draft Protocol II, but would do so and would make their views known in due course.
11. Mr. FLEMMING (Poland) said that it was not always possible to make a clear distinction between humanitarian law and the regulations which applied to the conduct of hostilities. It was thus inadvisable to refer in a basic rule of humanitarian law to the destruction or weakening of the military resources of the adversary, as was done in the original text of article 43. The basic rules in that article and in article 24, paragraph 1, of draft Protocol II should be concentrated on the protection of the

civilian population and civilian objects and on making a distinction between the civilian population and combatants and between civilian objects and military objectives. That was the purpose of amendments CDDH/III/9 and CDDH/III/15.

12. Article 24, paragraph 2 of draft Protocol II, was covered to a large extent by the amendment to paragraph 1.

13. Sir David HUGHES-MORGAN (United Kingdom) said that his delegation was still inclined to support the ICRC text of article 43. The United Kingdom delegation had not yet had time to study the various amendments in detail, but when it had done so it would see whether it could support any of them. Nor could it comment usefully on article 24 of draft Protocol II until the scope of that Protocol had been defined.

14. The deletion of the words "on land" from article 44, paragraph 1, would have the same effect as the insertion of the words "..., sea or air", namely, the application of section 1 of part IV of draft Protocol I to all warfare, on land, at sea or in the air.

15. Customary law for the protection of civilians and civilian ships in the case of warfare at sea differed greatly from that proposed in the draft Protocol. Under both bodies of law, civilians included crews and passengers in merchant ships and non-combatant passengers in warships, although the protection granted to them must obviously differ from one category to the other.

16. Merchant ships, some of which were armed in wartime, were entitled by customary law to use their arms in self-defence and were thus in a very different category from the civilian objects referred to in the draft Protocol.

17. Under the Treaty for the Limitation and Reduction of Naval Armaments, signed at London in 1930, and the Protocol of 1936, a submarine or other warship was permitted in wartime to sink a merchant vessel, provided the passengers and crew were removed to a place of safety. In the case of refusal to stop or of resistance to visit or search, a warship was entitled to sink a merchant vessel without taking such precautions.

18. There was thus a substantial contradiction between the customary and conventional law relating to merchant ships and the more comprehensive protection which it was proposed to grant to civilian objects under Protocol I. The rules of sea warfare perhaps needed to be codified or possibly changed, but a great deal of preparatory work would first be required to resolve the contradictions he had mentioned.

19. Air warfare was an even more difficult subject, because the rules relating to it were in many respects uncertain. It might be desirable for those rules also to be codified and expanded, but that again was a matter for extensive study.

20. The qualified experts who had held lengthy discussions with a view to establishing a clear set of rules for the guidance of those who had to engage in warfare had not taken the existing laws of sea or air warfare into account. Any attempt to make draft Protocol I apply to such warfare would weaken the efforts which had been made to give a clear lead in the field of humanitarian law.

21. That was why the sponsors of amendment CDDH/III/16 had restricted the field of application to attacks on land. They would have no objection to a redraft or to a definition of the expression "on land" to make it clear that attacks on targets on lakes, rivers or inland waterways were included.

22. The sponsors had followed the lead given by the ICRC in making the provisions of the section apply to attacks, but had done so in paragraph 1 of article 44 instead of in paragraph 2 and had defined the word "attacks" in a separate paragraph. It might be considered desirable to transfer the definition to article 2, to make it apply to draft Protocol I as a whole.

23. The amendment to article 44, paragraph 3, in document CDDH/III/16, was similar to paragraph 3 of amendment CDDH/III/21 to which the Syrian representative had objected; it was designed to avoid the use of the vague term "complementary" and to ensure the continued application of the humanitarian protection provided by earlier conventions and by customary law. That wording, which was clearer than the original text, would not weaken the additional protection to be given by the Protocol.

24. Mr. TIEN Chin (China) said it was imperative for the wording of the basic rule in article 43 to be explicit and for the field of application laid down in article 44 to be as broad as possible. His delegation therefore supported amendment CDDH/III/14.

25. In view of the cruel oppression and heavy casualties suffered by the civilian population in the aggressive wars launched by the imperialists, colonialists, racists and Zionists, Protocol I should provide for the maximum protection of civilians.

26. His delegation, which considered that the Conference should concentrate its attention at the current session on draft Protocol I, reserved its right to comment on draft Protocol II at a later stage.

27. Mr. CRABBE (Ghana) said that his delegation had submitted an amendment to article 43 (CDDH/III/20) in order to make it quite clear that the phrase "civilian population" was not limited to the civilian population of States parties to a conflict.

28. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that although amendment CDDH/III/9 was preferable to amendment CDDH/III/14, it could still be improved. The word "clear" should be inserted before "distinction" in article 43.



29. He asked whether the term "full protection" in amendment CDDH/III/14 meant the protection of civilians as a whole. To avoid misinterpretation it might be better to insert the words "as such" after "civilian population" in the first line of document CDDH/III/9.

30. The wide scope of protection of the civilian population proposed in the Ghanaian amendment (CDDH/III/20) seemed to be unwarranted.

31. With regard to amendment CDDH/III/14, his delegation preferred the ICRC text. The United Kingdom representative's explanations concerning air and sea warfare were indeed pertinent, but the ICRC had taken them into account in its draft. His delegation also preferred the ICRC text of article 44, paragraph 3, which included the word "complementary". Indeed, the main reason for adopting draft Protocol I was that it was complementary to existing laws and regulations.

32. Since the humanitarian provisions of draft Protocol II were urgently needed, he welcomed the amendment to article 24, paragraph 1, of that Protocol submitted by the delegations of Czechoslovakia, the German Democratic Republic and Poland (CDDH/III/15).

33. Mr. ALLAF (Syrian Arab Republic) apologized to the Australian, Belgian and United Kingdom representatives for his hasty conclusions concerning their amendments to article 44, paragraph 3. Those amendments were, he now realized, constructive, but he would still prefer them to be combined with the ICRC draft.

34. In reply to the Soviet Union representative, he explained that the words "full protection" in document CDDH/III/14 were self-explanatory and that the sponsors could not agree to change them.

35. Mr. EL SHEIKH (Sudan) added that "full protection" meant protection against military operations.

36. Despite the United Kingdom representative's explanations he still believed that to delete the words "on land" from article 44, paragraph 1, would not undermine the existing law of sea warfare. The basic rule should in any case be a comprehensive article with a wide range of application. Until the laws of war at sea were codified, States were undeniably bound by the existing rules; but as the United States representative had pointed out at the second meeting, the small proportion of civilians which could suffer from indiscriminate attack at sea should be taken into consideration.

37. Article 44, paragraph 3, as drafted in amendment CDDH/III/16 was, with the exception of the opening words, preferable to the ICRC version. If those opening words could be made affirmative rather than negative, so as to reaffirm existing law, he could support the amendment.

38. Mr. FLEMMING (Poland) said that the sponsors of document CDDH/III/9 had accepted the Soviet Union representative's amendment. The word "clear" should be inserted before "distinction" in the amendment and the French version should read "... la distinction nette ..."

39. Mr. BRETON (France) asked whether arrangements could not be made to discuss amendments not less than twelve hours after they had been circulated.

40. He wondered whether the last sentence of document CDDH/III/9 - "Civilian population and civilian objects shall be protected against the dangers of hostilities" - implied that national authorities ought to take protective steps before or during hostilities, which would be complicated, or whether it applied to an adversary.

41. Mr. MIRIMANOFF-CHILIKINE (International Committee of the Red Cross) explained that the ICRC version of article 43 was a general rule, which could be considered, as the French representative had pointed out, either with respect to the attacking party or with respect to the attacked party. The two cases were, however, specifically covered in article 46, paragraph 1 and article 50 on the one hand, and in article 46, paragraph 5 and article 51 on the other hand, which the ICRC would explain at a later stage.

#### ORGANIZATION OF WORK

42. Mr. PASCHE (Switzerland) said that it would be useful if the Committee could be given a time-table showing when the various articles would come up for discussion. That would make it possible for delegations to submit amendments sufficiently in advance to enable other delegations to study them in time. It would also be useful to have a summary table of the amendments submitted to each article.

43. The CHAIRMAN said that the Swiss suggestion would be submitted to the Secretariat.

44. He read out a letter from the Secretary-General of the Conference requesting representatives to reduce their amendments to the minimum, to group them in chapters and sections whenever they could, and to submit them as early as possible because of the Secretariat's heavy workload.

The meeting rose at 6 p.m.

SUMMARY RECORD OF THE FOURTH MEETING

held on Wednesday, 13 March 1974, at 3.15 p.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I: Article 43 - Basic rule (CDDH/1; CDDH/III/9, CDDH/III/10, CDDH/III/14, CDDH/III/20, CDDH/III/26) (continued)  
Article 44 - Field of application (CDDH/1; CDDH/III/10, CDDH/III/16, CDDH/III/19, CDDH/III/21) (continued)

Draft Protocol II: Article 24, paragraph 1 - Basic rules (CDDH/1; CDDH/III/12, CDDH/III/15, CDDH/III/23) (continued)

1. Mr. MIRIMANOFF-CHILIKINE (International Committee of the Red Cross), replying to a question by Mr. HERCZEGH (Hungary) concerning article 44, said that the expression "land" meant all national territory, including lakes, rivers, canals and other bodies of water, with the sole exception of territorial seas.
2. Mr. BRETTON (France) said that his delegation found the provisions of article 43 of Protocol I acceptable and that, to meet the wish of one delegation, it had prepared a compromise solution between the various texts proposed, namely, the original draft article, the amendment submitted by Czechoslovakia, the German Democratic Republic and Poland (CDDH/III/9) and the amendment submitted by the United Arab Emirates, Kuwait, Libyan Arab Republic, Madagascar, Romania, Sudan and the Syrian Arab Republic (CDDH/III/14). He therefore proposed that article 43 should be worded as follows (CDDH/III/26): "In order fully to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall make a clear distinction between the civilian population and combatants and between civilian objects and objectives constituting the military resources of the adversary."
3. Mr. TODORIC (Yugoslavia) said that the original text of article 43 was acceptable without major changes, since it merely reaffirmed principles already existing in international instruments and in customary law. With regard to the amendments, the objections to which they gave rise were not only matters of drafting; their sponsors should therefore try to align their points of view and, if possible, put forward a joint proposal.

4. Mr. FISCHER (German Democratic Republic) said that the sponsors of document CDDH/III/9 found the French proposal satisfactory. In order to facilitate the Committee's work they would withdraw their amendment and wished to be considered as co-sponsors of document CDDH/III/26.
5. Mr. ALVAREZ-PIFANO (Venezuela) considered that article 44, paragraph 3, as drafted by the ICRC, was in keeping with the objectives of the Conference. Quoting paragraph 3, he said that the word "complementary" in that text was particularly well chosen. The wording to be adopted by the Conference should not complicate the interpretation placed on the two Protocols or restrict the application of their provisions in the future.
6. He had some misgivings about paragraph 3 of the amendments submitted by Belgium and the United Kingdom (CDDH/III/16) and by Australia (CDDH/III/21), the first phrase of which read as follows: "Nothing contained in the provisions of the present section shall affect the humanitarian protection given by part II of the Fourth Convention . . .", which probably implied the application of the Fourth Geneva Convention of 1949 as a matter of priority over the Protocol. That was a problem of legal technique, of the application of successive instruments concerning the same question governed by international law.
7. The delegation of Venezuela was fully aware that the Conference was not called upon to revise existing international humanitarian law but merely to reaffirm it, and that was a general question which should be decided in the light of the decisions taken by Committee I on provisions such as those contained in articles 1 and 34. His delegation agreed with the statement in article 34 - "When the parties to the Convention are also Parties to the present Protocol, the Conventions shall apply as supplemented by this Protocol."
8. Referring to article 43 and the amendments thereto, he pointed out that, contrary to what the ICRC had said in its Commentary (CDDH/3, para. 53), that article did not contain in substance what was stated in the second preambular paragraph of the Declaration of St. Petersburg of 1863, namely "that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy". Article 43 stated, however, "... the Parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary.". But "military forces" and "military resources" were not the same thing. Types of military forces were set out in article 4 A, paragraphs (1), (2), (3) and (6) of the Third Geneva Convention of 1949, while the concept of military resources seemed to include not only military forces but the entire logistic support of such forces, including factories and industries manufacturing war materials, power plants and so forth.

9. Before making any comments on article 43 and the amendments thereto, the delegation of Venezuela would like to ask the representative of the ICRC for what reasons the Declaration of St. Petersburg had been amended in the sense of amplifying the concepts contained therein.
10. Mr. CASTREN (Finland) thought that the ICRC text could be improved along the lines proposed by the sponsors of amendment CDDH/III/14. He considered, however, that the term "to ensure full protection" took little account of realities, and suggested that the word "full" should be deleted. He also proposed that the corresponding provisions of article 24, paragraph 2, of draft Protocol II should be amended accordingly.
11. His delegation further hoped that the text proposed by the ICRC for article 44 would not be amended. It did not seem possible to delete the term "on land", since contemporary rules of air and sea warfare were different from those of land warfare, especially where the protection of the civilian population was concerned, and the Conference was not in a position to alter them even if it found them unsatisfactory. The amendments submitted by Belgium and the United Kingdom (CDDH/III/16) and by Australia (CDDH/III/21) were almost identical and did not greatly differ in substance from the ICRC text.
12. Mr. PALACIOS TREVINO (Mexico) said that in the case of article 43 his delegation preferred the ICRC text, the form of which might perhaps be amended.
13. It was also in favour of the deletion of the words "on land" from article 44, paragraph 1.
14. With regard to article 24 of draft Protocol II, his delegation wished to reserve its position until a decision had been taken concerning part I of draft Protocol II (Scope of the Protocol).
15. Mr. EL IBRASHY (Arab Republic of Egypt) said that he fully approved of the content of the amendment to article 43 in document CDDH/III/14, but suggested that the last part of the amendment should be slightly changed by replacing the words "objects of civilian nature" by "civilian objects". That drafting change would not apply to the French text.
16. Mr. TEIXEIRA STARLING (Brazil) said that he supported the text proposed by the ICRC for articles 43 and 44 of draft Protocol I and could agree to drafting changes which would make the text clearer and more precise. For the time being, he reserved his position on article 24 of draft Protocol II.
17. Mr. MATU (Albania) said he was in favour of the wording for articles 43 and 44 proposed by Romania (CDDH/III/10), although they represented a bare minimum, since, in view of the size of the military potential at the disposal of the super Powers and the use to which it was put in their wars of aggression, the civilian population was in greater danger than ever.

18. Mr. EATON (United Kingdom) said that the question was not substantive. The amendments submitted to article 43 of draft Protocol I did not appreciably improve the ICRC text. In his opinion, the many adjectives used in document CDDH/III/14 were superfluous.
19. With regard to the Venezuelan representative's remark concerning the wording of the amendments in document CDDH/III/16, he pointed out that article 43 defined a basic rule. The heads of entities responsible for applying the Conventions would consult article 47, not article 43. It must be stressed that the obligation to respect the civilian population and civilian objects should be fulfilled during attacks, and in that connexion he preferred the wording of document CDDH/III/14. It had also been said that the expression "to the destruction or weakening of the military resources of the adversary" was not suitable for a basic rule; nevertheless, humanitarian law should specify for soldiers and their commanders what they could attack, and the ICRC text was preferable from that point of view.
20. He proposed that an ad hoc group should be set up to examine the amendments submitted.
21. With regard to article 43, he drew attention to document CDDH/III/16 submitted by his delegation and that of Belgium, and pointed out that it was not intended to establish an order of priority among sources of law.
22. Mr. OULD MINNIE (Mauritania) said that he supported amendment CDDH/III/14 and wished to be included among its sponsors. He reserved the right to speak later on the other amendments.
23. Mr. CAMERON (Australia) said he thought that the texts of articles 43 and 44 of draft Protocol I should, as far as possible, be left as they were. He would not, however, be opposed to any amendments which would improve the wording.
24. His delegation could accept article 24, paragraph 2, of draft Protocol II, provided a small error in the English text was corrected.
25. He pointed out that article 43 of draft Protocol I and article 24, paragraph 1, of draft Protocol II defined a principle which was restated in subsequent articles.
26. In his opinion, the ICRC text of article 43 was preferable to amendments CDDH/III/9 and CDDH/III/14 and already covered all the proposed variants.
27. With regard to article 44, document CDDH/III/21 submitted by Australia would undoubtedly require amendment. He suggested that the words "including inland waters" be added after the words "on land" in paragraph 1 of that proposal.

28. In conclusion, he asked what law would be applicable in the case of civilian objects at sea subjected to attack by ground-to-air rockets or by aircraft.

29. Mr. GENOT (Belgium) said he wished to give some explanations of the amendment to article 44 submitted by his country and the United Kingdom (CDDH/III/16). In reply to certain delegations which wished the words "on land" to be deleted, he pointed out that the rules of naval warfare were so specific that the provisions of draft Protocol I, which had to be kept very simple, could not be applied to them. Nevertheless, civilians on board a vessel or aircraft were not deprived of all protection. Certain existing procedures were equivalent, in the case of naval warfare, to the provisions of the Protocol.

30. With regard to paragraph 3 of the Belgian and United Kingdom amendment, it should be borne in mind that there were other rules, both treaty and customary, which related to situations not covered by paragraph 1. Indeed, article 1 of draft Protocol I already established the complementary nature of that instrument in relation to the Geneva Conventions of 1949.

31. Mrs. MANTZOULINOS (Greece) said that she preferred the ICRC text of article 43. The proposed amendments contained unnecessary qualifications. The words "on land" in article 44 clearly expressed the purpose of that provision.

32. Mr. BLIX (Sweden) said that article 43 seemed to be acceptable as it stood, although some of the amendments might improve it. He thought it would be preferable to refer the relevant proposals to a working party.

33. He pointed out that it was proposed in document CDDH/III/14 to establish in article 43 the distinction drawn between civilian objects and military objectives in subsequent articles, but expressed doubt concerning the value of the many adjectives used in that text.

34. With regard to the proposed deletion of the reference to "the destruction or weakening of the military resources of the adversary", he said that it might perhaps be unwise deliberately to ignore the realities of war.

35. He preferred the amendment submitted by the Syrian Arab Republic and six other countries (CDDH/III/14) to the French amendment (CDDH/III/26).

36. With regard to article 44, he pointed out in connexion with the Belgian and United Kingdom amendment (CDDH/III/16) that the provisions of part IV, section I, applied to attacks on land rather than to military operations on the high seas.

37. The word "attack" considerably limited the scope of the articles in that section and a careful study should be made of the possible effects of using that term, particularly on articles 51, 52 and 55 and paragraph 3 of article 46 of draft Protocol I. Like the representative of Finland, he thought it preferable to retain the term "on land". He had a preference for the term "warfare" but could accept the expression "military operations", and preferred the text of article 44, paragraph 3, which appeared in document CDDH/III/16.

38. Finally, he reminded the Committee of the opinion expressed by his Minister in plenary session to the effect that article 44 should not be regarded merely as an addition to the Geneva Conventions of 1949, but that it should supplement The Hague Conventions.

39. Mr. KLEIN (Holy See) proposed the insertion of the following sentence at the beginning of article 43 and amendments thereto: "To spare the civilian population of the adversary to the greatest possible extent is a strict duty and shall be constantly borne in mind by parties to the conflict".

40. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) supported the United Kingdom representative's proposal that a small working party should be set up to examine amendments submitted to the Committee.

41. With regard to article 43, the Committee had before it the original ICRC draft, an amendment by the United Arab Emirates, Kuwait, the Libyan Arab Republic, Madagascar, Romania, Sudan and the Syrian Arab Republic (CDDH/III/14), and a French amendment (CDDH/III/26); it should be possible to agree on a generally acceptable text on the basis of those proposals.

42. The words "ensure full protection" were acceptable, in view of the explanation given by the Sudanese representative at the third meeting. He had no strong views on the adoption of either of the amendments, although the French amendment seemed to be the most appropriate.

43. Article 44, paragraph 1, was satisfactory, but if the majority of the Committee wished the term "attacks on land" to be defined, some explanations might be added at the end of the paragraph.

44. He agreed with the Swedish representative's views on paragraph 2 but thought it preferable to delete the last part of paragraph 2 of the original text, thus avoiding all reference to attacks.

45. With regard to article 24 of draft Protocol II, the Committee had before it three amendments, submitted by Romania (CDDH/III/12), the United States (CDDH/III/23) and jointly by Czechoslovakia, the German Democratic Republic and Poland (CDDH/III/15). That article was of vital importance, since steps had to be taken to protect the civilian population in non-international armed conflicts, such as



civil wars. The amendment in document CDDH/III/15 seemed to be the most suitable, since it reflected the views expressed at the Conference of Government Experts. On the other hand, he could not support the United States amendment to article 24, paragraph 1.

46. Mr. REED (United States of America) said he agreed with the Swedish representative that the words "military resources" should be retained in article 43. He also agreed with the representatives of Finland, Australia and Greece that the ICRC draft set out the basic rule very clearly. He was therefore prepared to endorse that text.

47. He drew attention to the connexion between the two paragraphs of article 24 of draft Protocol II and said that the essential point was to draw a distinction between the civilian population and combatants, and between civilian objects and military objectives.

48. The ICRC draft of article 44 would be entirely satisfactory provided the term "on land" referred to the whole territory of a State, including lakes, rivers, canals and other waterways, with the sole exception of the territorial sea, as the ICRC representative had pointed out. Paragraph 1 must be clear and concise, and the amendments submitted by Australia (CDDH/III/21) and by Belgium and the United Kingdom (CDDH/III/16) should be given due consideration in redrafting that article.

49. With regard to the Swedish representative's remark concerning attacks, he considered that the definition of that term should appear in article 2 and asked the officers of the Committee to bear that suggestion in mind.

50. Mr. EL MISBAH EL SADIG (Sudan) said that the French amendment (CDDH/III/26) ignored two important points which appeared in amendment CDDH/III/14, first, that article 43 should stipulate that the parties to the conflict should confine their operations only to military objectives and, secondly, that it should refer only to "military objectives", not to "military resources".

51. Where the drafting was concerned, the sponsors of amendment CDDH/III/14 were not prepared to accept the changes proposed by the United Kingdom representative. On the other hand, they could accept the Egyptian representative's oral amendment concerning the words "civilian objects" and were prepared to meet with the sponsors of the other amendments with a view to drawing up a joint text.

52. Mr. CHOWDHURY (Bangladesh) associated his delegation with those which considered that article 43 should state clearly that the civilian population must be spared the suffering caused by armed conflicts, whether international or non-international.

53. Although the ICRC draft had been carefully prepared, amendment CDDH/III/14 seemed likely to improve it, particularly by the insertion of the words "ensure full protection"; the deletion

of the words "to the destruction and weakening of the" and the replacement of the term "military resources" by "military objectives". Since the words "military objectives" appeared in the ICRC draft of article 47, it would be advisable to use the same wording in the various articles of draft Protocol I, to avoid misinterpretations.

54. The same applied to article 24 of draft Protocol II. With regard to article 44 of draft Protocol I, he considered that amendments to paragraph 1 should not limit its field of application and that certain misunderstandings might be avoided by retaining the original text.

55. He could support paragraph 1 of the original text and was in favour of the establishment of the small working party proposed by the United Kingdom representative.

56. Mr. RAHHALI (Morocco) said that his delegation considered the text in document CDDH/III/14 to be the best version of article 43 and wished to co-sponsor it. He agreed with other representatives that the words "on land" should be deleted from the article 44, paragraph 1.

57. Mr. ALLAF (Syrian Arab Republic) said that the sponsors of amendment CDDH/III/14 had wished to ensure not only respect but also protection for the civilian population - although the word "full" could be deleted if necessary. Secondly, they had deleted the phrase "to the destruction or weakening of the military resources", since they thought that it was not for a Conference on humanitarian law to draw up rules for the conduct of war by specifying the objectives of military operations. Finally, the sponsors had used the word "objectives" instead of "resources" to make the text as restrictive as possible.

58. Moreover, his delegation shared the Bangladesh representative's views on the harmonization of article 24 of draft Protocol II and article 43 of draft Protocol I.

59. The words "on land" should be deleted from article 44, paragraph 1; that would in no way affect the laws of naval or air warfare. As a compromise, he could accept the text of paragraph 3 proposed by Belgium and the United Kingdom (CDDH/III/16) and by Australia (CDDH/III/21) as subsequently amended by the Australian representative.

60. Mr. DIXIT (India) said he considered document CDDH/III/14 to be an improvement on the original text of article 43 of draft Protocol I. The word "protection", which appeared in the actual title of draft Protocol I, must be inserted and the word "full" could very well be retained. If the Committee did not reach a solution to that effect, the Indian delegation would be obliged to abstain.

61. He was also in favour of the deletion of the words "on land" from article 44, paragraph 1. That would in no way prejudice the rules of conduct of war and he endorsed the views of the representative of the Syrian Arab Republic who had accepted the wording of paragraph 2 given in document CDDH/III/16.

62. Mr. DUGERSUREN (Mongolia) pointed out that he had opposed the use of the words "to the destruction or weakening of the military resources of the adversary", because it was undesirable to give the impression of laying down laws of war in a humanitarian document. Amendment CDDH/III/14, on the other hand, stated how the parties to a conflict must behave in order to ensure the protection of the civilian population, and that wording seemed more appropriate.

63. He reserved the right to speak later on the United States amendment to article 24, paragraph 1, of draft Protocol II (CDDH/III/23).

64. Mr. AL-BARZANCHI (Iraq) said that his delegation supported the amendment to article 43 in document CDDH/III/14, since no useful purpose could be served by defining military operations. The words "military resources" seemed preferable to "military objectives".

65. He proposed that the words "on land" be deleted from article 44, since civilians and civilian objects could also be at sea or in the air. He preferred the word "warfare" to "military operation". The text of article 44, paragraph 2, should be left in its original form and paragraph 3 should be slightly reworded.

66. Mr. ABSOLUM (New Zealand) said he agreed with the Swedish representative that article 43 should not be changed, except perhaps with regard to the words "civilian objectives". The foregoing debate had shown that the different views expressed concerned only the form of the text. He supported the suggestion to set up a working party in which interested members could take part.

67. He also supported the text of article 44 proposed by Belgium and the United Kingdom (CDDH/III/16), but agreed with the Swedish representative that certain provisions of part IV, section I of draft Protocol I did not relate to "attacks". Finally, he shared the United States representative's view that paragraph 2 of article 44 belonged in the part concerned with definitions.

68. Mr. KANNAWAT (Thailand) said that the provisions on the protection of the civilian population must have a wide field of application. With regard to article 43, his delegation endorsed the principles set forth by the ICRC but was prepared to support any improvement that would strengthen the humanitarian aspect.

69. The amendments to article 44 in documents CDDH/III/16 and CDDH/III/21 deserved careful consideration.

70. He was in favour of the amendment to article 24, paragraph 1, of draft Protocol II in document CDDH/III/23; that text seemed to be more concise than the original.

71. Mr. MILLER (Canada) said that the field of application of article 24 of draft Protocol II might be regarded as substantially the same as that of draft Protocol I. An attempt had been made to draw up a text which would be acceptable to the largest number of countries and would be easily applicable. His delegation supported the amendments in document CDDH/III/23. All wording which fell under the laws of war should be eliminated from the text.

72. Miss EMARA (Egypt) said that the term "operation militaire" in the original French text of article 44 was acceptable to her delegation, since it avoided a definition of the concept of declared or undeclared, recognized or unrecognized war.

73. The comments made by her delegation on article 43 also applied to article 24 of draft Protocol II.

74. The CHAIRMAN proposed that a small working party be set up consisting of the sponsors of the various amendments, the legal adviser to the Committee and a representative of the ICRC, and presided over by Mr. Baxter, the Rapporteur of the Committee. The working party would study the amendments to articles 43 and 44 of draft Protocol I and article 24 of draft Protocol II, with a view to submitting a single text to the next meeting of the Committee.

It was so agreed.

The meeting rose at 6.30 p.m.

SUMMARY RECORD OF THE FIFTH MEETING

held on Thursday, 14 March 1974, at 3.45 p.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

TRIBUTE TO THE MEMORY OF MRS. PIERRE GRABER

On the proposal of the Chairman, the Committee observed a minute's silence in tribute to the memory of Mrs. Pierre Graber, wife of the President of the Conference.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I: Article 45 - Definition of civilians and civilian population (CDDH/1; CDDH/III/12, CDDH/III/13, CDDH/III/22, CDDH/III/25, CDDH/III/30)  
Article 46 - Protection of the civilian population (CDDH/1; CDDH/III/8, CDDH/III/10, CDDH/III/13, CDDH/III/27, CDDH/III/28)

Draft Protocol II: Article 25 - Definition (CDDH/1; CDDH/III/2, CDDH/III/12, CDDH/III/13, CDDH/III/31 CDDH/III/33)  
Article 26 - Protection of the civilian population (CDDH/1)

1. The CHAIRMAN invited the representative of the International Committee of the Red Cross (ICRC) to introduce article 45 to which amendments had been submitted by Finland (CDDH/III/13), Belgium and the United Kingdom (CDDH/III/22) and Brazil (CDDH/III/25), and article 46 of draft Protocol I, to which a number of amendments had been submitted, and also articles 25 and 26 of draft Protocol II.

2. Mr. MIRIMANOFF-CHILIKINE (International Committee of the Red Cross) said that in article 45 the ICRC had tried to give a definition of "civilians and civilian population" which would be in harmony with, but more explicit than article 13 of the Fourth Geneva Convention of 1949, relating to civilians. The records of the 1949 Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, showed that article 13 of the Fourth Convention had been interpreted in two different ways. Under the broader interpretation, the words "without any adverse distinction based in particular on . . . nationality" meant that the whole population of the countries parties to the conflict was protected, without exception. Under the restrictive interpretation, neither the civilian population of an ally nor, still less, the civilian population of a party to the conflict, would be covered. The ICRC had felt it safest to leave the

question open, for to adopt one interpretation rather than another would have been tantamount to revising article 13 of the Fourth Geneva Convention.

3. In reply to the point raised by the Ghanaian representative at an earlier meeting, he said that the ICRC Commentary to article 45, paragraphs 1 and 2, should be amended to read "Within the framework of this Section, all human beings who are on the territory of the High Contracting Parties and who do not form part of the armed forces" . . . instead of " . . . on the territory of the Parties to the conflict". Draft Protocol I would not apply to the civilian population of States not Parties to the Protocol in case of conflict between such States and States that were Parties to the Protocol. Nevertheless, when civilian persons of a State not Party to the Protocol were in the territory of a State Party to the Protocol which was in a state of conflict, they would be protected in the same way as the civilians of that State.

4. Article 43, paragraph 1 gave an contrario definition of the civilian population which had been almost unanimously approved at various governmental and Red Cross meetings. Some experts, however, would have preferred to omit such a definition or to keep the same drafting as in draft Protocol II, article 25, paragraph 1 ("Any person who is not a member of armed forces is considered to be a civilian").

5. Article 45, paragraph 3 contained an exception. Inevitably at times members of the armed forces would mingle with the civilian population, and their presence should in no way modify the civilian character of a population. If such combatants committed acts of hostility in such a situation, they would become lawful targets and article 46, paragraph 5 would apply.

6. Article 45, paragraph 4 should be discussed in relation to articles 35, paragraph 1 (c) and article 42, paragraph 1 (b).

7. The rule contained in article 46 was vital. Paragraph 1 merely reaffirmed existing international law. Exceptionally, the words "methods intended to spread terror" had been included to express an intention.

8. The idea behind paragraph 2 was that civilians taking a direct part in hostilities would during that time lose the protection afforded by the article.

9. Paragraph 3 was intended to clarify paragraph 1 and the basic rule. It had been drafted so as to cover all possible cases.

10. Since it was intended to preserve the civilian population from non-selective attacks, it would be impossible to leave aside the question of target area bombing. Greater precision with regard to sub-paragraph 3(a) had been requested, and the ICRC had studied the question of laying down precise measurements for the term "some

distance" between persons and property protected and military objectives. However, it was difficult if not downright dangerous to lay down criteria for such cases. The methods referred to in article 46, paragraph 3(a), which were by their nature non-selective, were moreover sufficiently well-known and did not require to be defined; in fact an unduly specific text would perhaps quickly become out-of-date.

11. Sub-paragraph 3(b) did not contain an exception to paragraph 1 but, as the word "incidental" showed, was intended to cover a different situation. The Red Cross agreed that only peace could guarantee effective protection for the civilian population within or near military objectives.

12. Since the First World War there had been many vain attempts at codifying the immunity of the civilian population. The 1922/23 project would have required combatants to abstain from bombing when it might affect the civilian population, but a good text was useless if it went unsigned, unratified and unimplemented. The Red Cross was conscious of the fact that the rule of proportionality contained a subjective element, and was thus liable to abuse. The aim was, however, to avoid or in any case restrict the incidental effects of attacks directed against military objectives.

13. In introducing article 25 of draft Protocol II, he said that paragraph 1, relating to the definition of a civilian, should be harmonized with article 1, paragraph 1, relating to the field of application, in conjunction with the work of Committee I. Only a desire for simplification had led to the omission of a reference to the presumption of civilian status, which would have corresponded with article 45, paragraph 4.

14. With regard to article 26, on protection of the civilian population, only paragraph 5 differed from the corresponding provisions in draft Protocol I, in that it expressed more concisely the idea of prohibiting the "exposure" of civilians to shield military objectives.

15. Mr. CASTREN (Finland), introducing his delegations amendment (CDDH/III/13), said that he wished to make only two drafting changes to the ICRC text of article 45.

16. The first was to insert the words "of the present Protocol" after the words "article 42", in order to make quite clear which instrument was being referred to. The Belgian and United Kingdom delegations had in fact submitted the same amendment in CDDH/III/22.

17. The second was to replace the full stop at the end of article 45, paragraph 2 by a comma and add the words "whether regarded individually, in groups or as a whole". That amendment was designed to avoid errors of interpretation. A similar amendment should be made to article 25 of draft Protocol II.

18. He could accept the United Kingdom and Belgian amendment to article 45, paragraph 1 (CDDH/III/22), but felt that their amendment to article 45, paragraph 4, was too vague; he preferred the ICRC text.
19. The amendment submitted by the Brazilian delegation in CDDH/III/25 to article 45, paragraph 1 was at first sight not acceptable to his delegation, since article 45 was already specific enough.
20. Mr. EATON (United Kingdom), introducing the joint amendments to article 45 (CDDH/III/22) said he noted that the Finnish delegation had accepted the replacement of the term "armed forces" in paragraph 1 by the term "combatants". He could not agree with the Finnish representative that the wording of paragraph 4 proposed by his and the Belgian delegations was too vague. His delegation supported the Finnish amendment to article 45, paragraph 2 (CDDH/III/13).
21. Mr. REZEK (Brazil) said that the amendment proposed by Brazil to article 45, paragraph 1 (CDDH/III/25), had two aspects.
22. First, since the text provided a definition of "civilian persons", it was expedient to add the preliminary phrase "For the purposes of the present Protocol . . .". It was not a question of limiting the field of application of a protective rule, but simply of avoiding any conflict between a definition of that nature and other definitions given by the administrative law of a Contracting State that might arise once the Protocol was incorporated in its internal legal system.
23. Secondly, it would be desirable to delete the words "of armed forces" after the word "categories". The reference to the third Convention of Geneva of 1949 made it quite clear what were the categories concerned. And it was certain that those categories, as a whole, covered more than the term "armed forces", or even the term "combatants", could cover.
24. Mr. CRISTESCU (Romania) said that his delegation wished to propose an amendment to article 45 and would submit a written text to the Secretariat as soon as possible.
25. Mr. PASCHE (Switzerland) said that his delegation preferred the text of article 45 submitted by the ICRC. Although it understood the concern which had prompted the Belgian and United Kingdom delegations to submit their amendment (CDDH/III/22), it felt that that amendment was more relevant to article 46 than to article 45.
26. Mr. HJERTONSSON (Sweden) said that his delegation wished to join as a sponsor of the Finnish amendments to article 45 (CDDH/III/13). It supported the Belgian and United Kingdom amendment to paragraph 1 of article 45 (CDDH/III/22), but for paragraph 4 favoured the wording proposed by the ICRC.



27. Mr. ALDRICH (United States of America) said that his delegation supported the Belgian and United Kingdom amendments (CDDH/III/22). With the possible exception of the amendment to be submitted by the Romanian delegation, all the amendments proposed to article 45 related to questions of drafting rather than of substance, and might usefully be submitted to a drafting group similar to that set up to consider the amendments proposed to article 43.
28. Mr. FLEMMING (Poland) said he supported the Finnish amendment to article 45, paragraph 1 (CDDH/III/13). On the other hand, that delegation's amendment to article 45, paragraph 2 (CDDH/III/13) was less acceptable, since any additional wording might weaken the text proposed by the ICRC.
29. With regard to the amendment to article 45, paragraph 4, submitted by Belgium and the United Kingdom (CDDH/III/22), he doubted whether legal rules could be extended to cover possible mistakes made by soldiers.
30. He appreciated the humanitarian spirit which had prompted the ICRC when drafting article 45, paragraph 4, but to presume civilian status in case of doubt might in practice aggravate the situation of the persons in question. For example, members of organized resistance movements formed among the civilian population would be liable to severe penalties if they could not prove that they belonged to such movements. The status of prisoner-of-war had in some cases proved far more advantageous than that of civilian.
31. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) said that the text of article 45 proposed by the ICRC was acceptable to his delegation but might be improved by some of the drafting amendments which had been submitted. His delegation could accept the Finnish amendments to paragraphs 1 and 2 (CDDH/III/13) even though, in the case of paragraph 2, it preferred the ICRC's text. It could also accept the amendment to paragraph 1 proposed by Belgium and the United Kingdom (CDDH/III/22). On the other hand, it did not consider that the amendment proposed by those delegations to paragraph 4 (CDDH/III/22) improved the ICRC's text, which it was prepared to accept although it shared the opinion of the Polish delegation as to the possible adverse effects of that rule for members of national liberation or resistance movements.
32. The Brazilian amendment to article 45, paragraph 1 (CDDH/III/25) was not an improvement on the ICRC text, which was acceptable as it stood. Articles 45 and 46, paragraph 2 should be read together; in other words, a civilian would lose his civilian status if he participated in hostilities.
33. Mr. BRETTON (France) said it was his delegation's considered view that the protection extended to civilians would be diminished if the civilian population were defined. However, his delegation would be prepared to accept the replacement of the term "armed forces" in article 45, paragraph 1 by the term "combatants". With regard to paragraph 4, it preferred the text submitted by the ICRC.

34. Mr. MIRIMANOFF-CHILIKINE (International Committee of the Red Cross) said that a problem of co-ordination with the work of Committee II might arise in the case of amendments to article 45 since the definition of civilians and civilian population would affect part II and part IV, section II, of draft Protocol I, with which that Committee had to deal. Attention might be drawn in that connexion to article 60, in which it was stated explicitly that the provisions of section II applied to the civilian population as defined in article 45. The Belgian and United Kingdom amendment (CDDH/III/22) to article 45, paragraph 4, could only apply to part IV, section I.

35. The Commentary to article 46, paragraph 2, should help to allay any anxiety about the original wording of that paragraph.

36. Mr. AJAYI (Nigeria) said he supported the Brazilian proposal to begin article 45, paragraph 1 with the words "For the purposes of the present Protocol," and would like the rest of the paragraph to be replaced by the Belgian and United Kingdom amendment (CDDH/III/22).

37. He also supported the Belgian and United Kingdom amendment to article 45, paragraph 4, but with two further sub-amendments: first, he would like to see the words "about to commit a hostile act" replaced by the words "a combatant", since it would be difficult to judge when a person might be about to commit a hostile act; secondly, he would like to see the words "as such" replaced by the more specific wording "as a civilian".

38. Mr. AHMADI (Iran) said that his delegation supported the Brazilian proposal (CDDH/III/25) to insert the words "For the purposes of the present Protocol," at the beginning of article 45, paragraph 1. He supported the ICRC text for the remainder of the paragraph, except that the words "armed forces" might be replaced by the word "combatants" as proposed by Belgium and the United Kingdom (CDDH/III/22).

39. His delegation was satisfied with the ICRC text of paragraph 2, the Finnish amendment (CDDH/III/13) to which appeared superfluous, and with the ICRC text of paragraphs 3 and 4.

40. Mr. DIXIT (India) said he agreed with the Finnish amendment (CDDH/III/13) to insert the words "of the present Protocol" after the words "Article 42" in paragraph 1. The proposed addition to paragraph 2, however, was tautological and did not improve the text.

41. The word "individuals" in the ICRC text of paragraph 3 might be replaced by the words "individual persons", which were used in the Commentary. He was somewhat concerned about the question of proportionality: a distinction should be made between a civilian population that was heavily outnumbered by the individuals referred to, and one among which such individuals were few.

42. He supported the Belgian and United Kingdom amendment (CDDH/III/22) to paragraph 2, with the Nigerian sub-amendment to replace the words "about to commit a hostile act" by the words "a combatant".

43. Mr. EIDE (Norway) said that his delegation could accept the Belgian and United Kingdom amendment to paragraph 1; the Brazilian amendment might have the effect of limiting the field of application.

44. He supported the Finnish amendment (CDDH/III/13) to paragraph 2, but preferred the ICRC text of paragraph 4 to the Belgian and United Kingdom amendment (CDDH/III/22).

45. He shared the United States representative's view that the Romanian amendment (CDDH/III/12) appeared superfluous.

46. Mr. TEIXEIRA STARLING (Brazil) said that if the word "combatant" was to be used, some definition would be required. Members of the armed forces or of organized armed groups might include non-combatant personnel.

47. The CHAIRMAN invited the Committee to consider the various amendments which had been proposed to article 25 of draft Protocol II.

48. Mr. QUACH TONG DUC (Republic of Viet-Nam), introducing his delegation's amendment (CDDH/III/2), said that the words "or indirectly" after the word "directly" should be deleted as a typographical error.

49. The definition in article 25, paragraph 1, appeared somewhat restrictive. Certain categories of personnel who could be considered neither as armed forces nor as civilians took a direct part in hostilities. Any part played by civilians should be restricted to the relief described in article 14 of draft Protocol II. He drew attention to article 26, paragraph 2, of the same Protocol, which had inspired his delegation's amendment.

50. The civilian objects referred to in articles 24 and 26 required definition, hence his delegation's proposal to add a new paragraph 4 to article 25.

51. Mr. CRETU (Romania), introducing his delegation's amendments (CDDH/III/12), said that they were designed to bring the provisions of draft Protocol II into line with those of draft Protocol I.

52. The words "or of organized armed groups under responsible command", which it was proposed to insert in article 25, had been taken from article 1, paragraph 1, of draft Protocol II.

53. Mr. CASTREN (Finland) said that his delegation's amendment to article 25, paragraph 2, of draft Protocol II was the same as that to article 45, paragraph 2, of draft Protocol I, which he had already introduced.

54. The Romanian amendment appeared acceptable at first sight.

55. Mr. SAMUELS (Canada) said that whatever the scope of Protocol II finally agreed upon, it would cover conflicts between armed forces or other organized armed groups. Care should be taken to ensure that no combatants were considered to be civilians. His delegation therefore proposed that the words "or of organized groups" be inserted after the words "of armed forces" in article 25, paragraph 1. The precise wording of that paragraph would, of course, have to be brought into line with the final text of article 1.

56. Mr. EL IBRASHY (Egypt) said that a new paragraph 4, worded the same as article 45, paragraph 4, of draft Protocol I, should be added to article 25 of draft Protocol II.

57. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that his delegation supported the Romanian proposal (CDDH/III/12) to insert the words "or of organized armed groups under a responsible command" after the words "armed forces" in article 25, paragraph 1. It also agreed with the Finnish amendment to paragraph 2 (CDDH/III/13).

58. The amendment of the Republic of Viet-Nam (CDDH/III/2) had been submitted with the express intention of providing a justification for the imprisonment of civilians. He urged delegations not to support it.

The meeting rose at 6.25 p.m.

SUMMARY RECORD OF THE SIXTH MEETING

held on Friday, 15 March 1974, at 10.50 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I: Article 45 - Definition of civilians and civilian population (CDDH/1; CDDH/III/12, CDDH/III/13 and Add. 1, CDDH/III/22, CDDH/III/25, CDDH/III/30, CDDH/III/35) (continued)  
Article 46 - Protection of the civilian population (CDDH/1; CDDH/III/8 and Corr. 1, CDDH/III/10, CDDH/III/13 and Add. 1, CDDH/III/27, CDDH/III/28) (continued)

Draft Protocol II: Article 25 - Definition (CDDH/1; CDDH/III/2, CDDH/III/12, CDDH/III/13 and Add. 1, CDDH/III/31, CDDH/III/33) (continued)  
Article 26 - Protection of the civilian population (continued)

1. The CHAIRMAN announced that the officers of the Committee would accept no more amendments to article 45 of draft Protocol I and article 25 of draft Protocol II. The final date for submitting amendments to article 46 of draft Protocol I and article 26 of draft Protocol II would be Monday, 18 March, at 12 noon, and for amendments to articles 47, 48 and 49 of draft Protocol I and articles 27 and 28 of draft Protocol II, Monday, 18 March 1974, at 6 p.m.

2. Mr. BADIALI (Italy) said that, although the original text of article 45 was balanced and sound, he was prepared to support the amendments to paragraph 1 in documents CDDH/III/13 and Add. 1 and CDDH/III/22. The words "armed forces" in that paragraph should indeed be replaced by "combatants" as the Belgian and United Kingdom representatives proposed, and he could support the proposal by Finland and Sweden to insert the words "of the present Protocol" after "Article 42". The original text of paragraph 2 was sufficiently clear and he could not accept the amendment in document CDDH/III/13 and Add. 1. He had no comments to make on paragraph 3 and paragraph 4 needed no amendment. In that connexion, he was not convinced by the arguments of the United Kingdom representative, who had said that he wished above all to avoid any specification of the contradiction which existed between article 5 of the Third Geneva Convention of 1949 and article 45 of draft Protocol I. In any case, if a contradiction really existed,

amendment CDDH/III/22 would not remove it: on the contrary, it retained the presumption established in the ICRC text. At all events, the rules laid down in those two articles related to two totally different situations and could not therefore be contradictory.

3. He would speak on article 25 of draft Protocol II when the field of application of that Protocol had been clearly defined.

4. Mr. MERIMANOFF-CHILIMINE (International Committee of the Red Cross) pointed out that the definition of attacks was based on an earlier ICRC text which defined attacks as "acts of violence committed against the adversary by means of arms, in the course of hostilities, whether for purposes of offence or of defence"; to avoid any contradiction between that concept and the concept of military operations, the latter would be defined as "movements or manoeuvres of armed forces in action, whether for purposes of offence or of defence".

5. Mr. CAMERON (Australia) proposed that the words "and combatants" be added after the words "armed forces" in paragraph 1 of article 45. He could support the proposal by Finland and Sweden (CDDH/III/13 and Add. 1) to insert the words "of the present Protocol" after "Article 42" in that paragraph.

6. His delegation had submitted an amendment (CDDH/III/35) proposing the addition of the words "until his status is otherwise established" at the end of paragraph 4.

7. Mr. TRANGGONO (Indonesia) supported the Belgian and United Kingdom amendment (CDDH/III/22). Paragraphs 2 and 3 of the original text were acceptable to his delegation.

8. Mr. EIDE (Norway) said that the amendments to article 45 of draft Protocol I should also apply to article 25 of draft Protocol II. The Egyptian amendment (CDDH/III/33) was acceptable, provided the corresponding article of draft Protocol II was amended accordingly.

9. Mr. PATRNOGIC (Monaco) said he thought that rules already laid down by the Geneva Conventions should not be altered. He was in favour of retaining the original text.

10. Mr. TEIXEIRA STARLING (Brazil) said he preferred to retain the wording of article 4 of the Third Geneva Convention of 1949. He reserved his delegation's position on article 25 of draft Protocol II until such time as the field of application of that Protocol was clearly defined, but pointed out that his delegation had already submitted an amendment (CDDH/III/31). If the Protocol was to apply in such non-international conflicts as civil wars, he would be prepared to accept the rules laid down in articles 25 and 26 of draft Protocol II. Otherwise, the Conference would have to adopt minimum rules in order to amend article 3 common to the four Geneva Conventions of 1949. He stressed that his delegation's amendment was in no way intended to give an unduly broad definition to the term "civilian".

11. Finally, the rules of international law which the Conference was trying to lay down would be useful only to the extent to which they were unreservedly accepted by the majority of States.
12. Mr. ALLAF (Syrian Arab Republic) said that he preferred the original text of article 45. The amendment by Finland and Sweden (CDDH/III/13 and Add. 1) was well-founded and seemed clearer than that proposed by Belgium and the United Kingdom (CDDH/III/22). In any case, he could not agree to the amendment to paragraph 4 in that document and would therefore prefer the original text of paragraph 4 to be retained.
13. Like some earlier speakers, he considered that the field of application of Protocol II should be defined before article 25 of that draft could be discussed.
14. Mr. CHELBI (Tunisia) said he shared the concern of the Italian and Australian representatives and endorsed the Brazilian representative's remarks on possible conflicts between domestic law and the Conventions. In his view, the Belgian and United Kingdom representatives should have borne in mind the connexion between Protocol I and article 4 of the Third Geneva Convention of 1949 when proposing that the words "armed forces" should be replaced by "combatants" in article 45, paragraph 1 (CDDH/III/22).
15. Mrs. MANTZOULINOS (Greece) supported the amendment by Finland and Sweden (CDDH/III/13 and Add. 1) and the amendment to paragraph 1 in document CDDH/III/22. The ICRC text of paragraph 4 was satisfactory. She supported the Egyptian amendment (CDDH/III/33) proposing the addition of a new paragraph to bring article 25 of Protocol II into line with article 45 of Protocol I.
16. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that, although the ICRC draft provided an excellent basis, he had a few comments to make, in view of the proposals and amendments already submitted.
17. The suggestion in the amendment by Finland and Sweden (CDDH/III/13 and Add. 1) concerning paragraph 1 of article 45 would facilitate the interpretation of the text and he had no objection to the addition of the words "whether regarded individually, in groups or as a whole" to paragraph 2, although he did not regard that as essential.
18. The first amendment in document CDDH/III/22, concerning paragraph 1 of article 45, might create some misunderstanding, and the ICRC draft was therefore preferable. The text suggested by the Brazilian representative (CDDH/III/25) was also unacceptable.
19. On the other hand, he agreed with the Brazilian proposal concerning article 25 of Protocol II (CDDH/III/31) and with the amendments to the same article submitted by the Romanian (CDDH/III/12) and Canadian representatives (fifth meeting).

20. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) said that if the words "armed forces" were replaced by "combatants", as it was suggested in document CDDH/III/22, the text would unequivocally apply to members of the national liberation movements, who had been recognized as combatants in a United Nations General Assembly resolution. Nevertheless, the reference to the Third Geneva Convention of 1949 in article 42 of Protocol I made it unnecessary to alter the ICRC draft.

21. Mr. ALVAREZ-PIFANO (Venezuela) said that it was right that article 45 of section I entitled "General protection against effects of hostilities" should contain a wide definition of the term "civilians and civilian population" and that in case of doubt a civilian should be presumed to be such, otherwise civilians and the civilian population would be subject to serious risks. His delegation therefore considered that the wording of article 45 was satisfactory except for a few drafting amendments.

22. The Venezuelan delegation was, however, against the amendment to paragraph 4 of article 45 submitted by Belgium and the United Kingdom (CDDH/III/22) because it introduced subjective considerations which, far from facilitating the practical application or the interpretation of the article, were likely to cause confusion. Article 46, paragraph 2, clearly stated that "civilians shall enjoy the protection afforded by this article unless and for such time they take a direct part in hostilities." But the revision of article 45, paragraph 4 suggested by the two delegations provided that "Unless there are reasonable grounds for supposing that he is about to commit a hostile act, a person who appears to be a civilian shall, for the purpose of this section be treated as such."

23. Mr. OULD MINNIE (Mauritania) said that the amendments submitted did not differ in substance from the ICRC draft. He was in favour of the term "armed forces", since it applied to everyone taking part in the war effort.

24. Mr. FLECK (Federal Republic of Germany) said that the first step should be to define the term "civilians". He considered that the word "combatants" should be used instead of "armed forces", and he therefore endorsed the Belgian and United Kingdom proposal (CDDH/III/22) concerning paragraph 1.

25. The Brazilian suggestion (CDDH/III/25) improved the original text, and a definition limited to the purposes of the present Protocol might even enable the United Kingdom and Belgian delegations to withdraw their amendment to paragraph 4 (CDDH/III/22).

26. He wondered whether the Romanian amendment (CDDH/III/30) to paragraph 1 might not be reconsidered in view of the content of article 46, paragraph 2.

27. He was in agreement with the amendment of Finland and Sweden to paragraph 2 (CDDH/III/13 and Add. 1), which made the text more precise.



28. Mr. AJAYI (Nigeria) said that he would like the words "member of the armed forces" in article 25 of Protocol II to be replaced by "combatant". He was in favour of the Romanian amendment (CDDH/III/18) to paragraph 1, provided the words "a member" were inserted between the word "or" and "of organized armed groups". He approved of the ICRC text of paragraphs 2 and 3.

29. He supported the proposal of the Republic of Viet-Nam (CDDH/III/2), which broadened the scope of the protection to be provided, but proposed that the new paragraph 4 should be amended to read:

"Objects which, by their character or use, are used for the civilian population, are considered to be civilian objects. They cease to be civilian objects when used for the purpose of hostilities".

30. Mr. SORIANO (Philippines) said he was in favour of adding the words "or combatants" after the words "armed forces" in article 45, paragraph 1. The text following the words "article 42" might be deleted. He suggested that paragraph 2 should be accepted as it stood, and that the phrase "who are not civilians" should be used in paragraph 3. The first phrase of the text proposed by Belgium and the United Kingdom (CDDH/III/22) seemed likely to facilitate the application of the rule laid down in the paragraph.

31. Mr. EATON (United Kingdom) said he wished to reply to some of the remarks made about the text proposed by his delegation and that of Belgium (CDDH/III/22). The arguments in favour of retaining the term "armed forces" in paragraph 1, did not seem convincing. That term was imprecise, it was used in very different ways in different parts of Protocol I, particularly in article 33, paragraph 1 - "members of their armed forces"; in article 40 - "Members of armed forces in uniform and other combatants"; and in article 41 - "Armed forces, including the armed forces of resistance movements". The Philippine proposal seemed to cover all aspects of the question.

32. With regard to article 45, paragraph 4, the Syrian representative had expressed the view that adoption of the United Kingdom and Belgian amendment would have the effect of increasing the dangers to which the civilian population was exposed. The intention of the proposal and, in his view, its effect, were in fact the opposite. In cases of doubt such as were envisaged by the paragraph some element of subjectivity was unavoidable. The sponsors of the proposal had tried to make the criteria as strict as possible to put a heavy burden of proof on the soldier. He thought the question should be referred to the Working Party and reserved the right to speak again on the subject.

33. Mr. MIRIMANOFF-CHILIKINE (International Committee of the Red Cross) said that the addition of the words "For the purposes of the present Protocol" at the beginning of article 45, paragraph 1, would be in contradiction with article 44, paragraph 3. A reservation must be made for the case of the civilians mentioned in part II of the Fourth Geneva Convention of 1949, and the case of civilians mentioned in other conventions in force must be examined.

34. The CHAIRMAN proposed that the texts relating to article 45 of draft Protocol I (CDDH/III/13 and Add. 1, CDDH/III/22, CDDH/III/25 and CDDH/III/30) and to article 25 of draft Protocol II (CDDH/III/2, CDDH/III/12, CDDH/III/13 and Add. 1, CDDH/III/31 and CDDH/III/33) should be referred to the Working Party, which would also take oral suggestions into consideration.

It was so agreed.

35. The CHAIRMAN said that the debate was open on article 46 of draft Protocol I and article 26 of draft Protocol II.

36. Mr. ALLAF (Syrian Arab Republic) proposed that in article 46, paragraph 1, the words "intended to" should be replaced by the word "that". It was dangerous to take a presumed intention as a criterion.

37. With regard to paragraph 2, he had no objection to the ICRC draft. In the interests of clarity, he proposed that the words "an active and" should be inserted before the words "direct part in hostilities".

38. His delegation considered that article 46, paragraph 3(b) was particularly important. While he understood the humanitarian considerations that had inspired the ICRC, he could not accept the theory of some kind of "proportionality" between military advantages and losses and destruction of the civilian population and civilian objects, or that the attacking force should pronounce on the matter. He suggested that the phrase following the words "civilian objects" should be deleted and that the word "and" should be replaced by "or" after the words "civilian population".

39. Certain additions should be made to the list of the acts prohibited by article 46. He proposed to return to that point at the appropriate time.

40. His delegation supported those amendments which had the same purpose as its own proposals.

41. Mr. HERCZEGH (Hungary) said that the ICRC text of article 46 was acceptable and that only sub-paragraph 3(b) raised some doubts. That was why his delegation, together with those of Czechoslovakia, the German Democratic Republic and Poland, had submitted document CDDH/III/3, the effect of which was simply to delete sub-paragraph

3(b) and to keep the introduction and sub-paragraph (a) of paragraph 3 unchanged. Similar changes would have to be made in article 26, paragraph 3, of Protocol II.

42. The new text of article 46, paragraph 3, of draft Protocol I was practically identical with that proposed by Romania (CDDH/III/10), but differed fairly substantially from the texts proposed in documents (CDDH/III/27 and CDDH/III/28, based on the rule of proportionality, which called for a comparison between things that were not comparable, and thus precluded objective judgment.

43. Provided the word "disproportionate" was deleted, the provisions of article 50 would suffice to ensure that accidental losses and damage were reduced to a minimum.

44. Mr. QUACH TONG DUC (Republic of Viet-Nam) thanked the Nigerian representative for making proposals concerning his delegation's amendment (CDDH/III/2) and suggested that they might meet privately to consider them.

The meeting rose at 12.40 p.m.



SUMMARY RECORD OF THE SEVENTH MEETING

held on Monday, 18 March 1974, at 10.20 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (Continued)

Draft Protocol I: Article 46 - Protection of the civilian population (CDDH/1; CDDH/III/3, CDDH/III/3 and Corr. 1, CDDH/III/10, CDDH/III/13 and Add. 1, CDDH/III/27, CDDH/III/28, CDDH/III/33, CDDH/III/43, CDDH/III/44, CDDH/III/48/Rev.1)  
(continued)

1. The CHAIRMAN invited the Committee to continue discussion of the amendments to article 46 of draft Protocol I.
2. Mr. FLECK (Federal Republic of Germany), introducing amendment CDDH/III/27, said that while article 46 of draft Protocol I as well as article 26 of draft Protocol II, as drafted by the ICRC, should be adopted in substance, the intention of the amendment was to make the provisions of article 46 clear and applicable for the serving soldier.
3. The amendment to article 46 in document CDDH/III/10 might be thought to duplicate the basic rule and its terms were too general to be effective so that his delegation could not support it. Nor could it support the amendment to article 46 in document CDDH/III/28.
4. The amendment to paragraph 2 contained in document CDDH/III/27 covered the same ground as the Romanian proposal in document CDDH/III/10, but was more precise. The sponsors of document CDDH/III/27 had taken the proposal by Finland and Sweden (CDDH/III/13 and Add. 1) into account in paragraph 3 (b), but were unable to accept the Romanian proposal for paragraph 3. The deletion of sub-paragraph 3 (b), as proposed in documents CDDH/III/3 and Corr. 1 and CDDH/III/10, would jeopardize the effectiveness of the ban on indiscriminate warfare and would be detrimental to the practicability of the whole article. Moreover, if one considered examples like attacks against isolated soldiers or guerrilla fighters among a crowd of civilians, the deletion of sub-paragraph 3 (b) would create a lacuna, since neither article 46, paragraph 3 (a), nor article 50 would provide a sufficient basis for the prohibition of such attacks.

5. His delegation appreciated the fact that no delegation objected to the ICRC proposal contained in paragraph 4. A clear prohibition of reprisals should not be mixed with the prohibition of terrorist acts in paragraph 1. An express prohibition of reprisals against civilian property, which was already laid down in article 33, paragraph 3 of the Fourth Geneva Convention of 1949, should be taken into consideration with reference to document CDDH/III/13 and Add.1. However, reprisals against civilian property in combat would inevitably endanger the lives of civilians, so that the prohibition of reprisals against civilians, as drafted by the ICRC, would deserve priority in that respect.
6. In reply to a question by the CHAIRMAN, he said that the words "au présent article" in paragraph 2 of the French text of document CDDH/III/27 should be replaced by the words "à la présente section".
7. Mr. TODORIC (Yugoslavia) said that opinions differed not so much on the basic ideas expressed in article 46 as on the means of applying them. Amendment CDDH/III/3 and Corr.1 was more concise than amendment CDDH/III/27, but the latter proposal retained the proportionality rule. Although not perfect, that rule should stand until a better formula could be found.
8. The words "sans discrimination" in the French text of paragraph 3 might be replaced by the words "sans distinction".
9. His delegation supported the amendments to paragraph 4 proposed in documents CDDH/III/10 and CDDH/III/13 and Add.1.
10. Mr. CRABBE (Ghana), introducing his delegation's amendment to article 46 in document CDDH/III/23, said that its main purpose was to prevent the use of propaganda as a means of spreading terror among the civilian population.
11. Since submitting its amendment, his delegation had consulted the delegations of Nigeria, Uganda and Tanzania, and it had been agreed that the provision should cover not only propaganda but all acts calculated to spread terror among the civilian population. That was the reason for the amendment proposed in document CDDH/III/38.
12. He supported amendment CDDH/III/13 and Add.1, but preferred the ICRC text, with the small changes he had proposed, to amendment CDDH/III/8 and Corr.1, which would mean a complete redrafting of paragraph 3. He could not support the rewording of article 46 proposed in document CDDH/III/10, because it gave the erroneous impression that all the civilian population taking part in the war effort could be subject to attack.
13. He agreed with the Syrian representative (sixth meeting) that the words "to an extent disproportionate to the direct and substantial military advantage anticipated" should be deleted from paragraph 3 (b).

14. It might be possible to work out an agreed text with the sponsors of the amendment to paragraph 1 in document CDDH/III/27. His delegation reserved its position on the other amendments.

15. In reply to a question by the CHAIRMAN, he said that his delegation's amendment to paragraph 1 (CDDH/III/28) had been replaced by the amendment in document CDDH/III/33.

16. Mr. DUGERSUREN (Mongolia) said that his delegation supported the idea behind amendment CDDH/III/3 and Corr. 1, which, however, appeared to be intended as a replacement for paragraph 3 as a whole, and not merely for sub-paragraph (b), as indicated. He would like to see sub-paragraph (b) retained, with some substantial changes. He shared the view of the Syrian representative that the words "incidental" and "to an extent disproportionate to the direct and substantial military advantage anticipated" should be deleted.

17. The words "which may be expected to . . ." were ambiguous and might provide a loophole for differing interpretations. The drafting group might consider their deletion or substitution.

18. His delegation supported the proposal to replace the words "intended to" by the word "that" in paragraph 1. He suggested that the words "In particular" in the second sentence should be deleted and that the word "also" should be inserted before the word "prohibited".

19. He supported the amendment by Finland and Sweden to paragraph 4 (CDDH/III/13 and Corr. 1) and found the Romanian proposal (CDDH/III/10) for the rewording of paragraph 1 interesting. A similar general provision on the right of the civilian population to effective protection might be included in the preamble to the draft Protocols.

20. He proposed that the words "which are situated in populated areas, and are at some distance from each other;" in paragraph 3 (a) should be replaced by the words "which are situated adjacent to or in the immediate vicinity of populated areas;". The drafting group might consider that suggestion.

21. His delegation might have occasion to revert to the more recent amendments when it had had an opportunity to study them.

22. Mr. HERCZEGH (Hungary), replying to the representative of Mongolia, said that the introductory sentence to the amendment to article 46 in document CDDH/III/3 and Corr. 1 should be worded: "Paragraph 3 should read as follows".

23. Mr. TEXEIRA STARLING (Brazil) said that, in amendment CDDH/III/27, the proposal to substitute the word "attacks" for the word "methods" in the second sentence of paragraph 1 had been made in the interests of consistency and precision of language. The object of the amendment to paragraph 2 was to stress that civilians should always be protected unless they lost civilian status by participating in military operations or committing hostile acts. The wording proposed for paragraph 3 did not alter the substance of the text proposed by the ICRC but was clearer and more precise. The same applied to the amendment proposed to the first sentence of paragraph 5. The deletion of the second sentence of that paragraph was proposed since the rule in question was laid down clearly and in detail in article 50, and its repetition at the end of article 46, paragraph 5 might weaken rather than strengthen it.

24. Mr. AL-ADHAMI (Iraq) said that article 46 as drafted by the ICRC had several drawbacks. The idea of intention in the second part of the first paragraph was subjective and vague. The words "intended to spread terror" should be replaced by the words "which spread terror".

25. With regard to the idea of proportionality in paragraph 3 (b), it would be impossible to prove that the military advantage expected was in fact disproportionate. That idea should be dropped.

26. Article 46 as a whole was not detailed enough; in particular, the question of civilians who were driven from their homes ought to be covered.

27. Paragraph 5 was impractical. The word "s'efforcera" in the French text was weak; so was the reference to article 50, which itself dealt with the idea of proportionality, an idea which he rejected. He had no actual proposals to make, but merely wished the article to be re-examined.

28. Mr. CASTREN (Finland) said that his delegation was in general agreement with the ICRC text, including the idea of proportionality in paragraph 3 (b). In document CDDH/III/13 and Add. 1 his delegation proposed to amend paragraph 4 by replacing the word "or" by a comma and by inserting the words "or civilian objects" after "civilians".

29. Article 33 of the Fourth Geneva Convention of 1949 already prohibited reprisals against protected persons. The main intention of paragraph 4 was to extend the protection to the civilian population as a whole. That was desirable, but it was not sufficient. Civilian objects should also be protected from reprisals everywhere, even in the field of hostilities.

30. He had noted the amendments submitted by other delegations, some of which improved the text, particularly from the drafting point of view. However, there were some important gaps to which he might revert later.



31. Mr. THOMSEN (Denmark) said that, although he approved the ICRC text for paragraph 1, he supported the amendments in document CDDH/III/27.
32. With regard to paragraph 2, the amendment in document CDDH/III/27 contained the same regulations as those laid down by the ICRC, namely that civilians should be protected unless they took a direct part in hostilities. Since the rules to be adopted would appear in military manuals, they should be worded as clearly as possible. In his view the ICRC text was sufficiently clear.
33. In the case of paragraph 3, the text proposed in document CDDH/III/27 was more precise than that of the ICRC.
34. His delegation could support the ICRC text for paragraph 4 and was in favour of the amendments to paragraph 5 in document CDDH/III/27. The reference to article 50 would not add much to the text.
35. Mr. SAMUELS (Canada) said that, on the question of area bombardment, the amendment in document CDDH/III/27 greatly clarified the ICRC text of article 46, paragraph 3 (a). The question of what constituted an area bombardment could be subjective and his delegation therefore supported a more precise explanation.
36. With respect to the words "to an extent disproportionate to the direct and substantial military advantage expected" in paragraph 3 (b), a reference to proportionality was necessary. An absolute prohibition would result in a very difficult situation, for instance when there was a single civilian near a major military objective whose presence might deter an attack.
37. In paragraph 4, the word "attacks" was the appropriate word to use. As to the idea of intention, it should be borne in mind that criminal responsibility in the major legal systems depended on intention, which was a necessary element in the Protocol.
38. Paragraph 4 dealt with the question of reprisals. It had to be remembered that when an enemy bombed major centres of population, no Government would stand idly by when the only way of stopping the bombing was to do the same to the other side. His delegation did not wish an unenforceable provision to be adopted, disrespect for which would lead to disrespect for the whole Protocol. His delegation could accept a prohibition on reprisals against civilians or the civilian population, but not on reprisals against civilian objects.
39. Mr. TRANGGONO (Indonesia), referring to the second sentence of paragraph 1, said that his delegation believed that attack on the civilian population and the spreading of terror should be given almost the same emphasis, and the words "In particular" were therefore unnecessary. Moreover, the words "methods intended" were not sufficiently specific and a clearer formulation was needed. The second sentence of paragraph 1 should be amended to read "The spreading of terror among the civilian population is prohibited".

40. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that the ICRC text of article 46 was a good basis for discussion and was generally acceptable to his delegation.

41. The amendments to paragraph 1 in document CDDH/III/38 were useful since they would make the text more comprehensive.

42. The amendment in document CDDH/III/8 and Corr. 1 would improve the text of paragraph 2 and increase the protection accorded to the civilian population. He preferred that amendment to the proposal in document CDDH/III/10.

43. With regard to the amendments in document CDDH/III/13 and Add. 1, it would be useful to have a reference to civilian objects, but it would be better to insert the words "as such" after "civilians" in paragraph 4.

44. His delegation could not support amendment CDDH/III/27, and would prefer the ICRC text.

45. He agreed that it would be useful to include the words "or hardship" in paragraph 3 (b), as proposed in amendment CDDH/III/28.

46. His delegation could not support the amendment to article 26 in document CDDH/III/42 and amendment CDDH/III/43 to article 46. There again, it preferred the ICRC text.

47. He found it hard to understand the Swedish amendment to article 46 in document CDDH/III/44, which appeared to be laying down rules for military operations against military objectives, a matter which was not within the competence of the Conference.

48. Mr. FISCHER (German Democratic Republic) said that his delegation had co-sponsored the amendment to paragraph 3 (b) of article 46 in document CDDH/III/8 and Corr. 1 because it considered that protection of the civilian population could not be improved if the concept of proportionality was retained. To permit attacks against the civilian population and civilian objects if such attacks had military advantages was tantamount to making civilian protection dependent on subjective decisions taken by a single person, namely, the military commander concerned. The Romanian amendment to article 46 (CDDH/III/10) was based on the same idea, and several delegations had expressed the view that the concept of proportionality should be excluded from the Protocol.

49. Mr. EL IBRASHY (Arab Republic of Egypt) said that his delegation accepted in principle the ideas underlying the ICRC text of article 46 but considered that some amendments were desirable. The words "intended to" in the second sentence of paragraph 1 should be replaced by some other expression in view of the difficulty of establishing intent. The words "and cause" in paragraph 3 (b) should be replaced by "or cause". The

principle of proportionality expressed in that sub-paragraph had serious implications, and the phrase "to an extent disproportionate to the direct and substantial military advantage anticipated" should therefore be deleted.

50. His delegation had co-sponsored an amendment (CDDH/III/48/Rev. 1) which proposed the addition of a new paragraph to article 46 providing, inter alia, for prohibition of mass deportations and expulsion.

51. All the amendments he had just proposed applied also to article 26 of draft Protocol II.

52. Mr. TIEN Chin (China) said that the criminal acts committed in many parts of the world by imperialist, colonialist and neo-colonialist forces constituted a serious infringement of the fundamental rights of oppressed nations and peoples and a violation of the four Geneva Conventions of 1949. The Conference, in discussing the draft Protocols and developing the Geneva Conventions, was in duty bound to face that harsh fact and to draw up provisions for the protection of the masses. In order to ensure maximum effective protection of the civilian population in time of war, those words must be correctly defined in the draft Protocols. His delegation considered that any person who was not a member of the armed forces or who did not participate directly in military operations was a civilian and should receive full protection against attack, deportation to concentration camps and every form of persecution.

53. Attempts to confine the meaning of "civilian population" within narrower limits was tantamount to providing the imperialists and colonialists with a pretext for attacking the civilian population during their wars of aggression.

54. People's militia and guerrilla fighters in wars of national liberation should be protected, since they were basically civilians who had been forced to take up arms in self-defence against imperialist repression in order to win independence and safeguard their right to survival. When not participating directly in military operations, members of people's militia or guerrilla movements should have civilian status and benefit from the protection granted to civilians.

55. Mr. CRETU (Romania), introducing his delegation's amendments to article 46 (CDDH/III/10), said that the changes proposed to paragraphs 1 and 2 were designed to ensure greater protection of the civilian population. The purpose of the amendment proposed to paragraph 3 was to exclude any reference to the unacceptable idea of proportionality. His delegation also considered that it was particularly important to forbid deportation of the civilian population and had therefore proposed the addition of a new paragraph to that effect.

56. Mr. AJAYI (Nigeria) said that the sponsors of the amendment to paragraph 1 in document CDDH/III/38 had been prompted by a desire to improve the wording of the ICRC text, so that the rule set out in that paragraph could be interpreted as widely as possible.

57. The wording of paragraphs 2, 3 and 4 proposed by the ICRC was fully acceptable to his delegation.

58. With regard to paragraph 5, his delegation had no objection to the ICRC text, although it would be prepared to accept the amendment to the first sentence proposed in document CDDH/III/27. It could not, however, agree to the proposal in that document to delete the second sentence of paragraph 5.

The meeting rose at 12.35 p.m.

SUMMARY RECORD OF THE EIGHTH MEETING

held on Tuesday, 19 March 1974, at 3.15 p.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I: Article 46 - Protection of the civilian population  
CDDH/1; CDDH/III/5 and Corr.1, CDDH/III/10, CDDH/III/13 and Add.1,  
CDDH/III/27, CDDH/III/28, CDDH/III/38, CDDH/III/43, CDDH/III/44,  
CDDH/III/48/Rev.1 and Add.1, CDDH/III/51) (continued)

Draft Protocol II: Article 26 - Protection of the civilian population  
CDDH/1; CDDH/III/12, CDDH/III/36, CDDH/III/42, CDDH/III/45,  
CDDH/III/48/Rev.1, CDDH/III/51) (resumed from the sixth meeting)

1. The CHAIRMAN invited the Committee to continue consideration of article 46 of draft Protocol I and article 26 of draft Protocol II.
2. Mr. SORIANO (Philippines) introduced his delegation's amendments to article 46 of draft Protocol I and article 26 of draft Protocol II (CDDH/III/51). Referring in particular to sub-paragraph 3 (b) of article 46, he said that if it was deemed necessary to introduce the principle of proportionality, a later part of the draft Protocol might be a more appropriate place.
3. Mr. EIDE (Norway) said that the concept of military necessity had lost much of its meaning in many modern conflicts, where one side was often technologically superior to the other and where at least one of the sides was often fighting not for survival but for some other reason. It would therefore be neither unrealistic nor impossible to lay down very strict criteria providing the greatest possible protection for the civilian population.
4. On the whole, his delegation was satisfied with the ICRC text of article 46. Only some minor changes were required, except in the case of sub-paragraph 3 (b) relating to the principle of proportionality, which needed more substantial amendment.
5. With regard to paragraph 1, his delegation could support amendments CDDH/III/38 and CDDH/III/48/Rev.1.
6. Sub-paragraph 3 (b) should be more restrictive. The best proposal submitted was the Swedish amendment in document CDDH/III/44, which his delegation supported on the understanding that it would be interpreted to mean that attacks which might entail losses beyond the immediate vicinity of the military objectives were absolutely prohibited and that the principle of proportionality, narrowly

defined, could be used as an excuse only when the losses and destruction took place in the immediate vicinity of the military objective.

7. With regard to paragraph 4, his delegation fully supported the substance of the amendment submitted by Finland and Sweden (CDDH/III/13 and Add.1), but considered that the more appropriate place for a provision prohibiting reprisals against civilian objects might be in article 47.

8. Mr. BLIX (Sweden), referring to the question of air warfare, explained in some detail that the history and literature of air warfare since the First World War presented much evidence which tended to show that terror raids and area bombardments had limited military value, while causing enormous losses in civilian lives and civilian objects. That should make it possible for the Conference to adopt rules along the lines proposed in article 46, which his delegation could support either in the form submitted by the ICRC, or in an improved form which would give even more protection.

9. The rule on proportionality in sub-paragraph 3 (b) should be tightened in order to avoid abuse. His delegation's amendment (CDDH/III/44) was intended to make the thrust of the rule clearer, and would bring the sub-paragraph closer into line with the structure of sub-paragraph 1 (a) of article 50, in which it would merely be necessary to add the word "immediate" before "vicinity". In preferring the term "immediate vicinity", his delegation appeared to be in agreement with the sponsors of the amendment to sub-paragraph 3 (b) in document CDDH/III/27. However, it was more sceptical about some of the other amendments in that document, especially the proposed addition to sub-paragraph 3 (a).

10. He supported the amendment submitted by Finland and Sweden to paragraph 4 (CDDH/III/13 and Add.1).

11. With regard to paragraph 1, his delegation agreed with the view that intent was difficult to prove. On the other hand, the alternative suggested by the delegation of the Soviet Union, namely, "acts capable of spreading terror", covered a very broad category indeed. Perhaps the Working Group could find a compromised solution such as, for example, "acts likely to spread terror".

12. Mr. BRUM (Uruguay) said that sub-paragraph 3 (b) should be redrafted in order to substitute the idea of risk for the concept of incidental damage. Responsibility should be measured in terms of the proportionality between the risk of damage to civilians or civilian objects and the anticipated military result of the attack.

13. Mr. FLEMMING (Poland) said that his delegation fully endorsed the arguments advanced by the Hungarian representative concerning the amendment to sub-paragraph 3 (b) in document CDDH/III/3 and Corr.1. The rule of proportionality as expressed in the ICRC text would give military commanders the practically unlimited right to decide to launch an attack if they considered that there would be a military advantage. Civilian suffering and military advantage were two values that could not conceivably be compared.
14. The proposal in document CDDH/III/27 to substitute the word "attacks" for "methods" in paragraph 1 was not acceptable to his delegation, which held the view that certain methods designed to spread terror, including acts of psychological warfare, should be prohibited. The ICRC text was acceptable, subject perhaps to certain drafting improvements.
15. In his delegation's opinion, the amendment to paragraph 2 in document CDDH/III/27 would make it very difficult to apply the rule effectively.
16. The ICRC text of paragraphs 4 and 5 was acceptable to his delegation.
17. Mr. DJANG (Democratic People's Republic of Korea) said that the phrase "to an extent disproportionate to the direct and substantial military advantage anticipated" should be deleted from sub-paragraph 3 (b), since acceptance of the principle of proportionality would provide war criminals with a pretext for their crimes.
18. Mr. OGOLA (Uganda) said that his delegation was a sponsor of the amendment to paragraph 1 in document CDDH/III/33, the object of which was to obtain recognition of the role of propaganda in spreading terror.
19. His delegation had not submitted an amendment to paragraph 2, but hoped that the Drafting Committee would reword the final draft so as to obviate any possibility of abuse by an unscrupulous adversary.
20. In his delegation's opinion, the phrase "to an extent disproportionate to the direct and substantial military advantage anticipated" should be deleted from sub-paragraph 3 (b).
21. His delegation was in full agreement with the principles embodied in paragraph 4, but considered that the very pertinent questions raised at the seventh meeting by the Canadian representative in that connexion should be taken into account.
22. He supported the Romanian proposal (CDDH/III/10), to add a new paragraph at the end of article 46.

23. Finally, his delegation was unable to comment on article 26 of draft Protocol II because of its position with regard to article 1 of draft Protocol I; however, it was not opposed to discussion of article 26 by other delegations.
24. Mr. GULD MINNIE (Mauritania) said that the concept of intention and the principle of proportionality should be replaced by more objective terms. His delegation therefore supported and wished to co-sponsor the amendment in document CDDH/III/43/Rev.1 provided that the word "methods" was replaced by the word "acts" in paragraph 1.
25. Mr. CAMERON (Australia) said that the questions of the protection of the civilian population and of area bombardment might usefully have formed the subject of two separate articles instead of being taken together in article 46. The Drafting Committee might keep that observation in mind.
26. The efficacy of the proposal to replace the word "methods" in paragraph 1 by the word "attacks" would depend entirely on the definition to be given to the word "attack". Reference to neither term could adequately limit what some regarded as permissible and others as reprehensible.
27. His delegation agreed to replace the word "article" in its amendment to paragraph 2 (CDDH/III/43) by the more appropriate word "section" and to replace the words "unless they are taking" by the words "except when they take". The proposal in document CDDH/III/27 seemed superfluous, since a civilian committing a hostile act, even an isolated one, would be taking a direct part in hostilities.
28. His delegation agreed to replace the words "could reasonably be attacked" in sub-paragraph 3 (a) by the words "are capable of being attacked" or some similarly appropriate phrase.
29. It agreed that the word "and" after the word "population" in sub-paragraph 3 (b) should be replaced by the word "or" and that the word "anticipated" should be replaced by the word "sought".
30. The proposals in documents CDDH/III/8 and Corr.1, and CDDH/III/10 added nothing to the ICRC text. None of the arguments advanced could justify abandoning the principle of proportionality. Since area bombardment was unlikely to be abandoned, there should be a distinct code related to it.
31. His delegation disagreed with the proposal in document CDDH/III/27 to delete the words "or any other method" after the word "bombardment" in sub-paragraph 3 (a) but agreed with the proposal to replace the words "to launch attacks" in sub-paragraph 3 (b) by the words "to attack". It should be unnecessary to insert the words "or hardship" in that sub-paragraph, as the



representative of Ghana had proposed (CDDH/III/23) since the preceding word "losses" covered that concept.

32. The amendment to article 46 in document CDDH/III/44 was unrealistic.

33. With regard to the view of some delegations that paragraph 3 was too subjective and provided too little protection, he said that military commanders, acting on the best information they could obtain, would attack targets which they regarded as warranting attack.

34. While his delegation could accept paragraph 4 as it stood, consideration should be given to the concern expressed by the Canadian representative at the seventh meeting. If the proposal by Finland and Sweden to prohibit reprisals on civilian property was accepted, it would be more appropriate to place it in article 47 than in article 46. It should be considered whether a set of regulations for reprisals which remained lawful should be included in part IV of the draft Protocol or in the parts with which Committee I was dealing.

35. Paragraph 5 might be simplified, as suggested in document CDDH/III/27.

36. In determining the final form of article 46, the fundamental principles of criminal law should be kept in mind and the provisions of the article should be precise and clear.

37. The CHAIRMAN said that the Rapporteur had taken note of the Australian representative's comments and would like him to be present when article 46 was discussed in the Working Group.

38. Mr. PALACIOS TREVINO (Mexico) said that his delegation supported the Philippine amendment to paragraph 1 (CDDH/III/51) and the Swedish proposal to reword sub-paragraph 3 (b) as a new paragraph 4 (CDDH/III/44).

39. It supported the ICRC text of the original paragraph 4 on the understanding that a provision reaffirming the prohibition of reprisals on civilian objects would be included in article 47. A provision to that effect already appeared in the Fourth Geneva Convention of 1949.

40. His delegation reserved its position on article 26 of draft Protocol II pending a decision on the scope of that Protocol.

41. Mr. RAHMALI (Morocco) pointed out that the amendments in document CDDH/III/43/Rev.1, of which his delegation was a sponsor, related only to article 46 of draft Protocol I. Morocco would reserve its position on draft Protocol II until the scope of that Protocol had been determined.

42. Mr. AHMADI (Iran) said that, although objections had been raised to the phrase "methods intended to spread terror" in paragraph 1, methods of war undoubtedly did spread terror among the civilian population, and those used exclusively or mainly for that purpose should be prohibited. The ICRC text appeared preferable to amendment CDDH/III/8.

43. His delegation supported the amendment to paragraph 2 in document CDDH/III/43.

44. The ICRC text of sub-paragraph 3 (a) appeared to be satisfactory. The deletion of sub-paragraph (b) would leave the case of a civilian population in the vicinity of a military objective unprovided for. His delegation supported the Swedish amendment in document CDDH/III/44 and the amendment by Finland and Sweden to paragraph 4 (CDDH/III/13 and Add.1).

45. Sir David HUGHES-MORGAN (United Kingdom) agreed that article 46 was of the highest importance and therefore required very precise wording. It was important to avoid using such qualifying adjectives as "general and effective" and such expressions as "under any circumstances", which would weaken rather than strengthen an absolute prohibition. His delegation was therefore not attracted to the Romanian amendment to paragraph 1 (CDDH/III/10).

46. For similar reasons his delegation was opposed to the amendments in CDDH/III/38 and CDDH/III/51, which referred to "acts capable of spreading terror" without limiting the form such acts might take. He preferred the word "attacks" suggested in document CDDH/III/27 to the word "methods" proposed by the ICRC.

47. With regard to paragraph 3, he shared the Ghanaian representative's doubts concerning the word "hostilities", for which a more precise substitute might be found.

48. His delegation thought that it would be a retrograde step to delete any reference to the principle of proportionality from paragraph 3, for that principle ought to form part of international law. Amendments CDDH/III/3 and Corr.1, CDDH/III/10 and CDDH/III/51 all contained a somewhat unrealistic ban on attacks made indiscriminately against military and civilian persons and objects: it was difficult to visualize an attacker who would not carry out an assault upon an entrenched adversary because of the presence of one or two civilians. The Committee must not put forward formulations which would not in practice be followed. To do away with the rule of proportionality would remove a valuable humanitarian protection from the civilian population and a rule of law which could be followed by combatants.

49. His delegation was in favour of the wording proposed for sub-paragraphs 3 (a) and (b) in document CDDH/III/27, with possible drafting changes.
50. With regard to paragraph 4, he shared the fears expressed by the Canadian representative that the prohibition on reprisals might be unworkable and might indeed weaken the whole Protocol.
51. Paragraph 5 was somewhat confusing. The last sentence seemed to be unnecessary, since article 50 would apply in any case. The wording of document CDDH/III/27 was a considerable improvement.
52. On a general point, his delegation, while approving the principles of article 46, was concerned by the difficulty that junior soldiers and members of armed groups would have in understanding and applying them. Should an individual soldier or resistance fighter apply the rule of proportionality in accordance with the facts known to him, or should he try to apply it in the light of facts known to his superiors? Responsibility for implementing the principles of article 46 should in the main rest with those who planned and ordered attacks, and some amendment of the ICRC draft would be needed. The problem might be solved by precise formulation of article 77.
53. It was hard for his delegation to comment on article 26 of draft Protocol II until the scope of that Protocol had been decided. An article along those lines might be appropriate if Protocol II had a high threshold; his delegation would have to reserve its position on that provision until the appropriate time.
54. Mr. GIRARD (France) said that in traditional wars attacks could not fail to spread terror among the civilian population: what should be prohibited in paragraph 1 was the intention to do so.
55. The principle of proportionality should be retained in sub-paragraph 3 (b).
56. Grave violations of draft Protocol I would undoubtedly provoke a reaction on the part of the victims, whose Government could hardly forbid them to take reprisals with a view to ending such violations. The provisions of paragraph 4 might, in certain circumstances, favour a party which violated the Protocol and penalized a party which observed it. His delegation would like the paragraph to be deleted, but if it was retained it should be amended to allow for the possibility of reprisals in the circumstances he had indicated but subject to three conditions. In the first place, the decision to resort to reprisals should be taken by the Government alleging the violation of the Protocol, not by the military commander; secondly, the adverse party should be given advance warning that reprisals would be taken if the violation was continued or renewed; and thirdly, the reprisals should be proportionate to the violation they were designed to end.

57. Mr. GONSALVES (Netherlands) said that his delegation shared the views of the representatives of the Federal Republic of Germany and the United Kingdom.
58. While generally supporting the ICRC text, it considered that the rules laid down in paragraph 3 should be made more precise and should contain more objective criteria to fit them for application by military commanders in the field. His delegation would support the amendment to that paragraph in document CDDH/III/27 if the word "deliberately" could be inserted before the word "attack" at the beginning of sub-paragraphs (a) and (b). The Drafting Committee might take that suggestion into consideration.
59. Mr. CASTREN (Finland) said that his delegation preferred the ICRC text of paragraphs 1, 2 and 3, which struck a reasonable balance between the protection of the civilian population and military interests, to the amendment in document CDDH/III/10. Neither of the texts of paragraph 4 referred to the prohibition of reprisals against civilian objects. The new paragraph 6 proposed in document CDDH/III/10 seemed unnecessary, since the deportation of the civilian population was already forbidden in article 49 of the Fourth Geneva Convention of 1949.
60. His delegation was unable to support the amendments to sub-paragraph 3 (b) in documents CDDH/III/8 and Corr.1 and CDDH/III/51.
61. It preferred the word "methods" used in paragraph 1 of the ICRC text to the word "attacks" proposed in document CDDH/III/27. The deletion of the words "and for such time" in paragraph 2 could be taken to mean that a person who had once taken a direct part in hostilities would lose his civilian status for the duration of such hostilities. His delegation was unable to accept the amendments to that paragraph in documents CDDH/III/27, CDDH/III/13 and CDDH/III/51.
62. It preferred the ICRC text of the introductory part of paragraph 3 to the amendment in document CDDH/III/27. The amendment to sub-paragraph 3 (a) would be acceptable if the words "or any other method" were reinserted after the words "by bombardment" and if the word "reasonably" before the word "possible" was deleted.
63. His delegation had no observation to make on the amendment to paragraph 5 in document CDDH/III/27 except to say that there must be no reduction in the protection afforded to the civilian population.
64. Referring to the amendments in document CDDH/III/28, he said that it would be inappropriate to deal with the question of propaganda in draft Protocol I. His delegation had some doubts about the proposal to insert the words "or hardship" in sub-paragraph 3 (b), since the term was somewhat vague. It supported the amendment to that paragraph in document CDDH/III/44, which should be studied carefully by the Working Party. That body might also consider the amendment to paragraph 1 in document CDDH/III/51.

65. Not only would it be unwise to delete paragraph 4 of article 26 of draft Protocol II, as it was suggested in document CDDH/III/42, but that provision should be extended to cover reprisals against civilian objects.
66. His delegation was unable to support the amendments in document CDDH/III/36 but could endorse the amendment to article 26 of draft Protocol II in document CDDH/III/45.
67. Mr. ALDRICH (United States of America) said that article 46 was important for giving general guidance to military commanders in the conduct of their operations.
68. His delegation supported the amendments in document CDDH/III/27. The phrase "at some distance from each other" in sub-paragraph 3 (a) of the ICRC draft and "beyond the immediate vicinity" in the Swedish amendment (CDDH/III/44) were vague.
69. The rule of proportionality set out in the amendment in document CDDH/III/27 was based on existing international law, and it was important to record and interpret that rule in article 46. Collateral damage to civilians and civilian objects was often unavoidable and it was unrealistic to attempt to make all such damage unlawful: the rule of proportionality was as far as the law could reasonably go. If the element of intent was omitted, the provision might be used to justify trials for accidents or for unavoidable damage.
70. His delegation agreed that attacks on the civilian population intended to spread terror should be prohibited, but considered that the prohibition of the free flow of information was unacceptable.
71. The task of the Conference was not to prevent the consequences of war, but to moderate them as much as possible. The rules should be capable of acceptance by Governments and of practical application. The amendments in document CDDH/III/27 set out the maximum protection that could be provided.
72. His delegation supported the amendments to article 26 of draft Protocol II in document CDDH/III/36. It was inappropriate to include the same detailed provisions in a protocol on non-international armed conflicts as in one on international armed conflicts.
73. Mr. DIXIT (India) said that, in his delegation's opinion, the prohibition of spreading terror among the civilian population should also extend to psychological or propaganda warfare. Since that point had not been covered in the ICRC commentary, it must be provided for explicitly in article 46 itself. The method of spreading such terror was of secondary importance. His delegation was in general agreement with the amendments in document CDDH/III/33.

74. His delegation endorsed the ICRC draft of paragraph 2 on the understanding that civilians would forfeit their protection only when they took a direct part in hostilities.
75. His delegation generally supported the principle set out in paragraph 3, but thought that the drafting needed improvement. The use of the word "indiscriminate" was inappropriate; "without distinction" would be better, since the emphasis should be on making a distinction between civilian population and combatants and between civilian objects and military objectives. Moreover, the principle was somewhat weakened by the use of the words "in particular". It seemed unnecessary to look into the intention of a party to a conflict in case of attack when providing protection to the civilian population, or to think in terms of criminal law: the aim should be to put an end to attacks which brought suffering to the civilian population, except perhaps when a party had no other alternative in the prevailing circumstances. In that connexion, his delegation was in sympathy with the substance of the Swedish amendment (CDDH/III/44), although not entirely with its wording.
76. His delegation supported the principle set out in paragraph 4; the ICRC text was satisfactory, but the amendment by Finland and Sweden (CDDH/III/13 and Add.1) would be an improvement.
77. With regard to paragraph 5, he agreed in principle that an adversary should not be allowed to move the civilian population, but thought that an exception might be allowed when the population was moved for its own protection by the authorities of its country. He would be interested to hear the views of other delegations on that point.
78. His delegation had already made known its reservations with respect to draft Protocol II.
79. Mr. HERCEGH (Hungary) said the debate had shown that opinion in the Committee was divided on the principle of proportionality set out in sub-paragraph 3 (b). His own view was that a rule well established in international law should be reflected in practice and should produce the intended effects. Yet the number of civilian victims had increased alarmingly over the past few years: accordingly, either the rule was not well established and hence not binding; or it existed and could not be applied in armed conflicts; or it existed and was applied, but the results of its application provided the best argument against it.
80. The amendments in documents CDDH/III/27, CDDH/III/28, CDDH/III/43, and CDDH/III/44 improved the ICRC text and maintained the rule of proportionality, but did not provide a satisfactory solution of the problem.

81. Sub-paragraph 3 (b) established a link between civilian losses and military advantage, but the latter was hard to define even if the words "direct and substantial" were added. The ICRC did not refer to the matter, and that was certainly due to no mere oversight but to the fact that the authors of the Commentary had been unable to be specific. Military advantages were based on unpredictable strategical considerations which evolved much more quickly than humanitarian law. He doubted whether it was really necessary to introduce such an ambiguous rule, which might well change the very nature of humanitarian law. Although it was true that the Conference was laying down regulations for soldiers, which must be realistic, it must not take the military view as the point of departure. His delegation was therefore in favour of strengthening the protection accorded to the civilian population without mentioning the rule of proportionality.

82. Mr. MENCER (Czechoslovakia) said that his delegation considered the ICRC text to be acceptable and wished it to be changed as little as possible. Paragraphs 1, 2, 4 and 5 were well balanced, although his delegation and others would not object to improvements of paragraph 3. His delegation was, however, one of the sponsors of a proposal (CDDH/III/3 and Corr.1) to delete sub-paragraph 3 (b), for reasons which had just been explained by the Hungarian representative. The concepts of proportionality, anticipated military advantage and incidental losses were ambiguous, and sub-paragraph 3 (b) left the door wide open to abuse: it would therefore be best to delete it.

83. Mr. TRANGGONO (Indonesia) said that his delegation had already proposed the deletion of the words "In particular, methods intended" from the second sentence of paragraph 1 and regarded the ICRC text of paragraph 2 as the most suitable. It also endorsed the ICRC draft of sub-paragraph 3 (a), but considered that the words "to an extent disproportionate to the direct and substantial military advantage anticipated" in sub-paragraph 3 (b) were subjective and should be deleted. The ICRC text of paragraph 4 was satisfactory to his delegation.

84. With regard to paragraph 5, his delegation agreed that the use of civilians for military purposes should be strictly prohibited, but believed that when guerrillas and units of resistance movements were forced to entrench themselves in areas with civilian populations, that should not be interpreted as using civilians for military purposes or as impeding the adversary's military operations. It therefore proposed that paragraph 5 should be amended to read: "Civilian population or individual civilians shall not be used for military purposes. If a Party to the conflict, in violation of the foregoing provision, uses civilians for military purposes, the other Party to the conflict shall take the precautionary measures provided for in article 50".

85. Mr. MATI (Albania) reiterated his delegation's view that the main objective of the Conference was to provide effective protection for the civilian population and for freedom fighters in unjust colonial wars. It was a fact that barbarous massacres of such persons had been perpetrated, for example, by the American imperialists against the Koreans and the Viet-Nameese and other peoples of Indo-China and by other imperialist and colonialist Powers against oppressed peoples.

86. The Conference had a clear-cut duty to adopt unequivocal provisions which would improve the protection of the civilian population and the freedom fighters, and to specify methods of combat which directly affected the civilian population, civilian objects and the freedom fighters. The distinction between just and unjust wars must be used as a criterion in that regard.

87. Moreover, methods of warfare indiscriminately affecting the civilian population, such as atomic weapons, bombardment of the civilian population and deportation, must be specifically prohibited.

88. His delegation was in favour of deleting the words "to an extent disproportionate to the direct and substantial military advantage anticipated" from sub-paragraph 3 (b) of article 46 and supported the amendments in CDDH/III/43/Rev.1.

89. The CHAIRMAN announced that the amendments to article 46 in documents CDDH/III/8 and Corr.1, CDDH/III/10, CDDH/III/13 and Add.1, CDDH/III/27, CDDH/III/28, CDDH/III/38, CDDH/III/43, CDDH/III/44, CDDH/III/48/Rev.1 and Add.1, and CDDH/III/51 would be referred to the Working Group.

The meeting rose at 6 p.m.



SUMMARY RECORD OF THE NINTH MEETING

held on Wednesday, 20 March 1974, at 3.20 p.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCCLS I AND II (CDDH/1) (continued)

Draft Protocol I: Article 46 - Protection of the civilian population  
(CDDH/1; CDDH/III/8 and Corr.1.) (concluded)

Draft Protocol II: Article 26 - Protection of the civilian population  
(CDDH/1; CDDH/III/12, CDDH/III/28, CDDH/III/36, CDDH/III/42,  
CDDH/III/45, CDDH/III/48/Rev.1, CDDH/III/51, CDDH/III/63)  
(concluded)

1. Mr. FLECK (Federal Republic of Germany) said that, since his delegation had supported the substance of article 46 of draft Protocol I, it could give equal support to article 26 of draft Protocol II. His delegation felt that the scope of draft Protocol II as proposed by the ICRC reflected a reasonable compromise after a long and substantive discussion by experts and that the threshold set up by referring to "armed forces or other organized armed troops under responsible command" would be high enough to justify the expectation that Governments would devote all their efforts to maintaining the substance of draft Protocol II.
2. He was glad that the sponsors of the amendment in document CDDH/III/8 and Corr.1 had not formally reiterated their proposal to delete paragraph 3 (b). The prospect of entrusting decisions under article 26 of draft Protocol II to the military need not cause anxiety, since the purpose of that article was to lay down rules for the behaviour of combatants.
3. On the other hand, it was essential that armed forces should be provided with military manuals clearly setting out the rules of international law which they were required to observe in a conflict.
4. Mr. FEIXEIRA STARLING (Brazil) said that although his delegation agreed to examine certain aspects of draft Protocol II in order to expedite the Committee's work, it reserved its position until the field of application of that Protocol was known.
5. Introducing his delegation's amendment to paragraph 2 of article 26 (CDDH/III/63), he said the first point he wished to stress was that civilians should at all times enjoy the protection to which they were entitled, so long as they remained civilians.

6. His second point was that civilians lost their civilian status from the moment they took part in hostilities, whether directly or indirectly.

7. The Brazilian delegation was unable to accept the phrase "... and for such time ...", since it applied equally to persons who were alternately civilians or members of organized groups according to the exigencies of the moment. On the other hand, his delegation considered that persons who had at one time taken part in the hostilities but had ceased to do so could be regarded as civilians.

8. Mr. EIDE (Norway) said that the civilian population must be given the same protection irrespective of the nature of the conflict. Article 26 of draft Protocol II should therefore reproduce exactly the terms of article 46 of draft Protocol I. If article 26 was less detailed than article 46, it would mean that less precise rules were being laid down on the protection of civilians in cases of non-international conflicts. He strongly urged Governments favouring such a course to reconsider their position.

9. Secondly, obligations undertaken under a Protocol II which gave full protection to the civilian population would hardly go further than those already undertaken by Governments with respect to the civilian population under the general principles of humanitarian law, which had now become customary law. Governments would simply have the benefit of more precise rules that would make it possible for them to defend themselves against unfounded criticism.

10. Lastly, the adoption of identical texts for article 46 of draft Protocol I and article 26 of draft Protocol II would avoid differences of interpretation.

11. Mr. SAMUELS (Canada) said that he hoped that draft Protocol II would be given detailed consideration at the second session of the Conference in 1975. In recent times, most of the suffering caused by conflicts had resulted from non-international conflicts. It was important that draft Protocol II should embody rules that were practical. It could already be foreseen that some of the rules in the present draft, based on moral principles, would be unworkable; they must be omitted, to avoid the danger of adopting a code which could not be respected.

12. In the conflicts to which draft Protocol II applied, the armed forces of a recognized authority would be facing an organized, armed group that was seeking either to overthrow the Government or to establish a new State in part of the territory of the State it was attacking. The members of the opposing group were intermixed with the civilian population and their activities were restricted to a relatively small area.

13. In the amendment submitted by his delegation (CDDH/III/36) it was proposed to delete the second sentence of article 26, paragraph 1, to replace the word "article" by the word "chapter" in paragraph 2, to reword the end of paragraph 2 to read "except when they commit hostile acts or take a direct part in military operations", and to delete paragraphs 3 and 5.
14. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that he wished to reply to certain delegations which had expressed the desire to see the same provisions in article 26 of draft Protocol II and in article 46 of draft Protocol I. He pointed out that there were differences between international and internal conflicts. With regard to the latter, it was essential to make rules that everyone could accept.
15. Generally speaking, the ICRC draft was well thought out. In article 26, paragraph 1, he would be in favour of replacing the words "intended to" by the word "that" unless the majority of the delegations wished to retain the former expression.
16. The amendment submitted by Finland and Sweden (CDDH/III/13 and Add.1) proposing a new article 26 bis was interesting. He supported the new wording proposed by Ghana (CDDH/III/28) for article 26 paragraph 3 (b). He was opposed to the Australian proposal to delete article 26 paragraphs 2 and 4 (CDDH/III/42), and was unable to accept the wording suggested for paragraph 3 (a) of that article.
17. With regard to the Canadian amendment to article 26 (CDDH/III/36), there was a danger that the deletion of the second sentence of paragraph 1 might make the situation worse. He could not agree to the deletion of paragraphs 3 and 5 of the same article, which contained important provisions.
18. With regard to the Philippines amendment to article 46 (CDDH/III/51), he thought that it should be left to the Working Group to examine the advantages of the proposed wording. He did not see any need for the change suggested by Sweden to the proposed new article 26 bis (CDDH/III/52). On the other hand it seemed to him that document CDDH/III/62/Rev.1 sponsored by the Arab Republic of Egypt, Iraq and the Syrian Arab Republic contained an idea which the Working Group might well consider.
19. Mr. PASCHE (Switzerland) said that article 26, which in his view was the most important article to be considered by the Conference, gave rise to a practical difficulty - that of defining the persons who took an active part in hostilities.
20. With regard to paragraph 2, it would be necessary to give a minimum definition of the groups of persons that were to be protected in all circumstances.

21. According to the criteria adopted in the report by the Secretary-General of the United Nations of 13 September 1970 (A/8052, para.149) the persons to be protected were: (a) those whose conduct and activities had no relation with the conduct of hostilities; (b) those who participated in the conflict or assisted the uprising under duress; and (c) those who merely expressed opinions criticizing the Government or favouring the objectives of the uprising.

22. Referring to paragraph 1, he said that the prohibition of terrorism was of particular importance in an internal conflict. He supported the ICRC proposal which could perhaps be improved, by prohibiting terrorism as a method of combat.

23. His delegation considered that the ICRC proposal for paragraph 3 was not unrealistic and that, in all internal conflicts, it was necessary to respect the three principles formulated in General Assembly resolution 2444 (XXIII) on the respect for human rights in armed conflicts. Those principles were: (a) that the right of the parties to a conflict to adopt means of injuring the enemy was not unlimited; (b) that it was prohibited to launch attacks against the civilian populations as such; (c) that 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.

24. He believed that the last part of article 26, paragraph 3 (b) should be retained. The application of the controversial principle of proportionality should make it possible to avoid an aggravation of the sufferings of the civil population.

25. The question of reprisals mentioned in paragraph 4 should be given further study. The proposals relating to article 26 were equally valid mutatis mutandis for article 46.

26. Mr. BARILE (Italy) said that the general protection provided for under international rules in the event of hostilities should be the same, whether the armed conflicts were international or non-international. Steps should be taken to ensure that the two draft Protocols were on parallel lines.

27. His delegation reserved the right to return to the subject of the various paragraphs of article 26 of Protocol II once the Conference had reached definite conclusions about article 46 of Protocol I.

28. Mr. FISSENKO (Byelorussian Soviet Socialist Republic) said that the majority of the armed conflicts which had occurred since the end of the Second World War had been of a non-international nature. The Diplomatic Conference should therefore adopt without delay international rules supplementing those already in force, so as to ensure better protection for the victims of

those conflicts. Such rules should be based on the following main principles: non-intervention by one State in the internal affairs of another, respect for national sovereignty and territorial integrity, and respect for the unity of population within the existing national borders.

29. In his view, draft Protocol II could be adopted on condition that a few improvements were made. Articles 24 and 25 did not meet with any serious opposition, and that was an encouraging sign. He hoped that those articles would be adopted by consensus. The original text of paragraph 1 of article 26 was acceptable with the amendment in document CDDH/III/48/Rev. 1 replacing the words "intended to" by the word "that". Paragraph 2 should be adopted unchanged; he was therefore unable to accept the amendments proposed by Canada (CDDH/III/36) and Australia (CDDH/III/42). Paragraph 3 raised no difficulty. It contained important humanitarian norms for the protection of the civilian population, in particular the prohibition "to attack without distinction, as one single objective, by bombardment or any other method, a zone containing several military objectives which are situated in populated areas and are at some distance from each other". The term "populated areas" meant, for him, areas in which the civilian population prevailed. Accordingly, he could not accept the Canadian amendment (CDDH/III/36). The Swedish amendment (CDDH/III/52) should be studied by the Working Group. He questioned whether amendment CDDH/III/42, proposed by Australia, improved the original text. On the other hand, he was ready to accept the amendment by Ghana (CDDH/III/29). He was in favour of retaining paragraphs 4 and 5 of article 26 of draft Protocol II.

30. The CHAIRMAN said that the Working Group had already drawn up documents covering articles 43, 44 and 45 of draft Protocol I and 24 and 25 of draft Protocol II; those documents would be examined at the Committee's next meeting. He suggested that the amendments to article 26 of draft Protocol II (CDDH/III/12, CDDH/III/23, CDDH/III/36, CDDH/III/42, CDDH/III/45, CDDH/III/48/Rev.1, CDDH/III/51 and CDDH/III/68) should be sent to the Working Group.

It was so agreed.

The meeting rose at 4.40 p.m.



SUMMARY RECORD OF THE TENTH MEETING

held on Thursday, 21 March 1974, at 10.20 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I: Article 43 - Basic rule (CDDH/1; CDDH/III/29)  
(resumed from the fourth meeting and concluded)

Article 45 - Definition of civilians and civilian population (CDDH/1; CDDH/III/66) (resumed from the sixth meeting and concluded)

Draft Protocol II: Article 24 - Basic rules (CDDH/1; CDDH/III/53)  
(resumed from the fourth meeting and concluded)

Article 25 - Definition (CDDH/1; CDDH/III/72)  
(resumed from the sixth meeting and concluded)

Proposals by the Working Group (CDDH/III/29, CDDH/III/53, CDDH/III/66, CDDH/III/72)

1. The CHAIRMAN invited the Committee to consider the texts proposed by the Working Group for articles 43 (CDDH/III/29), and 45 (CDDH/III/66) of draft Protocol I and for articles 24 (CDDH/III/53) and 25 (CDDH/III/72) of draft Protocol II. It would be recalled that certain delegations had reserved their position on draft Protocol II until Committee I had taken a decision on the field of application of that Protocol.

Draft Protocol I:  
Article 43 - Basic rule (CDDH/1; CDDH/III/29)

2. Mr. BAXTER (United States of America), Rapporteur, introducing the Working Group's proposals, said that the amendments suggested to article 43 of draft Protocol I reflected a certain convergence of view in the Working Group and were mainly of a drafting nature. It had been considered that there should be both respect and protection for the civilian population, that a distinction should be drawn between civilians and combatants and between civilian objects and military objectives and that parties to a conflict should direct their operations against military objectives only. In view of the objections raised in Committee III to the phrase "the destruction or weakening of the military resources of the adversary" in article 43 of the ICRC text on the grounds that such wording was more appropriate in a convention on the law of war than in a protocol covering the protection of the civilian population during hostilities, the Working Group had used the phrase "shall direct their operations against military objectives." He had not had time to consult all the

members of the Working Group, but wished to suggest the insertion of the word "accordingly" before the words "shall direct" in document CDDH/III/29. The same amendment might be considered in connexion with the corresponding article of draft Protocol II.

3. Mr. KUROKAWA (Japan) said that since there were still wide differences of opinion concerning the articles now before the Committee, he hoped that the Committee's decision would not be binding and that there would be an opportunity for further consultation. Many delegations had pointed out in the plenary debates that provisions of international humanitarian law should be capable of application by the majority of States. His delegation supported that view and would therefore prefer the documents concerned, especially article 44, not to be put to the vote for the time being.

4. The CHAIRMAN emphasized that the Committee must reach a decision on the text of article 43. The decision would not be binding and could be reversed at the second session of the Conference. The Rapporteur would mention in his report that several delegations had reserved their position on the article until the field of application of draft Protocol II had been decided by Committee I.

5. Mr. FISCHER (German Democratic Republic) said that, although his delegation could support the Working Group's wording of article 43 for the time being, it would have preferred the article to state what objectives should not be attacked, as that formula would be more in keeping with international humanitarian law.

6. Mr. ALLAF (Syrian Arab Republic) said that the wording proposed by the Working Group could not be left pending until the second session of the Conference. That text should, if possible, be adopted by the Committee, and the plenary Conference could either confirm or reverse that decision. Delegations could reserve their right to revise the text at plenary meetings or at the second session of the Conference. His delegation's vote on the article would not prejudice its decision concerning the field of application of Protocol II as a whole.

7. Mr. TIEN Chin (China) said that his delegation regarded the discussions in Committee III and the decisions taken on articles of the two draft Protocols as preliminary and subject to review at the second session of the Conference.

8. Mr. HAKSAR (India) said that it would be difficult for some delegations to vote on the proposed text of article 43, and suggested that the Committee should merely take note of the Working Group's proposal concerning article 43 (CDDH/III/29) and request the Rapporteur to incorporate that text in his report to the plenary Conference, mentioning the reservations expressed by many delegations and their wish to reconsider the wording of article 43 at the Conference's second session.



9. Mr. SIBAY (Turkey) said he fully supported the Indian representative's suggestions.
10. Mr. EL SHEIKH (Sudan) said he thought that it would be in order for the Committee to vote on the Working Group's text of article 43.
11. Mr. ALLAF (Syrian Arab Republic), speaking on a point of order, said that the Committee could either discuss the substance of the Working Group's proposal or reserve its position on that text for the time being. It did not seem appropriate to decide on some texts by a vote and on others by consensus. The best course would be to take note of the Working Group's text and to postpone a final decision on it until the second session of the Conference.
12. Mr. BETTAUER (United States of America) said that his delegation was fully prepared to adopt the Working Group's text of article 43 (CDDH/III/29).
13. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that, in accordance with the rules of procedure, the Committee should take a decision forthwith on the Working Group's proposals. Such a decision could be reversed by the plenary Conference if the majority so desired. The Committee's report should mention the reservations expressed by certain delegations concerning article 43.
14. Mr. AL-ADEAMI (Iraq) said that it would be premature to vote on the Working Group's text of article 43 and suggested that the Committee should merely take note of the Working Group's report.
15. The CHAIRMAN put the Indian representative's proposal to the vote.

The proposal was rejected by 44 votes to 13, with 9 abstentions.

Article 43, as drafted by the Working Group and amended by the Rapporteur, was adopted by consensus.

Article 45 - Definition of civilians and civilian population (CDDH/1; CDDH/III/66)

16. Mr. BAXTER (United States of America), Rapporteur, introducing the Working Group's text of article 45 (CDDH/III/66) said that in paragraph 1 the term "categories of persons" had been used instead of "categories of armed forces" to avoid controversy. After some discussion, the ICRC draft of paragraph 2 had been maintained. It had been pointed out that the inclusion of a definition of the term "civilian" might give rise to difficulties in connexion with municipal administrative law. Countries which considered that to be a problem might wish to file a statement to that effect at the time of accession or ratification.

17. Paragraph 4 had given the Working Group the most difficulty and the proposed text was the result of long discussions. The paragraph had been redrafted so as to avoid the idea of presumption, which also occurred, in a different context, in article 5 of the Third Geneva Convention of 1949 and which raised complex problems in municipal administrative law.

18. With regard to the suggestion in the foot-note to document CDDH/III/66, he would indicate in his report the possibility of transposing some of the paragraphs to article 2 of draft Protocol I, but thought it was premature to take any decision on the matter at that stage.

19. Mr. BRUM (Uruguay) said that the Spanish version of paragraph 3 should be based on the French version and should read as follows: "La presencia entre la poblacion civil de personas aisladas cuya condicion no responda a la definicion de persona civil no priva..."

20. Mr. BRETTON (France) pointed out that in the French text of paragraph 4 there was no translation of the English phrase "as to whether a person is a civilian". He therefore suggested that the opening words might read "En cas de doute sur le point de savoir si une personne est un civil, cette personne ..."

21. Mr. AL AWADHI (Kuwait) and Mr. KHAN (Pakistan) proposed that the words "he or she" in paragraph 4 should be replaced by the words "such persons".

That proposal was adopted by consensus.

22. Mr. TIEN Chin (China) said that his delegation had already expressed the view that those who were not members of armed forces or were not taking part in military operations were civilians. He also considered that militia and guerrilla fighters were civilians who were forced to defend themselves. Accordingly, when they were not taking part in military operations, they should enjoy full civilian status and protection. Yet the Working Group's text of paragraph 1 extended the field of application of article 45 and at the same time narrowed the scope of the protection given to civilians, and was therefore unacceptable.

23. Article 42 of draft Protocol I, to which reference was made in paragraph 1, related to the important but controversial question of wars of national liberation and was linked with article 1, which had also given rise to divergent views. However, since article 42 had not yet been discussed, it could not properly be taken as a basis for paragraph 1 of article 45. That point should be given further consideration before any decision was taken.

24. Mr. OULD MINNIH (Mauritania) said he endorsed the views of the Chinese and Syrian representatives.

25. Mr. ALLAF (Syrian Arab Republic) said he agreed that no decision could be taken on a definition based on an article which had not yet been approved. He therefore suggested that the decision on paragraph 1 of article 45 should be postponed until article 42 had been adopted.

26. The CHAIRMAN emphasized that any decision taken by the Committee would be regarded as provisional and would be subject to review after discussion in plenary meeting. Since the Committee's work could not be left in the air, he suggested that a vote should be taken on the Working Group's text for article 45 (CDDH/III/66) and that the statements of the Chinese and Syrian representatives should be incorporated in the Rapporteur's report.

27. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) and Mrs. MANTZOULINOS (Greece) said they supported the Chairman's suggestion.

28. Mr. AJAYI (Nigeria) said he was in favour of deferring the decision. If the majority opposed that view, however, the text should be adopted by consensus rather than by a vote.

29. Mr. BRUM (Uruguay) proposed that article 45 should be put to the vote and that if it was adopted a clarification should be added to the effect that the reference to article 42 was intended to cover members of organized resistance movements recognized as having the status of armed forces.

30. Mr. ALLAF (Syrian Arab Republic) reiterated his view that no decision could be taken on article 45 until a decision had been taken on article 42.

31. The CHAIRMAN said that an explicit foot-note would be added to document CDDH/III/66, summarizing the points raised in the Committee, with special reference to paragraph 1.

Article 45, of draft Protocol I, as drafted by the Working Group and amended during the meeting, was adopted by consensus, on the understanding that an appropriate second foot-note would be added.

Draft Protocol II:

Article 24 - Basic rules (CDDH/1; CDDH/III/53)

32. Mr. BAXTER (United States of America), Rapporteur, said that the Working Group's intention had been to make the texts of article 43 of draft Protocol I and article 24 of draft Protocol II identical.

33. Mr. BRETON (France) said that the French texts of the articles would have to be aligned with the English original and with each other.

34. Mr. PALACIOS TREVINO (Mexico) said that the same applied to the Spanish texts.

35. Mr. HANSAR (India) said that since draft Protocol II had not yet been discussed at the Conference, even less was known about its field of application than about that of draft Protocol I; accordingly, in discussing articles of draft Protocol II, the Committee was working in a vacuum and could not take any definitive decision. He suggested that all proposals relating to articles of draft Protocol II should be accompanied by foot-notes pointing out that any agreement on them was merely provisional and subject to reservations.

36. The CHAIRMAN said that the Indian representative's point would be mentioned in the report and that his suggestion concerning foot-notes would be noted.

37. Mr. TIEN Chin (China) said that the concept of "non-international armed conflicts" was ambiguous and raised a problem of fundamental principle. The very need for a second protocol to deal with them required further study. It would be improper to take any hasty decisions concerning article 24 or any other article of draft Protocol II.

38. Mrs. MANTZOULINOS (Greece), Mr. OULD MINNIE (Mauritania) and Mr. KIRCA (Turkey), said that they wished the names of their delegations to be included in any foot-note listing the delegations which entered reservations.

39. Mr. ALLAF (Syrian Arab Republic) said that there would be no need for a list of names, since the foot-notes suggested by India would express the general opinion of the Committee.

40. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that he could not agree with that view and suggested it would be more accurate to say that several delegations reserved their positions.

After a brief discussion the USSR representative's suggestion was approved.

Article 24 of draft Protocol II, as drafted by the Working Group and amended by the Rapporteur was adopted by consensus.

Article 25 - Definition (CDDH/1; CDDH/III/72)

41. Mr. BAXTER (United States of America), Rapporteur, said that the Working Group had thought it desirable for article 25 of draft Protocol II to conform as closely as possible to the corresponding text of article 1, paragraph 1. If the latter text was subsequently changed, article 25, paragraph 1, would have to be altered accordingly: that fact would be mentioned in his report. The reference to "organized armed groups" in the Working Group's text was based on the similar reference in the ICRC draft of article 1, paragraph 1. The phrase "under responsible command" had been omitted because its inclusion would have meant that the members of armed groups not under responsible command would be regarded as civilians, thus placing these groups at an advantage.

42. A question had been raised in the Working Group concerning persons, such as labourers, ammunition carriers, messengers or political agitators, who assisted or supported members of armed forces or organized armed groups. The Working Group had taken the view that that question should be set aside until article 26, paragraph 2, had been examined.

43. Paragraphs 2 and 3 in the Working Group's draft were identical with paragraphs 2 and 3 of article 45 of draft Protocol I and paragraph 4 was identical with the corresponding clause of article 45 proposed in document CDDH/III/66; it should be changed in accordance with the amendment that the Committee had adopted.

44. The Working Group had also decided to postpone consideration of a proposal to add a definition of "civilian objects" until it came to consider other amendments on the same subject.

45. Mr. BRETON (France) and Mr. BRUM (Uruguay) said that the French and Spanish versions of the text of article 25 of draft Protocol II, proposed in document CDDH/III/72, should be brought into line with those of article 45 of draft Protocol I.

Article 25 as drafted by the Working Group and as amended was adopted by consensus.

The meeting rose at 12.30 p.m.



SUMMARY RECORD OF THE ELEVENTH MEETING

held on Thursday, 21 March 1974, at 3.30 p.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (concluded)

Draft Protocol I: Article 44 - Field of application (CDDH/1; CDDH/III/54)  
(resumed from the fourth meeting and concluded)

Proposals by the Working Group (CDDH/III/54) (concluded)

1. The CHAIRMAN said that the Working Group's proposals concerning article 44 of draft Protocol I appeared in document CDDH/III/54. He suggested that the Committee should consider these proposals, then vote on each paragraph by a show of hands and, finally, adopt article 44 as a whole.
2. Mr. BAXTER (United States of America), Rapporteur, said he regretted that the Working Group had been unable to submit single texts for paragraphs 1 and 2 of article 44 of draft Protocol I because the Group was not empowered to take decisions on matters of substance.
3. Since the proposal concerning paragraph 2 might affect paragraph 1, he suggested - with the Chairman's approval - that paragraph 2 be considered first, followed by paragraph 1 and then by paragraph 3.
4. With regard to paragraph 2, the Committee had to decide whether the term "military operations" should be retained or whether it should be replaced by "attacks". Participants in favour of the original text had pointed out that attacks were acts of violence committed against the adversary; on the other hand, those in favour of deleting that term considered that the provisions in that part of draft Protocol I should apply to the civilian population of all parties to the conflict.
5. The Working Group had submitted several alternatives for paragraph 1, in view of the fact that Protocol I should apply in all war situations affecting the civilian population on land.
6. The words "complementary to" in the English text of paragraph 3 had caused some difficulties, and the Working Group had proposed that those words should be replaced by "in addition to". The French text had been left unchanged.
7. He drew the Committee's attention to the connexion between the provisions of draft Protocol I and in particular, those of part II of the Fourth Geneva Convention of 1949 concerning the protection of civilians and civilian objects of all parties to the conflict; it was for that reason that the Working Group had proposed new wording for paragraph 3.

Paragraph 2

8. Sir David HUGHES-MORGAN (United Kingdom) said he thought that the words "committed against the adversary" should be retained. The adversary was in any case a military adversary, and protection of the civilian population covered the populations of all parties to the conflict.

9. Replying to a question by Mr. PALACIOS TREVINO (Mexico), Mr. BAXTER (United States of America), Rapporteur, said that the Working Group had at no time considered the effects of hostilities taking place in outer space.

10. The CHAIRMAN called for a vote on the proposal to delete the words "against the adversary"

The proposal was rejected by 13 votes to 8, with 10 abstentions.

Paragraph 2 was adopted by 51 votes to 1, with 13 abstentions.

11. Mr. BLISHCHENKO (Union of Soviet Socialist Republics), supported by Mr. BRUM (Uruguay) said that it might be better to transpose paragraph 2 as adopted to article 2 of draft Protocol I. It would be wise to keep that question in abeyance until the second session of the Conference, since article 2 of draft Protocol I had not yet been adopted.

12. Mr. BAXTER (United States of America), Rapporteur, said that he fully shared the view expressed by the USSR representative.

Paragraph 1

13. The CHAIRMAN invited the Committee to vote on proposal A in document CDDH/III/54, to replace the term "military operations" by the word "attack".

The proposal was rejected by 50 votes to 10, with 5 abstentions.

14. The CHAIRMAN put to the vote proposal B, to the effect that the words "against the adversary" should be retained.

The proposal was adopted by 31 votes to 22, with 11 abstentions.

15. The CHAIRMAN put to the vote proposal C, to the effect that the words "on land" should be retained.

The proposal was adopted by 35 votes to 33, with 4 abstentions.

16. Mr. ALLAF (Syrian Arab Republic) said he considered that the vote taken on paragraph 1 had been premature, particularly with regard to the words "on land", and that the Working Group's text (CDDH/III/54) should first have been examined without a vote. The text as a whole must therefore be put to the vote.



17. Mr. BAXTER (United States of America), Rapporteur, said that the information given by the representative of the ICRC at an earlier session concerning the sense of the expression "on land" would be mentioned in the report.
18. He read out the English text of paragraph 1 as amended.
19. Mr. MIRIMANOFF-CHILIKINE (International Committee of the Red Cross) read out a French translation of the text.
20. An exchange of views on the position of the words "on land" then took place between Sir David HUGHES-MORGAN (United Kingdom) and Mr. BETTAUER (United States of America), who wished them to be placed after the words "military operations", Mr. EIDE (Norway), Mr. BLISHCHENKO (Union of Soviet Socialist Republics) and Mr. BLIX (Sweden), who wished to place them at the end of the paragraph, and Mr. BRETTON (France), Mr. PASCHE (Switzerland), Mr. LACLETA MUNOZ (Spain) and Mr. BRUM (Uruguay), who thought that the term "on land" should be placed before the words "the civilian population".
21. Mr. EIDE (Norway), supported by Mr. EATON (United Kingdom), Mr. SAMUELS (Canada) and Mr. BLISHCHENKO (Union of Soviet Socialist Republics), proposed that the question be put to the vote.
22. Mr. ALLAF (Syrian Arab Republic) said that to the best of his recollection, the Working Group had not reached agreement on the point at issue. He considered the matter to be substantive and proposed that paragraph 1 should be referred back to the Working Group.
23. Mr. TIEN Chin (China), Mr. PALACIOS TREVINO (Mexico), Mr. BLISHCHENKO (Union of Soviet Socialist Republics), Mr. TRANGGONO (Indonesia), Mr. OULD MINNIE (Mauritania), Mr. EL SHEIKH (Sudan) and Mr. BLIX (Sweden) supported the Syrian proposal.
24. Mr. TIEN Chin (China) drew attention to paragraph 1 of rule 35 of the rules of procedure, which stated that decisions on all matters of substance should be taken by a two-thirds majority of the representatives present and voting.
25. Mr. ALDRICH (United States of America) said he did not believe that the placing of the words "on land" could lead to different interpretations, and pointed out that the Committee had already taken a decision. He was opposed to referring article 44, paragraph 1, back to the Working Group as that would delay the Committee's work and suggested that the Drafting Committee should be asked to give the finishing touches to the text.
26. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) proposed that a vote should be taken on paragraph 1 as a whole, on the understanding that the Working Group would examine the question of the placing of the words "on land".

27. Mr. SAMUELS (Canada) said he considered that matters of substance should not be referred to the Working Group and that the Committee itself should decide on them. The position of the term "on land" was a matter of substance.

28. Mr. BLIX (Sweden) said that the Committee should be asked to decide whether article 44, paragraph 1, should be sent back to the Working Group. Otherwise, a vote should be taken on the position of the words "on land".

29. Mr. EL SHEIKH (Sudan), supported by Mr. KURDI (Saudi Arabia), asked whether it was necessary to take a further vote in cases where the participants in a vote interpreted the text on which they had voted in different ways.

30. The CHAIRMAN put to the vote the Syrian proposal to refer paragraph 1 back to the Working Group.

The proposal was adopted by 41 votes to 21, with 17 abstentions.

### Paragraph 3

Paragraph 3 was adopted by 73 votes to none, with 2 abstentions.

31. After some discussion between the CHAIRMAN, Mr. BAXTER (United States of America), Rapporteur, and Mr. ALLAF (Syrian Arab Republic), it was decided that the Working Group would meet immediately after the end of the meeting to consider article 46, paragraph 1, of draft Protocol I and that it would resume consideration of article 44, paragraph 1, the following day.

### INTERNATIONAL DAY FOR THE ELIMINATION OF RACIAL DISCRIMINATION

32. Mr. AJAYI (Nigeria) reminded the Committee that the Sharpsville massacre in South Africa had taken place exactly fourteen years previously, and that the international community had decided (see United Nations General Assembly resolution 2142 (XXI) ) that 21 March, the anniversary of that massacre, would thereafter be observed as "International Day for the Elimination of Racial Discrimination". He appealed to all men of goodwill to remember the occasion and to redouble their efforts to combat apartheid, particularly in Africa.

33. Mr. ALLAF (Syrian Arab Republic), Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) and Mr. OULD MINNIE (Mauritania) supported the Nigerian representative's appeal.

34. Mr. STEYN (South Africa) pointed out that people had been killed in riots elsewhere in the world, and more recently.

The meeting rose at 5.30 p.m.

SUMMARY RECORD OF THE TWELFTH (CLOSING) MEETING

held on Tuesday, 26 March 1974, at 3.25 p.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

ADOPTION OF THE REPORT OF THE COMMITTEE (CDDH/III/73)

1. The CHAIRMAN drew attention to the draft report prepared by the Rapporteur (CDDH/III/73), which was brief and should be read in conjunction with the summary records of the Committee's proceedings.
2. Mr. BAXTER (United States of America), Rapporteur, said that the report summarized hours of discussion very briefly, but that more details were given on the articles which the Committee had been unable to complete.
3. Since the report had been circulated he had received certain drafting amendments. In the first paragraph of the French text, the word "constitué" should be replaced by "élu". To bring the English text into line with those of the other two language versions, the words "Secretary: Mr. B. Hediger, jurist" should be deleted and a new paragraph inserted, reading: "The post of Secretary of Committee III was assumed by Mr. B. Hediger, jurist." A further sentence should be added reading: "The ICRC was represented by Mrs. D. Bindschedler-Robert and by Mr. J. Mirimanoff-Chilikine."
4. On page 3, the words "various articles" in the eleventh line should be replaced by "item (d)".
5. On page 5, the fourth line should be replaced by the following text: "At the time of voting and during the subsequent discussions, the Chairman made it clear that the voting on articles of draft Protocol II would be subject to the decision to be taken later by Committee I on article 1 of draft Protocol II on the scope of that Protocol. Various delegations ...". Moreover, the word "also" should be inserted before the word "understood" in the seventh line of page 5.
6. On page 6, the sentence beginning in the thirteenth line should read as follows: "The amendment proposed in document CDDH/III/9 was withdrawn by its sponsors, who stated their agreement with document CDDH/III/26, and the amendment proposed in document CDDH/III/10 was withdrawn by its sponsor, who stated his agreement with document CDDH/III/14".
7. The last sentence on page 3 should be reworded as follows:  
"The paragraph resulting from the first votes on the first two questions reads (with the question unresolved of the placing of 'on land' in either the place marked 'A' or the place marked 'B'):  
'The provisions contained in the present Section apply to any land, air or sea military operations against the adversary ... (A) which may affect the civilian population, individual civilians or civilian objects ... (B)'."

8. On page 11, the words "article 2" at the end of the second paragraph under the heading "Paragraph 1" should be amended to read "article 42".
9. On page 15, the words "imposing responsibility for" should be inserted in the second line between "problem of" and "acts". In the eighteenth line on the same page, the words "to delete subparagraph 3 (b) as a whole and yet others thought it desirable" should be inserted after the phrase "the civilian population".
10. In the last paragraph on page 17, the words "article 2 of" before "Protocol II" should be deleted and replaced by "an article on definitions in ...".
11. In the penultimate line of the paragraph under the heading "Paragraphe 4" on page 10 of the French text, the word "accordée" should be replaced by "considérée" and the text of article 45 appearing in that paragraph should be replaced by that of article 25 on page 15 of the French text.
12. The CHAIRMAN read out a text submitted by the Chinese delegation for inclusion in the second paragraph on page 13, in order to reflect its position concerning the protection of the civilian population. He believed, however, that the summary records made that position sufficiently clear.
13. Mr. TIEN Chin (China) confirmed that his delegation wished its position to be reflected in the report. He would submit a simplified text to the Rapporteur.
14. The CHAIRMAN suggested that the Chinese delegation might be satisfied if its views were incorporated in a corrigendum to the summary record.
15. Mr. TIEN Chin (China) said that the matter could be discussed informally after the meeting.
16. Mrs. MANTZOULINOS (Greece) pointed out that document CDDH/III/17/Rev.1, which was listed in the annex to the draft report under article 48 bis, should in fact appear under article 47.
17. Mr. ALVAREZ-PIFANO (Venezuela), referring to the section dealing with article 44, paragraph 3, in the draft report (CDDH/III/73, pages 9 and 10), said that it failed to reflect fully the discussion which had taken place on that paragraph. The report stated that "in the discussion of this paragraph in the Committee and in the Working Group, some difficulty was encountered with the word 'complementary', a word which was thought by some to lend a measure of ambiguity to the paragraph." He recalled, however, that certain delegations had felt that the word "complementary" should be retained since they considered it to be an appropriate expression to indicate the correct manner in which the Conventions and the Protocol should be interpreted and applied.

18. It was not a drafting matter but one of substance since amendments had been submitted in which the word "complementary" had been omitted (CDDH/III/16 and CDDH/III/21). His delegation therefore thought that that fact should be pointed out in the report - otherwise the impression would be given that the Committee had wished to replace or delete the word "complementary" when in fact the contrary was the case. His delegation therefore suggested that the following sentence should be inserted at the end of the second sentence on page 10 of the draft report:

"Other delegations considered that the word 'complètent' in the French version, and 'completan' in the Spanish version, had a precise meaning and expressed correctly and in an appropriate manner the fact that the Protocol was intended to supplement the Conventions and that the Conventions were supposed to be applied as supplemented by the Protocol."

19. Mr. CASTREN (Finland), referring to the penultimate paragraph of the section on article 46 of draft Protocol I, on page 15, said that the considerable discussion on the protection of civilian objects against reprisals should be taken into account. He would submit a written amendment.

20. Mr. ALLAF (Syrian Arab Republic) said that the word "Certain", at the beginning of the second sentence of the last paragraph on page 7, should be replaced by the word "Several".

It was so agreed.

21. Mr. ALLAF (Syrian Arab Republic), referring to the last paragraph on page 8, said that not only the question of the placing of the words "on land", but also that of the retention or deletion of those words remained unsolved.

22. Mr. BAXTER (United States of America), Rapporteur, said that the paragraph might be redrafted to read:

"The paragraph resulting from the first votes on the first two questions reads (with the question of whether to include the words "on land" and, if so, the placing of those words, left unresolved) ...".

23. Mr. ALLAF (Syrian Arab Republic) said he could accept that suggestion.

24. He would like it to be mentioned that he had asked for a vote on paragraph 1 of article 44 as a whole.

25. Referring to the second paragraph under the heading "Paragraph 1" on page 11, he said that the words "the coverage of" and "especially as regards national liberation movements" were ambiguous and should be deleted.

It was so agreed.

26. Mr. ALLAF (Syrian Arab Republic) said that the outcome of the discussion on the possibility of conflict referred to in the fourth sentence on page 12 should be reflected in the report.
27. Mr. BAXTER (United States of America), Rapporteur, said that an appropriate addition would be made.
28. Mr. ALLAF (Syrian Arab Republic) said that the different opinions on the principle of proportionality had not been reflected sufficiently clearly. He suggested that the words "rejected this principle as a criterion and" should be inserted after the words "while other delegations" in the sixteenth line of page 15.
- It was so agreed.
29. Mr. ALLAF (Syrian Arab Republic) said that the reference to the concept of reprisals on page 15 did not faithfully reflect the discussion. The overwhelming majority of speakers had been in favour of retaining the provision and many of them had wished it to be extended to cover civilian objects. He would leave it to the Rapporteur to make a suitable amendment.
30. His delegation had been a sponsor of the amendments to article 49 of draft Protocol I in documents CDDH/III/65 and CDDH/III/76 and would like to be included in the list given in the annex.
31. Mr. BAXTER (United States of America), Rapporteur, said that the amendment submitted by Finland and Sweden (CDDH/III/13 and Add.1 would cover the Syrian representative's point on the question of reprisals.
32. In reply to Mr. EL IBRASHY (Arab Republic of Egypt), Mr. BAXTER (United States of America), Rapporteur, said that the words "military operations" or:" in the second and third lines under the heading "Paragraph 1" on page 7 would be deleted.
33. Mr. EL IBRASHY (Arab Republic of Egypt) said that he would like the words "to give renewed study to article 44, paragraph 1, of draft Protocol I as to whether or not to include the words 'on land' and, in the event of their inclusion, to the place where they should be inserted" to be added after the words "to return the entire paragraph to the Working Group" at the end of the penultimate paragraph on page 8. The remainder of the text on article 44, paragraph 1, should then be deleted.
34. Mr. BAXTER (United States of America), Rapporteur, said that he would like to retain a reference to the view that the words "on land" included rivers, canals and lakes.
35. Mr. EL IBRASHY (Arab Republic of Egypt) said that he could accept the Syrian proposal as amended by the Rapporteur.

36. The French text of article 43 of draft Protocol I as it appeared on page 5 of the draft report should be brought into line with that of article 24 of draft Protocol II on page 13 of the French text.

37. Mr. DUGERSUREN (Mongolia) said that the Committee's terms of reference on page 1 of the draft report should be set out more clearly.

38. The last sentence of the second paragraph on page 15, which related to the question of proportionality, should be re-drafted to take into account the view expressed by several delegations that the body of humanitarian law should not contain any wording that might be interpreted as condoning any casualties caused to the civilian population.

39. Mr. BAXTER (United States of America), Rapporteur, said that he would take into account both the changes suggested by the preceding speaker.

40. Mr. FLECK (Federal Republic of Germany) proposed that the word "reasonable" in the fifteenth line of page 15 should be replaced by "necessary", and that the word "aerial" in that line should be deleted.

It was so agreed.

41. Mr. MATI (Albania) said that the Committee's report should reflect the point of view expressed by his own and other delegations concerning the protection of freedom and guerrilla fighters. He therefore supported the Chinese delegation's request in that connexion.

42. Mr. BETTAUER (United States of America) requested that the view expressed by the Canadian delegation and supported by his own delegation concerning the applicability of certain parts of article 26 of draft Protocol II to non-international conflicts should be reflected in the third paragraph on page 13.

43. Mr. BAXTER (United States of America), Rapporteur, said that that would be done.

44. Mr. BETTAUER (United States of America) said that the amendments proposed by the delegation of the Syrian Arab Republic to the last two paragraphs on page 6 caused his delegation some difficulty, since the original text as amended by the Rapporteur at the beginning of the meeting was, in its view, an accurate reflection of what had taken place. The question of whether or not to retain the words "on land" had not been left open, since the Committee had taken a vote on it.

45. The CHAIRMAN said that during the discussion of article 44, paragraph 1, of draft Protocol I, the Committee had reached the conclusion that the placing of the words "on land" was a question of substance. At the request of the delegation of the Syrian Arab Republic the Committee had decided by a vote at the eleventh meeting to refer the entire paragraph back to the Working Group for further consideration.

46. Mr. ALLAF (Syrian Arab Republic) said that the Chairman's description of what had taken place was quite correct. It would also be recalled that at the time of the vote on the question of referring the whole paragraph to the Working Group for further consideration, one delegation had asked whether that Group would be instructed to consider only the placing of the words "on land", and that the Committee had decided that the Working Group should not confine itself to that question but should study the whole paragraph.

47. The CHAIRMAN assured the Committee that the report would reflect only what had actually taken place. Any delegation wishing to take a stand on questions of substance would have the opportunity of doing so when the Committee's report was considered by the Conference meeting in plenary assembly.

48. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) proposed that the following new sentence should be inserted before the last sentence of the first paragraph on page 5 of the draft report: "Other delegations were of the opinion that the voting on articles of draft Protocol II does not depend on the decision on the scope of draft Protocol II, since these articles deal with the protection of the victims of non-international armed conflicts, which should be ensured whatever the scope of Protocol II might be".

It was so agreed.

49. Mr. TIEN Chin (China) said he supported the Syrian representative's comments on the paragraphs relating to the questions of proportionality and reprisals.

50. Mr. BRECKENRIDGE (Sri Lanka) said that the layout of the draft report was not entirely satisfactory. A clearer distinction should have been made between the summary of the Committee's discussions, the proposals submitted by the Working Group, and the decisions taken by the Committee. Consideration of the draft report would also have been facilitated if the paragraphs had been numbered. He hoped that those points would be taken into account when future reports were drafted.

51. Mr. RAHHALI (Morocco) and Mr. DIXIT (India) said that their delegations would submit their amendments to the Secretariat in writing.

52. The CHAIRMAN asked whether the Committee was prepared to adopt the draft report (CDDH/III/78), as amended, by consensus.

It was so decided.

#### CLOSURE OF THE SESSION

53. After the customary exchange of courtesies, the CHAIRMAN declared that the Committee had completed its work at the first session of the Conference.

The meeting rose at 6.5 p.m.



SECOND SESSION

(Geneva, 3 February - 18 April 1975)

COMMITTEE III

SUMMARY RECORDS OF THE THIRTEENTH TO FORTIETH MEETINGS

held at the International Conference Centre, Geneva,

from 5 February to 14 April 1975

Chairman: Mr. H. SULTAN (Arab Republic of Egypt)

Rapporteur: Mr. G. ALDRICH (United States of America)  
Mr. R. BAXTER



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SUMMARY RECORD OF THE THIRTEENTH (OPENING) MEETING

held on Wednesday, 5 February 1975, at 4 p.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

ORGANIZATION OF WORK

1. The CHAIRMAN said that the officers had decided that, as Mr. Dugersuren (Mongolia) was absent temporarily from the second session of the Conference, he would be replaced as Vice-Chairman by the new Head of the Mongolian delegation. Since the latter had not yet arrived at Geneva, Mr. Damdindorj (Mongolia) would temporarily deputize for him. Mr. Aldrich, Head of the United States delegation, had kindly agreed to replace Mr. Baxter, the Rapporteur, who would be detained at the University of Harvard until March.
2. The officers' suggestions concerning the Committee's method of work (CDDH/III/1/Rev.1) had been adopted at the first session. Referring to the draft programme of work (CDDH/III/201), he said that fifty-four meetings were scheduled to be held during the second session, twenty-one of which would be devoted to the articles dealing with general protection against effects of hostilities, nineteen to the articles on methods and means of combat, and two to article 42 concerning the new category of prisoners of war. Twelve more meetings were allocated for the examination of articles 63 to 69, although that task might be entrusted to Committee I.
3. With regard to draft Protocol I, articles 43, 44, paragraphs 2 and 3, and article 45 had already been adopted and article 44, paragraph 1 and article 46 had been referred to the Working Group. In the case of draft Protocol II, article 24, paragraph 1 and article 25 had been adopted and article 26 had been referred to the Working Group. Consequently, the Committee would start by considering articles 47, 48 and 49 of draft Protocol I and the corresponding articles of draft Protocol II (articles 27 and 28). The Secretariat had so far received eleven amendments to article 47, nine to article 48 and ten to article 49. Delegations wishing to submit amendments to article 47 should do so before noon on Friday, 7 February. In the case of articles 48 and 49, the deadline might be Tuesday, 11 February.
4. The Conference had adopted the proposals of the General Committee relating to the conduct of the debates. Amendments submitted by several delegations would accordingly be introduced by one single speaker. Furthermore, amendments having points in

common would be grouped in a single amendment. To that end, he proposed that a Co-ordination Group should be set up under the chairmanship of Mr. Herczegh (Hungary), Vice-Chairman of Committee III.

It was so agreed.

5. Mr. ALDRICH (United States of America), Rapporteur, pointed out that the Committee had only a limited number of meetings available to it in which to bring its consideration of highly complex subjects to a successful conclusion. He thought that the Working Group should meet as often as the Committee - for instance, in the afternoons. The members of the Working Group would be convened as soon as possible to consider article 44, paragraph 1 and article 46 of draft Protocol I, as also article 26 of draft Protocol II. Consideration of those articles should not take up more than two meetings.

6. Mr. HERCZEGH (Hungary) pointed out that there were so many amendments that it would be necessary to make great efforts to co-ordinate them in order to reduce the number, without in any way prejudicing the right of delegations to express their views. He proposed that the Co-ordination Group should meet immediately after the meeting to determine its working methods.

It was so agreed.

The meeting rose at 4.30 p.m.

SUMMARY RECORD OF THE FOURTEENTH MEETING

held on Thursday, 6 February 1975, at 3.50 p.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONDOLENCES TO THE PRESIDENT OF THE CONFERENCE

On the proposal of the Chairman, the Committee decided to send a telegram to the President of the Conference expressing its condolences on the death of his mother, Mme. Paul Graber.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1)

Draft Protocol I: articles 47, 48 and 49

Draft Protocol II: articles 27 and 28

1. The CHAIRMAN invited the Committee to take up articles 47, 48 and 49 of draft Protocol I, after which the corresponding articles of draft Protocol II, namely articles 27 and 28, would be examined.
2. The deadline for submitting any further amendments to article 47 was 7 February at noon; in the case of articles 48 and 49 it was 10 February at noon.
3. He invited the representative of the International Committee of the Red Cross to introduce article 47 of draft Protocol I.
4. Mrs. BINDSCHEDLER-ROBERT (International Committee of the Red Cross) said that articles 47, 48 and 49 of draft Protocol I and articles 27 and 28 of draft Protocol II concerned the protection of civilian objects. They provided for a system of protection or immunity for civilian property. Article 47 dealt with civilian objects in general, article 48 with objects indispensable to the survival of the civilian population, and article 49 with works and installations containing dangerous forces.
5. Article 47 prohibited attacks on civilian objects in general but made no mention of reprisals. To forbid reprisals against civilian objects in general would exclude the possibility of carrying out reprisals under the laws of war, and the ICRC had feared that there might be strong opposition to the inclusion of such a strict prohibition. There was of course nothing to prevent the Committee from introducing the concept of prohibition of reprisals into article 47, should it so desire.

6. At the time the article had been drafted, the question had arisen whether civilian objects should be defined positively or negatively or, alternatively, whether there should be two parallel definitions of civilian objects and military objectives. It had been thought best to adopt one definition only. It had also seemed logical to establish a negative presumption in favour of civilian objects by defining military objectives - which were the exception - and presuming all other objects to be civilian: the definition was, however, completed in paragraph 2 by a list of typical civilian objects.

7. The definition of military objectives given in article 47, paragraph 1, contained three elements. First, a distinction was made between the nature, purpose or use of those objectives in order to cover objects of a military nature, objects destined for the armed forces, and objects which might be taken over for military use, for example, a school transformed into barracks.

8. The second concept contained in the definition was defined by the words "recognized to be of military interest", and was complementary to the first. The third concept was that of the military advantage offered by total or partial destruction of the military objective. In fact, that was more in the nature of a condition; it thus prohibited the destruction of even military objectives in cases where such destruction presented no direct or immediate military advantage.

9. Objects which were used by, or served the interest of both the army and the civilian population (mixed objectives), had not been mentioned specifically in article 47, but the Committee might perhaps wish to consider them within the framework of the definition in paragraph 1. The last phrase of paragraph 2 made it clear that civilian objects converted to military use could not be considered as military objectives unless they were used mainly for military purposes.

10. The CHAIRMAN said that the delegations of Finland and Sweden had requested that their proposal to include a new article as article 26 bis of draft Protocol II (CDDH/III/13 and Add.1) should be discussed after the Committee had completed its discussion of article 47. In the absence of any objection, he would take it that the Committee agreed to that procedure.

It was so agreed.



Draft Protocol I

Article 47 - General protection of civilian objects (CDDH/1, CDDH/56; CDDH/III/10, CDDH/III/17/Rev.1, CDDH/III/39, CDDH/III/41, CDDH/III/49, CDDH/III/52, CDDH/III/56, CDDH/III/57, CDDH/III/58, CDDH/III/63, CDDH/III/79)

11. The CHAIRMAN invited the delegations that had submitted amendments to article 47 to introduce them.

12. Mr. CRETU (Romania) said that his delegation's proposal to insert a new article before article 47 and to redraft article 47 (CDDH/III/10) had been prompted by the need to ensure the maximum protection of objects indispensable to the survival of the civilian population. His delegation considered that a separate and clear definition would facilitate the application of the Protocol. It was more important to define civilian objects than to define military objectives, so that combatants would be in no doubt about the nature of the objects to be protected. He drew attention to the fact that the new article proposed by his delegation defined civilian objects as all objects which were not "directly and immediately used by the armed forces".

13. The same spirit had prompted his delegation to propose the deletion of article 48 and the redrafting of article 47 so that it dealt also with objects indispensable to the survival of the civilian population. It should be noted that paragraph 2 of his delegation's proposed redraft of article 47 contained a new notion, that of national economic interest, and that paragraph 3 prohibited the movement of civilian objects or installations across the national borders of their country of origin.

14. The Romanian delegation was ready to co-operate with other delegations wishing to submit similar proposals.

15. Mr. MAHONY (Australia) said that his delegation, too, was willing to co-operate with others with a view to reducing the number of amendments proposed to article 47 and achieving a clear and concise statement of the law.

16. The Australian amendment to article 47 (CDDH/III/49) sought to make the meaning clearer. In particular, the expression "military interest" in the ICRC draft of paragraph 1 was too general, and had been dropped in the Australian proposal. His delegation also proposed the deletion of the word "mainly" in paragraph 2.

17. Mr. SCHUTTE (Netherlands), introducing his delegation's amendment to article 47 (CDDH/III/56), said that his delegation had difficulty in accepting article 47 as it stood, especially paragraph 2, which it felt to be confusing and unrealistic. That paragraph listed a number of objects designed for civilian use and then forbade their destruction, although some of those objects - installations and means of transport, for example - could subsequently contribute to part of the military effort and therefore be attacked. Similarly, in paragraph 1, the phrase "objectives which are ... recognized to be of military interest" was too vague, there being no indication of who was to recognize them as such. His delegation would therefore like article 47 to be replaced by the text which it had submitted. That text differed from the ICRC text in that it emphasized the personal conscience and the personal knowledge of those who attacked. In the proposed new paragraph 1, the word "or" was used rather than "and" to link the two halves of the provision, the first part of the sentence being static in sense and the second half dynamic. The phrase "capture and neutralization" had also been proposed. His delegation was ready to co-operate with others who took a similar view.

18. Mr. EL GHONEMY (Arab Republic of Egypt), introducing amendment CDDH/III/63 on behalf of the sponsors, said that the amendment had been submitted in a humanitarian spirit. The deletion in paragraph 1 had been suggested on the ground that any definition of the kind given in that paragraph constituted a restriction which could be misused. Similarly, the phrase "... except if they are used mainly in support of the military effort" in paragraph 2 could encourage unwarranted attacks and should be deleted. The inclusion of the sentence "These objects shall not be made the object of reprisals" at the end of paragraph 2 would be a logical addition, in line with article 48.

19. Mr. WOLFE (Canada), introducing his delegation's amendment (CDDH/III/79), said that he concurred fully with the statement made by the representative of the Netherlands. His delegation objected to the conjunctive nature of the word "and" in paragraph 1 and had deleted the word "substantial" as being unclear. The list of objects in paragraph 2 was somewhat ambiguous, it being impossible, for instance, to state that all means of transport could be immune. The word "mainly" was felt to be too subjective for practical use.

20. His delegation would withdraw its amendment in favour of that proposed by the Netherlands (CDDH/III/56).

21. Mr. GIRARD (France) introduced his delegation's amendment (CDDH/III/41), which was based on the same ideas as those of Canada and the Netherlands. He agreed that the word "mainly" in paragraph 2 should be deleted and that in paragraph 1 a new idea should be introduced, which his delegation felt to be essential, namely, that of the military potential of the adverse Party.
22. Mr. MENCER (Czechoslovakia), introducing amendment CDDH/III/58 on behalf of his own delegation and that of the German Democratic Republic, said that, since article 47 dealt exclusively with objects, the sponsors considered that it should start with a form of wording similar to that in articles 43 and 46, stipulating concisely that civilian objects should not be the object of attack or of reprisals. That idea had already been covered by other States, with whom the sponsors would be prepared to co-operate.
23. He felt that the content and general tenor of article 47 was not appropriate to humanitarian law. It made no reference to what was prohibited but rather underlined what was permitted, as in paragraph 1, which included a list of military objectives. He stressed the pitfalls of seeking legal perfection and attempting to cover every point and was in favour of a brief, clear statement which would be understandable by all.
24. The CHAIRMAN stated that the delegation of the Holy See had informed him that it was willing to withdraw its amendment (CDDH/III/39) and to support that submitted by the delegations of Greece, Jordan and Spain (CDDH/III/17/Rev.1). He invited the four delegations to submit a revised version of the draft resolution not later than midday the following day.
25. Mr. BLIX (Sweden) introduced his delegation's amendment (CDDH/III/52). Article 47 gave an abstract definition of military objectives, followed by a specific list. His delegation thought it inevitable that doubt would arise whether certain objectives were civilian or military. It would be desirable therefore to stipulate that in case of doubt whether an object was civilian it should be presumed to be so, a provision which corresponded to article 45, paragraph 4.
26. Mr. KALSHOVEN (Netherlands), introducing amendment CDDH/III/57 on behalf of the sponsors, said that it raised the question of reprisals against the civilian population and civilian objects. The sponsors felt there should be either no prohibition at all but simply general restrictions, or else outright prohibition. The ICRC had sought a third course, that of almost complete

prohibition, for it had been thought unrealistic not to leave parties a loop-hole. The sponsors felt, however, that that solution was only seemingly realistic. In fact, reprisals could rarely be confined to civilian objects alone and the infliction of suffering on the civilian population would be virtually inevitable. The sponsors were therefore in favour of deciding for or against complete prohibition. In draft Protocol I, article 46, paragraph 4 and articles 48 and 49 prescribed complete prohibition on the ground that reprisals were directed against the innocent and not the culprits and tended to cause grave suffering: the sponsors of the amendment were in favour of extending that to a complete ban on all reprisals against the civilian population and civilian objects alike. In view of the function of genuine reprisals as a law-enforcing device, acceptance of the proposed complete ban on reprisals against the civilian population and civilian objects would make it an urgent task for the Conference to continue its search for other mechanisms that could effectively contribute to enforcing the rules on protection of the civilian population. That provision was not intended to solve the problem of nuclear deterrents, which lay outside the scope of the present Conference.

27. Mr. CASTREN (Finland) stated that, in his delegation's view, the protection of civilian objects should be the same in international and in national conflicts. Consequently, it was essential to define military and civilian objects and those of a mixed character so far as non-international conflicts were concerned. His delegation, together with that of Sweden, had therefore proposed (CDDH/III/13 and Add.1) the insertion of a new article 26 bis in draft Protocol II similar in text to that of article 47 of Protocol I. The appropriate place for the new article would be between articles 26 and 27 of Protocol II.

28. The Swedish delegation had further proposed a new paragraph 3 (CDDH/III/52) to new article 26 bis in draft Protocol II, to read: "In case of doubt as to whether any object is civilian, it shall be presumed to be so". The delegation of Finland supported that amendment since it reinforced measures to protect civilian populations without impeding military operations.

29. Mr. CRISTESCU (Romania) said that his delegation was willing to co-operate with the sponsors of amendments CDDH/III/17/Rev.1, CDDH/III/39, CDDH/III/52, CDDH/III/57, CDDH/III/58, and CDDH/III/63. He suggested that the sponsors of those amendments should meet to draw up a single text.

30. Mr. WOLFE (Canada) asked if there was any time-limit for the submission of amendments to draft Protocol II.

31. The CHAIRMAN said that amendments could be submitted at the end of discussions on articles 47, 48 and 49. He invited the sponsors of amendments to meet with the Vice-Chairman at the end of the meeting in order to produce a single amendment.

The meeting rose at 5.35 p.m.



SUMMARY RECORD OF THE FIFTEENTH MEETING

held on Friday, 7 February 1975, at 10.15 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CO-ORDINATION GROUP

1. Mr. HERCZEGH (Hungary), Chairman of the Co-ordination Group, pointed out that the Group had held three meetings, and that the opinions expressed by delegations during the meetings and in private consultations had been taken into account. He proposed that the Co-ordination Group should suspend its activities for the time being and resume them later when the conditions necessary for the success of its work were fulfilled.

It was so agreed.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 47 - General protection of civilian objects (CDDH/1, CDDH/56; CDDH/III/10, CDDH/III/17/Rev.1, CDDH/III/41, CDDH/III/49, CDDH/III/52, CDDH/III/56, CDDH/III/57, CDDH/III/58, CDDH/III/63, CDDH/III/79) (continued)

2. Mr. WOLFE (Canada) reverting to the proposed amendment on the prohibition of reprisals (CDDH/III/63), introduced at the fourteenth meeting (CDDH/III/SR.14), said that if it attempted to provide for a total prohibition of reprisals, the Committee would be drawing up a theoretically ideal document at the humanitarian level, but that such a prohibition would be based on the assumption that the Party or State in question would not retaliate, and it was doubtful whether such would be the case; there had in fact been abuses, not only on the pretext of reprisals, but also on the pretext of the law of war. The question was whether an attempt should be made to curb the victims' desire for vengeance by formulating a rule, or whether that aspect could be left undecided. He thought it was better to lay down a rule.

3. Mr. CARIAS (Honduras) said he thought the Romanian amendment (CDDH/III/10) was unnecessary. The Netherlands amendment (CDDH/III/56) stressed the changes that would have to be introduced to give the article as broad a scope as possible. He had the impression, however, that in the second part of paragraph 1, which read "or whose complete or partial destruction, capture ... offers a ... distinct military advantage", the use of the word "or" weakened the provision intended to protect civilian objects; he would like a clearer formulation.

4. With reference to article 47, paragraph 2, he disagreed with the Netherlands proposed amendment, for he believed that the description of basic objects in the ICRC text was clearly enough worded to facilitate the article's application.

5. Referring to the means of transport mentioned in paragraph 2 of the ICRC draft, he pointed out that, in the event of conflict, they could contribute to the war effort, and that a more precise wording would have to be found.

6. Mrs. MANTZOULINOS (Greece) introduced amendment CDDH/III/17/Rev.1 which her Government had submitted with Spain and Jordan, later joined by the Holy See and Venezuela. It consisted of the insertion in article 47 of a new paragraph on the protection of the country's cultural heritage, with the title of the article being amended to "General protection of civilian cultural and religious objects". It was a provision based on Article 27 of the annex to The Hague Convention No. IV of 1907 concerning the Laws of War on Land which had already been repeated in The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict. Similarly, the principle of the prohibition of reprisals incorporated in the amendment only reaffirmed Article 33 of the fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War. That provision covered attacks on the cultural heritage of mankind as a whole, and it was out of respect for that heritage that the amendment proposed to introduce a similar provision in article 47.

7. Mr. CASTREN (Finland) said that while he considered the ICRC text to be satisfactory on the whole, his delegation believed that it could be still further improved, and it accepted the Swedish amendment (CDDH/III/52) as well as that of Austria and its co-sponsors (CDDH/III/57), which would prohibit reprisals against civilian objects. Those texts expressed the same idea as the amendment which he had proposed for article 46, paragraph 4 (CDDH/III/44), and which could now be considered withdrawn.

8. Most of the other amendments deviated too much from the ICRC text, which itself was a well-balanced one. He accepted the amendment just introduced by the representative of Greece, which was based on a perfectly praiseworthy principle, but he considered that the question had already been decided by Article 27 of The Hague Regulations of 1907, annexed to The Hague Convention No. IV of 1907, and was now accepted as customary law, and also by The Hague Convention of 14 May 1954, for the Protection of Cultural Property, notwithstanding its two provisos.



9. Mr. REED (United States of America) said that he supported the objective of article 47, which was to ensure the protection of civilian objects. Just as it had been necessary to define "civilians" in Chapter II of Part IV, Section I of draft Protocol I, it was clearly important now to define "civilian objects"; he therefore supported the amendment proposed by the Netherlands delegation (CDDH/III/56), which in his opinion had three virtues. It defined military objectives for the benefit both of the military commander and of the soldier on the battlefield, and it stipulated that any objects that were not military objectives within the meaning of paragraph 1 of the article were civilian objects.

10. He was not satisfied with the wording "used mainly in support of the military effort", which appeared in the ICRC text. From particular examples, such as railway or telephone systems serving both civilian and military purposes, he concluded that the objects in question were very likely to be military objectives, which could be attacked, subject to the proportionality rule.

11. Moreover, whereas article 45 sought to define civilians, in the context under discussion it was a question of defining civilian objects, namely inanimate objects and not people. While he did not object to houses, churches and so forth being specifically mentioned, he thought that in the practical application of the provisions a soldier risking his life on the battlefield could not be expected to take a decision in the circumstances of the moment, and grant a presumption in favour of doubtful objects, as distinguished from people, being immune from attack.

12. Lastly, he said he was largely in agreement with the Canadian representative's comments on the subject of civilian objects. Great care should be taken to avoid formulating too narrow a ban on attacks on civilian objects which were used in support of the military effort.

13. Sir David HUGHES-MORGAN (United Kingdom) said that two different attitudes stood out in the various amendments proposed for article 47. Some followed the ICRC lead, affording protection to civilian objects on condition that they were not used for military purposes; others, as could be seen in amendment CDDH/III/63 submitted by the Arab Republic of Egypt and its co-sponsors, called for absolute protection at all times. He rejected the second approach, which was unrealistic. Schools, for example, were sometimes used as barracks, and civilian vehicles were requisitioned for military purposes, and both in that case would be immune from attack. The idea was therefore unrealistic. The simplest course would be to take the ICRC text as a basis, and then incorporate

amendments that would improve it, such as the one submitted by the Netherlands (CDDH/III/56). Like the Czechoslovak representative, he believed that the final text must be such as could be easily understood by soldiers. He disapproved of the expression "recognized to be of military interest", in paragraph 1 of the ICRC text, for that wording introduced an element of subjectivity.

14. So far as concerned paragraph 2 of the ICRC text, he did not agree with the Honduran representative, and believed that it would be very dangerous to give a list of examples, which might turn out to be incomplete.

15. He was against the proposed amendment to paragraph 1 submitted by Czechoslovakia and the German Democratic Republic (CDDH/III/58), which contained no definition of military objectives and would entail some contradiction with the provisions of paragraph 2. He drew attention in that context to the idea expressed on page 60 of the ICRC Commentary that, for maximum protection the provisions should be based on military objectives rather than on a definition of civilian objects. He expressed approval of the text prepared by the Institute of International Law and reproduced in foot-note 23 on page 60 of the Commentary.

16. Lastly, he expressed his agreement with the Canadian delegation on the subject of a ban on reprisals.

17. Mr. NGUYEN VAN HUONG (Democratic Republic of Viet-Nam) drew attention to the advantages and disadvantages of the two formulas envisaged for article 47, and examined their practical consequences. One, based on military objectives, and clearly explained in the Commentary, had been adopted by the ICRC, as well as by Australia, Canada, and the Netherlands. The other, providing for protection of civilian objects, had been advocated by Romania, and also, in more concise form, by Czechoslovakia and the German Democratic Republic.

18. Reminding the Committee of his country's experiences, he gave figures for the multiple destruction wrought by the United States army on what the State Department had alleged to be "concrete and steel blocks", in other words "military objectives", which could therefore be destroyed without infraction of The Hague Convention No. IV of 1907, whereas it had really been against civilian objects and even civilian populations that the attack had been directed.

19. His delegation wished to draw that state of affairs to the attention of the legislators of future humanitarian law; it supported the amendments proposed by Czechoslovakia and the German Democratic Republic (CDDH/III/58) on the one hand, and by Romania (CDDH/III/10) on the other, so that the legal norm adopted would

be a ban on attacks against civilian objects, without any possibility of invoking the legitimacy of attacks on so-called "military objectives". Similarly, his delegation supported amendment CDDH/III/52 proposed by Sweden.

20. Lastly, without in any way prejudging the French delegation's intentions, he would warn the Committee against the possible dangers involved in the words "military potential of the adverse Party", which appeared in that delegation's amendment (CDDH/III/41).

21. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) emphasized the importance of article 47 and the need for precise formulation of the provisions intended to protect civilian objects. There should be an over-all approach based on two important premises: first, it was necessary to stress the distinction between military objectives and civilian objects not used for military purposes; and, second, it was necessary to bear in mind that a party to an armed conflict which had been attacked and which was obliged to defend itself, must be enabled to carry out all the military operations required, making maximum use of any military advantages it might gain. It must not be deprived of the means of self-defence, but it must be able to carry out military operations in conformity with humanitarian principles. He would like to recall in that connexion that at its twenty-ninth session the United Nations General Assembly had approved by a large majority a definition of aggression (see United Nations General Assembly resolution 3314 (XXIX)). That definition should be inserted in Part IV, Section I, Chapter I, as an integral part of draft Protocol I.

22. Article 47 proposed by the ICRC contained provisions which would afford a minimum degree of protection to civilian objects and to victims of armed conflicts. Amendments CDDH/III/49, CDDH/III/56 and CDDH/III/79 did not define military objectives in as satisfactory manner as did the ICRC draft. Amendment CDDH/III/17/Rev.1 was important, for it repeated a prohibition which was to be found in The Hague Convention of 1954 and to which attention should perhaps be drawn again. His delegation approved amendments CDDH/III/52 and CDDH/III/57.

23. Mr. MARTIN HERRERO (Spain) proposed certain amendments to the Spanish text. It could be very difficult to draw a distinction between military installations and civilian objects such as telecommunication facilities and means of transport. The definitions should therefore be as precise as possible.

24. Mr. CHOWDHURY (Bangladesh) considered that article 47 should be studied very closely, for technical developments had without any doubt aggravated the sufferings of civilian populations in armed conflicts. One could either lay down that attacks should be limited to military objectives, or that civilian objects should be protected, but the aim was still to protect those civilian objects in wartime, and the Working Group should specify that intention in very clear-cut terms. It should therefore take account of the various ideas contained in the amendments. The Netherlands amendment (CDDH/III/56) deserved consideration, as did the Swedish amendment (CDDH/III/52). Mention should also be made of works of art, for they, too, were civilian objects. The Working Group should apply a number of amendments to the ICRC draft, which it should take as a basis.

25. Mr. Moun Seun JANG (Democratic People's Republic of Korea) said he believed it was essential to state clearly that only military objectives must be attacked. Civilian objects should be protected without exception. Events in Viet-Nam and Korea showed that criminal acts had been committed against the civilian population under pretext of action against military objectives.

26. Mr. CRISTESCU (Romania) said that he associated himself with the USSR representative's remarks to the effect that a definition of aggression should be included in draft Protocol I. His Government considered that the distinction between aggressor and victim of aggression, made in international law, should be taken as a starting point. The definition should be so worded as to cover both the civilian population and the means of combat.

27. The ICRC draft first of all defined military objectives, and then referred to the protection of civilian objects. In his country's amendment (CDDH/III/10), article 47 had been submitted in another form, since the current Conference, in the view of his delegation, was not intended to define military objectives. It was necessary to keep to what was the fundamental principle of humanitarian law, a subject which had been dealt with also by the United Nations in numerous resolutions. In its amendment CDDH/III/10, therefore, his delegation first of all gave a definition of civilian objects, and then outlined the applicable rules, drawn from the relevant resolutions of the United Nations General Assembly according to which those objects should enjoy general and effective protection from the ravages of war.

28. His delegation endorsed amendment CDDH/III/63, as well as Swedish amendment CDDH/III/52, of which it desired to become a co-sponsor.

29. The question of reprisals had been dealt with in two different ways in the amendments. In amendment CDDH/III/63, it was stated that civilian objects should not be made the object of reprisals, whereas amendment CDDH/III/57 specified that attacks against civilian objects by way of reprisals were prohibited. The latter wording appeared to restrict considerably the application of the rule assuring protection of the objects in question. It would be of interest to know more precisely whether reprisals which were not attacks, or attacks which were not reprisals, were admissible or not.

30. Mr. EL GHONEMY (Arab Republic of Egypt) said that amendment CDDH/III/63 specifically referred, in the second sentence of article 47, paragraph 2, to objects designed for civilian use, a fact which should dispel all doubts raised by certain delegations regarding the validity of that amendment.

31. Mr. GILL (Ireland) said that he supported the Netherlands amendment (CDDH/III/56), but thought that the word "distinct" in paragraph 1 of the English text should be replaced by "direct". His delegation was in favour of the proposal submitted by the Greek, Jordanian and Spanish delegations (CDDH/III/17/Rev.1) joined later by the delegation of the Holy See, regarding the addition of a paragraph 3, provided it included a clause stipulating that the use, for military purposes, of the objects referred to in the paragraph should be prohibited. So far as concerned the Swedish amendment (CDDH/III/52), he said his delegation shared the opinion of the United States delegation that it was reasonable and realistic, whenever there was any doubt regarding the civilian or military nature of an object, to assume that it was of a military nature.

32. Mr. BLIX (Sweden) said that he considered article 47 one of the most important in draft Protocol I. An express article was needed to check, as far as possible, the tendency to broaden the notion of "military objectives", a tendency which had resulted in an increasing number of civilian victims.

33. The Hague Conventions did not contain any definitions of military objectives, but the ICRC, on the basis of The Hague Rules of Air Warfare 1922/1923, drafted by a Commission of Jurists at The Hague in December 1922 - February 1923, and of the work of the Institute of International Law, had produced the wording which was now found in draft article 47. His delegation considered that that kind of definition was indispensable if the term "military objectives" was not to be interpreted too loosely and freely by belligerents for whom the principal restraints were generally only the cost-effectiveness of an attack.

34. The ICRC wording, which provided an abstract definition of military objectives and stated that whatever did not fall within the context of that definition should be considered a civilian object and should, accordingly, be protected, was satisfactory if not perfect. Another suggested formula was that civilian objects should be defined, all other objects being regarded as military objectives. That approach, however, might well lead to less extensive protection than the ICRC draft. His delegation supported the first formula on the understanding that certain details might be modified.

35. Several delegations wished draft Protocol I to contain a definition of aggression based on that adopted at the twenty-ninth session of the United Nations General Assembly, but a definition of that kind could not appropriately be included in the provisions of the Protocol; at most, it could be annexed thereto. On the other hand, it might be useful to supply a list of examples of military objectives which, though not exhaustive, might serve as a guide to those concerned.

36. He thanked the Romanian delegation for having associated itself with his country's amendment, but regretted that the Romanian amendment (CDDH/III/10) had removed from article 47 all definitions of military objectives and civilian objects; he accordingly preferred the ICRC text. The idea contained in paragraph 3 of that amendment, however, was interesting and worth adopting.

37. The Australian amendment (CDDH/III/49) did not appear to be so very different from that of the Netherlands (CDDH/III/56), which was supported by Canada, or from that of France (CDDH/III/41). Those delegations could perhaps get together and produce a common text. He noted that the word "mainly", contained in paragraph 2 of the text proposed by the ICRC, had been left out of paragraph 2 of the Australian amendment. In view of the remarks made during the current debate by the United States representative, he thought that it would be advisable for that word to be retained.

38. He noted, in connexion with the Netherlands amendment (CDDH/III/56), that the examples of military objectives had also been deleted. That was regrettable. The word "and" in the ICRC text had been replaced by "or" in the Netherlands text. That change, if accepted, would give the belligerents too much latitude.

39. After commenting on the French amendment (CDDH/III/41), which contained one half of the ICRC draft definition of military objectives, the amendment of Czechoslovakia and the German Democratic Republic (CDDH/III/58), which did not include a definition, and the amendment of Greece, Jordan and Spain (CDDH/III/17/Rev.1), which

he endorsed on condition that it clearly specified that the objects concerned should not be used for military purposes, he said that amendments CDDH/III/63 and CDDH/III/57, which referred to the prohibition of attacks on civilian objects by way of reprisals, dealt with a controversial subject. His delegation was, nevertheless, in favour of such a ban.

40. Mrs. MANTZOULINOS (Greece) said, for the information of the Irish and Swedish representatives, that amendment CDDH/III/17/Rev.1 took account of the condition they wished to be attached to the provision contained in the amendment.

41. Mrs. DARIIMAA (Mongolia) said that the ICRC text should be used as the basis for work on article 47, because it represented a compromise which would facilitate the adoption and ratification of the Protocol by the largest possible number of Governments. Although the idea on which amendment CDDH/III/63 was based was excellent, there was, nevertheless, little likelihood that the countries with a large military potential would be able to accept it. A more realistic approach would therefore be to adopt a compromise text which bound those countries legally and ensured, in particular, protection for the victims of national liberation movements, which had a small military potential.

The meeting rose at 12.35 p.m.





SUMMARY RECORD OF THE SIXTEENTH MEETING

held on Monday, 10 February 1975, at 10.15 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 47 - General protection of civilian objects (CDDH/1, CDDH/56; CDDH/III/10, CDDH/III/17/Rev.1, CDDH/III/52, CDDH/III/56, CDDH/III/57, CDDH/III/58) (continued)

1. The CHAIRMAN said that it had been agreed with the Chairman of Committee I that articles 63 to 69 of draft Protocol I did not fall within the competence of Committee III but would be considered by Committee I.
2. No further amendments had been submitted to article 47 of draft Protocol I. In the case of articles 48 and 49, one amendment had been submitted. The deadline for the submission of amendments to articles 27 and 28 of draft Protocol II was noon on 12 February and new amendments to articles 50 and 51 of draft Protocol I should be submitted by noon on 14 February.
3. Mr. HERNANDEZ (Uruguay) said that his delegation understood the views of other delegations on military objectives and civilian objects, but there was a problem in the interpretation of those terms.
4. The text of article 47 of draft Protocol I as it stood was adequate. Since the Protocols would be disseminated at all levels, they had to be clear and precise to all parties engaged in conflict, for otherwise each party might decide for itself what was a military objective and what a civilian object. The protection of civilians was a key issue in the discussion and his delegation firmly supported the Romanian amendment (CDDH/III/10), particularly the proposed new paragraph 3.
5. Mr. TODORIC (Yugoslavia) said that his delegation attached particular importance to article 47 but considered it vital to define the term "civilian objects". The Swedish amendment (CDDH/III/52) and that of Romania (CDDH/III/10) should both be adopted. Reprisals against civilian objects and the forced transfer of civilian populations across national borders should be prohibited. Article 47 should also include measures for the protection of historic monuments and works of art, in so far as those were not covered by The Hague Convention of May 1954 for the

Protection of Cultural Property in the Event of Armed Conflict. There were divergencies of view in the amendments relating to the protection of civilian property and the ban on reprisals, but it should be possible to reconcile those differences by using the ICRC text as a basis.

6. His delegation hoped that the sponsors of the various amendments would be able to produce a single document in order to facilitate the work of the Committee.

7. Mr. SCHUTTE (Netherlands) said that article 47 was one of the key items in draft Protocol I.

8. Replying to questions which had arisen in connexion with amendments of which the Netherlands was a sponsor, he said that the Romanian representative had asked whether amendment CDDH/III/57 permitted any attacks on civilian objects other than by way of reprisals, and whether the amendment would allow reprisals on civilian objects by means other than an attack. The answer to the first question was that reprisals on civilian populations were prohibited by international law. With regard to the second question, the wording of amendment CDDH/III/57 had been revised and paragraph 4 of article 46 had been used as a basis for it. The sponsors of paragraph 4 of article 46 and of amendment CDDH/III/57 considered that reprisals would take the form of an attack, attacks being defined in article 44, paragraph 2, as "acts of violence committed against the adversary, whether in defence or offence". That was logical, but the Drafting Committee could possibly find a better wording.

9. The Swedish representative had asked at the fifteenth meeting (CDDH/III/SR.15) whether there was any substantive difference between the two sentences in paragraph 1 of amendment CDDH/III/56 which were separated by the word "or", and if not whether one of those sentences could be deleted or, better still, whether the word "or" could be replaced by "and" as in the ICRC text. There was a difference between objectives which by their nature or use effectively contributed to the military effort and objectives whose complete or partial destruction, capture or neutralization offered a distinct military interest. In the first case, the instructions were primarily directed to those who had a general view of the military situation, who would normally be officers of high rank, while in the second case the instructions were meant for the soldier in the field, who normally had only a limited view of the situation. There was of course a difference between tactics and strategy, as every soldier was aware. How the soldier interpreted his instructions was a matter of individual conscience and that was a decision which went to the heart of humanitarian law.

10. With regard to the amendment proposed by Greece (CDDH/III/17/Rev.1) concerning the protection of historic monuments and works of art, there seemed to be a feeling that The Hague Convention of May 1954 was inadequate. Caution should be exercised in seeking to bring about any changes, but if the objective was to obtain more ratifications of a Convention to which few countries had put their signature, then the proposal was laudable and worthy of support.
11. Mr. OULD MINNIH (Mauritania) felt that the text of article 47 as submitted by the ICRC was a good basis for discussion. The main need was to draft acceptable standards that could be applied by all. The ordinary soldier had not the intellectual standards or the time to apply rules that were at all ambiguous. Some of the amendments to article 47 revealed divergent points of view. He formally proposed that the various sponsors should collaborate with the Working Group with a view to producing a single text.
12. Mr. BEN SEDRINE (Sultanate of Oman) paid a tribute to those delegations which had submitted amendments to article 47. The adoption of those amendments should make the article more effective and thus reduce human suffering and economic damage and spare historic places from the effects of war.
13. It was vital for the Conference to establish principles which did not lend themselves to conflicting interpretations. If such principles were clearly laid down in legal language, they could be easily understood and applied by military colleges and High Commands.
14. He was puzzled by the silence on the question of reprisals in article 47. That was a vital matter which should be included in the article, particularly in the light of recent experience. He was also concerned about the definitions of the terms "military objectives" and "civilian objects". Both definitions left much to be desired. His delegation supported amendment CDDH/III/57, which seemed to take into account the points he had raised.
15. Mr. BIERZANECK (Poland) supported the ICRC draft of article 47 but considered that the phrase "of military interest" was too vague. He proposed that it should be replaced by "of military character or nature". He supported the amendment on the protection of historic monuments and works of art and proposed that the text should be harmonized with that of The Hague Convention of May 1954. He also supported the new paragraph proposed in amendment CDDH/III/57 and pointed out that it was impossible to carry out reprisals against civilian objects without injuring civilians. Lastly, he proposed that the definition of aggression which had been approved by the United Nations General Assembly at its twenty-ninth session (resolution 3314 (XXIX), annex) should be reflected in the Protocols on international conflicts.

16. Mr. QUACH TONG DUC (Republic of Viet-Nam) said that the views expressed on the protection of civilian objects were varied and often conflicting. Military objectives were defined in paragraph 1 and civilian objects in paragraph 2 of article 47. He agreed, however, that the term "recognized to be of military interest" was too vague and might be replaced by some such term as "serving military ends", while the last phrase of paragraph 2 might be replaced by "except when they are occupied by military personnel or used directly for military purposes". The definition of civilian objects in paragraph 2 should include a second factor - that of effective use by the civilian population - because the sole factor of purpose appeared to be insufficient: the factor of use should be decisive in determining the civilian nature of an object. He also felt that paragraph 2 should cover schools, markets, hospitals, places of worship and so forth and should prohibit reprisals against civilian objects. He also supported amendment CDDH/III/17/Rev.1 concerning historic monuments and works of art. It should be stipulated that the cultural property of a country should never be occupied by military forces or serve as a cover for military objectives: the better preservation of the cultural heritage of a country would thus be ensured.

17. Mr. FISCHER (German Democratic Republic) said that article 47 was of the utmost importance for the protection of civilian populations during military operations. Its essential concern was to develop a basic rule in relation to article 46 of draft Protocol I. The important thing was not to seek definitions, but to place a clear ban on attacks on civilian objects and to define those objects, as had been done in the ICRC text. The amendment submitted by his delegation and that of Czechoslovakia (CDDH/III/58) was based upon that idea. The additional Protocols were not intended to provide rules to tell soldiers what they could and could not attack; they were intended to lay down what must be protected in the event of an armed conflict.

18. His delegation firmly supported the USSR proposal that an article in conformity with the United Nation's General Assembly definition of aggression should be adopted. It could thus be made clear that no State committing aggression could justify its action.

19. His delegation also supported the Swedish amendment (CDDH/III/52), the amendments concerning reprisals, and amendments CDDH/III/39 and CDDH/III/17/Rev.1.

20. Mr. NGUYEN VAN HUONG (Democratic Republic of Viet-Nam) said that his delegation fully supported the USSR proposal for the insertion in the text of the Protocol of the definition of aggression as adopted by the United Nations General Assembly at its twenty-ninth session. Without it, the articles in Part IV of draft Protocol I

would be devoid of meaning and might even be illegal. Following the era of the League of Nations and the signing of the Briand-Kellogg Pact,<sup>1/</sup> the Charter of the United Nations had accepted a new concept of war: the concept of illegal warfare. It had indeed been stated at the Nürnberg trials that a state of war could not give legality to acts committed in a war unless that war itself was legal. If articles 43, 44 and 47 of draft Protocol I were adopted as they stood, they would lead to the absurd result that aggression was permitted.

21. Under the Charter of the United Nations, only two kinds of armed conflicts were recognized: illegal wars of aggression and wars conducted in self-defence or fought by peoples struggling against colonial or foreign domination or racist régimes. If the types of war covered by the provisions of articles 43, 44 and 47 were illegal wars of aggression, according to the United Nations Charter, that would mean that what was prohibited by that law was allowed under those articles. Logically, morally and intellectually, the only types of war that could be covered by the legislation under discussion should be legal wars. All the rest were crimes punishable under penal law. That was a serious problem that must be solved along the lines proposed by the USSR delegation. The problem might arise also in other Committees. A general solution should therefore be found to the problem of the basic structure of draft Protocol I which made a sharp division between jus ad bellum and jus in bello with a view to placing both parties on an equal footing, even in illegal wars. Such equality was condemned not only by modern positive law but also by logic, intelligence and morality.

22. Mr. REED (United States of America) expressed concern at the new element which had been introduced into the discussion at the Committee's fifteenth meeting, namely, the definition of aggression adopted by the United Nations General Assembly at its twenty-ninth session. The Conference was concerned with the treatment of people affected by armed conflicts, and not with the rightness or wrongness of such conflicts. The essence of humanitarianism was its universal applicability; all people were entitled to humanitarian treatment whether the cause for which they were fighting was just or unjust, lawful or unlawful. The political concept of aggression adopted by the General Assembly carried with it the notion that one party to a conflict was in the right and therefore at a certain advantage, while the other was in the wrong and at a disadvantage. Surely that did not mean that the party

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<sup>1/</sup> General Treaty for renunciation of war as an instrument of national policy, signed at Paris on 27 August 1928.

which was in the right was permitted to act unhumanely. The purpose of the draft Protocol was to ensure humanitarian treatment for all, and the introduction of the political concept of aggression would not serve the cause of humanitarianism.

23. Mr. BLIX (Sweden) said that his delegation was basically satisfied with the ICRC draft of article 47, which represented a reasonable compromise. With the exception of the point relating to the definition of aggression, it could agree with the views expressed by the representative of Poland. It also agreed with the representative of the Democratic Republic of Viet-Nam that it would be regrettable if the articles under discussion were to imply in any way that aggression was permitted. It did not consider, however, that any such inference could in fact be drawn from the text. The adoption by the General Assembly of a definition of aggression was indeed an historical event; however, the definition placed the responsibility for aggression at a higher level - the State or Government level - than that of warfare in the field. Consequently, his delegation was somewhat sceptical about the appropriateness of introducing the definition of aggression into the part of the draft Protocol under consideration. The preamble would be a more appropriate place for such a reference.

24. The representative of the Netherlands, replying to the Swedish delegation's question concerning amendment CDDH/III/56, had drawn a fine distinction between the over-all or "static" military situation and the "dynamic" situation in the field of military operations. In that connexion, he noted that the Australian amendment (CDDH/III/49) concerned only the latter situation, while the French amendment (CDDH/III/41) related only to the former. In principle, his delegation was in favour of a more restricted definition than that proposed by the Netherlands and it considered that the ICRC draft of article 47, paragraph 1, was acceptable.

25. At the fifteenth meeting, his delegation had criticized the rewording of article 47 proposed by the Romanian delegation (CDDH/III/10) on the grounds that it gave no definition of civilian objects. In doing so, it had overlooked the Romanian proposal for the insertion of a new article giving such a definition before article 47. Consequently, it withdrew its criticism, although it considered that the proposed definition was too sweeping to be generally acceptable. With regard to article 47, paragraph 2, the Romanian proposal was more restrictive than the ICRC draft, since it excepted objects "mainly used as military objectives". He reaffirmed his delegation's support for paragraph 3 of the Romanian amendment and for the suggestion that reprisals against civilian objects should be prohibited.

26. His delegation's amendment to article 47 (CDDH/III/52) had been submitted prior to the approval by the Committee of article 45, paragraph 4, and would therefore need to be modified by the Working Group so that its wording corresponded to that used in the said paragraph.

27. Mr. IIJIMA (Japan) said that, from the logical standpoint, it would be sufficient to define either military objectives or civilian objects, since to define one was automatically to define the other. From the standpoint of legislative techniques, however, the choice between the two possible types of definition did give rise to a serious problem which, in his view, should be solved by deciding which would best promote the effective protection of civilian objects. His delegation considered that the definition to be included in article 47 should be that of military objectives; it therefore concurred with the basic approach adopted by the ICRC. Nevertheless, it did not deny the importance of defining civilian objects and it had been impressed by the statement made at the fifteenth meeting by the representative of Romania in that connexion.

28. Unless the definition of military objectives was clear enough for soldiers in combat to interpret and apply, it would not serve to ensure adequate protection for civilian objects. Furthermore, when military objectives were defined, civilian requirements should be fully protected and military requirements should be taken into account. In principle, his delegation could support the Netherlands amendment (CDDH/III/56), although it preferred the more restrictive tenor of the ICRC draft.

29. Past experience had shown that when a definition, however good, was applied to a real situation, some doubt could arise whether a given object was military or civilian in nature. In order to overcome that difficulty, a complete list of military objectives should be drawn up and, in addition, a provision along the lines of that proposed by the Swedish delegation (CDDH/III/52) should be included in the draft Protocol. In that connexion, a reference might usefully be made to article 45, paragraph 4.

30. With regard to the proposal that the definition of aggression approved by the United Nations General Assembly should be included in the part of draft Protocol I under discussion, he observed that the Geneva Conventions of 1949 and the draft additional Protocols were concerned with jus in bello and not with jus ad bellum.

31. Mr. KARASSIMEONOV (Bulgaria) considered that the purpose of article 47 should be to define civilian objects rather than military objectives. His delegation was therefore in favour of the amendments which sought to lay down a clear and unambiguous definition

which would ensure that civilian property was not subject to attack. It had noted with interest the amendment proposed by Czechoslovakia and the German Democratic Republic (CDDH/III/58). It also favoured amendment CDDH/III/57 which sought to prohibit reprisals against civilian objects.

32. With regard to paragraph 2 of article 47, the ICRC draft could serve as the basis for the final wording, subject to the addition of certain new elements such as those appearing in the Swedish amendment (CDDH/III/52) and in the joint proposal concerning the protection of historic monuments (CDDH/III/17/Rev.1).

33. He supported the proposal by the Union of Soviet Socialist Republics concerning the definition of aggression approved at the twenty-ninth session of the United Nations General Assembly. Inclusion of a reference to that definition in draft Protocol I would assist the United Nations Security Council in its important task of taking action when acts of aggression were committed and would indicate that the Diplomatic Conference endorsed the unanimous position of the General Assembly. The statements by some representatives, particularly that of the United States of America, to the effect that inclusion of the definition in the Protocol would be detrimental to the cause of humanitarian law were unacceptable to his delegation.

34. Mrs. DARIIMAA (Mongolia) supported the USSR representative's proposal concerning the concept of aggression. She did not agree with the view that inclusion of the definition of aggression in the Protocol would be tantamount to discriminating against one or other party to an armed conflict. The USSR proposal included the phrase "for the purposes of the present Protocol" and the aim of draft Protocol I was precisely to protect the innocent civilian population. Furthermore, there was nothing whatsoever in the proposal which implied that victims of aggression should receive greater protection than their adversaries' civilian population.

35. The proposal also made specific mention of civilian objects. It was true that military operations in armed conflicts usually took place on the territory of the victim of aggression and not on that of the aggressor; consequently, one of the Conference's tasks was to ensure protection of civilian property in the victim's territory. However, the USSR proposal did not discriminate in any way against civilian objects situated in the territory of the aggressor; they too would be protected under the Protocol when, in the final stages of combat, the victim had gained the upper hand.



36. Mr. RABARY (Madagascar) said that imperialist and racist aggression against the just and legitimate struggles of liberation movements were all too often carried out with complete disregard for the dignity, rights and survival of the population in question and for the protection of national civilian and cultural property. It was therefore important that combatants should be in a position to distinguish clearly between military objectives and other objects. His delegation considered that article 47 should provide an unambiguous definition of military objectives; it should also reflect the substance of the Swedish amendment (CDDH/III/52), the amendment concerning reprisals against civilian objects (CDDH/III/57) and paragraph 3 of the Romanian amendment (CDDH/III/10).

37. The CHAIRMAN declared the general discussion on article 47 closed. In the absence of any objection, he would take it that the Committee wished the amendments to be referred to the Working Group, together with the comments made by delegations during the discussion.

It was so agreed.

Article 48 - Objects indispensable to the survival of the civilian population (CDDH/1, CDDH/56; CDDH/III/10, CDDH/III/13 and Add.1, CDDH/III/28, CDDH/III/49, CDDH/III/50, CDDH/III/63, CDDH/III/64, CDDH/III/67, CDDH/III/74)\*

#### Draft Protocol II

Article 27 - Protection of objects indispensable to the survival of the civilian population (CDDH/1, CDDH/56; CDDH/III/13 and Add.1)\*

38. The CHAIRMAN invited the Committee to take up article 48 of draft Protocol I together with article 27 of draft Protocol II, on the understanding that the latter would be discussed ad referendum.

39. He invited the representative of the International Committee of the Red Cross to introduce the two articles.

40. Mrs. BINDSCHIEDLER-ROBERT (International Committee of the Red Cross) said that article 48 was concerned with the first specific category of civilian objects dealt with in Part IV, Section I, Chapter III. It sought to ensure the survival of the civilian population and to prevent movements of refugees. Implicitly, it condemned the starvation of civilians as a means of war.

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\* Resumed from the fourteenth meeting.

41. Unlike article 47, article 48 prohibited not only attack and destruction but also reprisals. If the Conference were to decide to extend prohibition of reprisals to all civilian objects by including a provision to that end in article 47, one of the distinctive elements of article 48 would disappear. Furthermore, while article 47 referred only to "attacks", article 48 used the term "attack or destroy" in order to provide for all eventualities. For example, the use of defoliants was an act of destruction but might not perhaps be considered an attack. The article did not concern the destruction by a Party to the conflict of the objects in its possession, since article 66 provided for the protection of such property.

42. She drew attention to the fact that no mention was made of the purpose of the objects in question; consequently, it was forbidden to attack or destroy them even if the army of the adverse party derived benefit from them. An exception should no doubt be made for objects which were definitely earmarked for consumption by the army. Since the list of objects appearing in the text was not complete but merely illustrative, it might be necessary to replace the word "namely" by a more appropriate word.

43. Article 27 of draft Protocol II concerned the objects dealt with in both articles 46 and 48 of draft Protocol I; it placed each Party to the conflict under the obligation to respect both its own property and that of its adversary. It had been considered desirable to simplify the text in that way because the situations which arose in non-international armed conflicts were often less clear-cut than those obtaining in international conflicts. The ICRC had also considered that simplified rules would be easier to apply in non-international conflicts. The term "attack, destroy or render useless" was based on the wording of articles 48 and 66 of draft Protocol I and had been used in order to cover all possible situations.

44. The CHAIRMAN invited delegations to introduce their respective draft amendments to article 48, in the chronological order in which they had been submitted.

45. Mr. CRETU (Romania), introducing amendment CDDH/III/10 proposing the deletion of article 48, said that his delegation did not, of course, wish to delete the contents of article 48: it would simply prefer that article to be merged with article 47, to which it had already submitted a corresponding amendment. His delegation attached considerable importance to the substance of article 48 and had therefore suggested a rewording of article 47 which would be broader in scope than the ICRC proposal, covering all objects indispensable to the survival of the civilian population. It was important to include among the categories of objects listed

those which were of national economic interest. He also stressed the need to prohibit any reprisals which led to the enforced movement of civilians. His delegation was willing to co-operate with others in an attempt to broaden the coverage of the provision.

46. Mr. CASTREN (Finland) introduced amendment CDDH/III/13 and Add.1 on behalf of his own delegation and that of Sweden. It proposed the replacement of the word "or" by a comma and the insertion of the words "or render useless" after the word "destroy", thus bringing the article into line with article 27 of draft Protocol II. The proposal to replace the word "namely" by the words "such as" was a simple change but one which had considerable repercussions, since it was essential that all objects indispensable to the survival of the civilian population should be protected in all circumstances. In that connexion he quoted the ICRC commentary on article 48 (see ICRC Commentary (CDDH/3, p.62)), which pointed out that an exhaustive list of objects would have involved the risk of an oversight or arbitrary selection. He noted with satisfaction that a similar broadening of scope had been proposed in amendment CDDH/III/63.

47. Amendment CDDH/III/13 and Add.1 was equally applicable to article 27 of Protocol II, to which an addition had also been proposed, namely to insert the sentence "These objects shall not be the subject of reprisals.", thus bringing the text into line with article 48 of draft Protocol I.

48. Mr. MAHONY (Australia), introducing his delegation's amendment to article 48 (CDDH/III/49), said that the aim of that article was to ensure the survival of the civilian population and to avoid the creation of movements of refugees. The article should be considered in close relation to article 47, dealing with the general protection of civilian objects. The words "indispensable to the survival of the civilian population" in the ICRC text conveyed the meaning that the civilian population would not survive if the objects specified in the article were attacked or destroyed. His delegation considered that the immunity provided under the article would be more realistic if that phrase was replaced by the words "so as to prejudice the survival", which would convey the idea that the attack or destruction placed the survival of the civilian population in jeopardy. The amendment sought to increase as far as possible the protection to be given to objects and crops upon which the civilian population depended. It omitted the words "whether it is to starve out civilians, to cause them to move away or for any other reason", since they appeared to limit the immunity conferred by the article.

49. With regard to the question of reprisals, his delegation noted the submission made at the fifteenth meeting by the Canadian delegation and hoped that the whole question would be studied further. It therefore reserved its views on the subject until later.

50. His observations applied equally to the corresponding article 27 of draft Protocol II.

51. Mr. REED (United States of America), introducing amendment CDDH/III/50, said that his delegation had been guided by practical considerations which could be applied to the force in the field. It fully supported the proposal that objects indispensable to the survival of the civilian population were entitled to protection and that they should not be deliberately destroyed for the purpose of denying their use to the civilian population. As it stood, however, the article went well beyond that intended protection and further clarification was necessary, on, for instance, whether the provision applied to a Party to the conflict in its own territory or not.

52. His delegation's amendment also raised the question of objects such as food intended solely for military consumption, which should not be entitled to any degree of protection. Nor should objects be entitled to protection if they served the purpose of shielding the enemy from observation or attack. It was important that the article should not encourage combatants to seek protection under provisions intended solely for the protection and benefit of the civilian population.

53. It was only practical to recognize that when legitimate military objectives were attacked a certain amount of incidental damage to civilian objects was inevitable, although such damage must not be disproportionate to the military advantage sought. His delegation had submitted an amendment to article 48 which it believed provided the protection necessary to objects indispensable to the survival of the civilian population, without prejudicing the right of a party to carry out an attack against objects which were being used for military purposes.

54. Mr. EL GHONEMY (Arab Republic of Egypt), introducing amendment CDDH/III/63 on behalf of the sponsors, stressed that the main issue was that of the starvation of the civilian population, which must be avoided at all costs. Two new objects had therefore been inserted in the list: firstly, drinking water installations and supplies since it was illogical to consider the protection of water supplies without the corresponding installations; secondly, fuel

reservoirs and refineries, since fuel concerned the whole international community, which depended on oil in all spheres. The word "namely" should be replaced by the phrase "such as", to give the most extensive application possible. The sponsors supported amendments CDDH/III/13 and Add.1 and CDDH/III/28 and expressed sympathy with amendment CDDH/III/64.

55. Mr. HERCZEGH (Hungary), introducing amendment CDDH/III/64 on behalf of the sponsors, said that the additional paragraph it proposed for inclusion in article 48 was aimed at the prevention of ecological warfare and the destruction of the environment through military operations. That was unfortunately now no longer theoretical but had become a reality in modern warfare and it was essential to continue the struggle against pollution of all kinds not only in peacetime but also in war. The methods of destruction of the environment - for example, the use of defoliants and giant bull-dozers, the systematic bombardment of forests and fields, etc. - were numerous and had therefore not been listed in the amendment. The text had been proposed for inclusion in article 48 on the basis that the preservation of the balance of nature was essential to the civilian population, but if necessary it could be included as a separate article. The natural environment should have the same protection as the objects indispensable to the survival of the civilian population. The sponsors agreed with the delegations which were in favour of total prohibition of reprisals. They were ready to co-operate with other delegations with similar views, especially those of Australia and the Democratic Republic of Viet-Nam.

56. Mr. EATON (United Kingdom) introduced amendment CDDH/III/67 on behalf of his own delegation and that of Belgium. The object of the amendment was not to alter the principle, with which they were in full agreement, but simply to achieve greater clarity in order to facilitate practical application of the provisions by soldiers in the field. Paragraph 1 of the amendment prohibited starvation of civilians as a method of warfare, and the sponsors were willing to merge their draft with those of others, for example that of the United States delegation. In fact much of the statement by the United States representative was applicable to the present amendment.

57. The amendment proposed no ban on reprisals, the intention being to leave intact the existing bans on reprisals against civilian objects in occupied territory which were contained in The Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws of War on Land, and the fourth Geneva Convention of 1949, and to retain the right of reprisal against such objects in enemy territory subject to the existing restraints in customary law, which were considerable. His delegation shared the misgivings expressed by the representative of Canada concerning the proposed bans on

reprisals and agreed that such bans would have to be conditional on the improvement of the means of enforcement and supervision of the provisions on protection of the civilian population which appeared in that section. At present there were no signs of such improvement.

58. If a ban on reprisals was introduced, it should not, in his view, be absolute but qualified, so that the right should be retained, subject to strict legal restraint on its exercise, in the circumstances where a Party to the conflict was subjected to persistent attacks on its own civilians and civilian objects which did not cease despite repeated protests. In such circumstances a Party to the conflict would undoubtedly take reprisal measures. The Conference should seek, therefore, to place legal restraints upon such measures, for example under Part V of draft Protocol I dealing with enforcement measures.

59. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic), introducing amendment CDDH/III/74, said that, as his delegation understood it, the ICRC text of article 48 dealt with objects which were intended only for non-military purposes. He fully supported that provision but felt that it must be supplemented by a paragraph indicating that the use of any such objects for military purposes deprived the object of the full protection envisaged by Section I of Part IV as a warning to parties to the conflict not to utilize civilian objects for such purposes. His delegation agreed with those who had mentioned the need to prohibit reprisals and damage to the natural environment and was ready to combine its draft with others similar.

60. He stressed that the Conference was of special importance in view of the fact that 1975 marked the thirtieth anniversary of the end of the Second World War and the victory over fascism. His delegation had based its proposals on the concrete experience of the Ukrainian people and the people of the USSR in trying to combat imperialist aggression, for it was essential that international law should be based on realities, not on abstract academic concepts.

The meeting rose at 12.50 p.m.

SUMMARY RECORD OF THE SEVENTEENTH MEETING

held on Tuesday, 11 February 1975, at 10.25 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 48 - Objects indispensable to the survival of the civilian population (CDDH/1, CDDH/41, CDDH/56; CDDH/III/13 and Add.1, CDDH/III/28, CDDH/III/49, CDDH/III/50, CDDH/III/57, CDDH/III/63, CDDH/III/64, CDDH/III/67, CDDH/III/74) (continued)

Draft Protocol II

Article 27 - Protection of objects indispensable to the survival of the civilian population (CDDH/1, CDDH/56; CDDH/III/12, CDDH/III/28, CDDH/III/36, CDDH/III/47, CDDH/III/49, CDDH/III/62/Rev.1) (continued)

1. The CHAIRMAN said that, before opening the general debate on article 48 of draft Protocol I and the corresponding article 27 of draft Protocol II, he would ask Mrs. Bindschedler-Robert of the International Committee of the Red Cross to make a statement.
2. Mrs. BINDSCHEDLER-ROBERT (International Committee of the Red Cross) explained two points concerning articles 48 and 66 of draft Protocol I both of which dealt with objects indispensable to the survival of the civilian population. Article 48, as also articles 47 and 49, which were part of the system of protection, were aimed at prohibiting attacks and were not intended to cover the question of destructive measures by a Party to the conflict relating to objects in its power. That aspect was covered by article 66 and therefore came under the section concerning the treatment of persons in the power of a Party to the conflict.
3. As far as the respective spheres of territorial application of articles 48 and 66 were concerned, article 48 provided for a general prohibition of destruction of objects in enemy hands, whereas article 66 covered objects in the power of a Party to the conflict, whether in occupied territory or not, thus attempting to protect the said objects wherever they were located.
4. Mr. ROSAS (Finland) said that his delegation considered the ICRC text of article 48 a good basis for discussion and especially appreciated the clear manner in which it prohibited the destruction of the objects indispensable to the survival of the civilian

population. It would therefore be difficult for his delegation to accept amendments such as CDDH/III/50 and CDDH/III/67, which would subject the prohibition to certain exceptions and modifications. It was, however, ready to consider amendments CDDH/III/63 and CDDH/III/28, although he was not sure that all the objects mentioned therein could be added to the article.

5. His delegation attached great importance to the protection of the natural environment and considered it essential that ecological warfare should be outlawed before irreparable harm was done, to the detriment of present and future generations. It welcomed amendment CDDH/III/64 and others which introduced that idea. Some of those amendments related to articles in Part IV of draft Protocol I (Civilian population), whereas others related to articles appearing in Part III (Methods and means of combat). That question had been raised also at the twenty-ninth session of the United Nations General Assembly the previous year, at which the Union of Soviet Socialist Republics had submitted a draft Convention on the prohibition of action to influence the environment and climate for military and other purposes incompatible with the maintenance of international security, human well-being and health (United Nations General Assembly resolution 3264 (XXIX), annex). His delegation considered that the whole question of ecological warfare was highly complex and required careful consideration, but it was possible to deal with general principles concerning the matter at the present Conference, though without attempting to list the means which might be used to influence the environment for military purposes.

6. Amendments such as CDDH/III/64 offered a suitable basis for such discussion, but required further clarification before a final decision could be made on how ecological warfare should be prohibited in the additional Protocols. His delegation's preliminary view was that it should be dealt with also in Part III of draft Protocol I. The relevant amendments could perhaps be merged in order to establish a suitable wording.

7. Mr. OULD MINNIH (Mauritania) said that his delegation considered that the ICRC text corresponded effectively to the two basic issues at stake: the prohibition of attack on or destruction of objects indispensable to the survival of the civilian population and of the use of such objects in reprisal measures. His delegation proposed two minor changes: the replacement of the word "namely" by the words "such as", in the interests of precision, and the addition of fuel reservoirs and refineries in the list of objects to be protected, although that list should not be made too cumbersome. After careful consideration of the various amendments to article 48, his delegation considered that there were no real difficulties in the way of merging them into one text.



8. Mr. GRIESZLER (Austria) said that his delegation agreed in principle with the ICRC text of article 48 but was in favour of the replacement of the word "namely" by "such as" and would prefer the use of the phrase "attack, destroy or render useless". In view of the amendment proposed to article 47 by his delegation and others in document CDDH/III/57, his delegation felt that the last sentence of article 48 should be deleted.
9. Mr. NGUYEN VAN HUONG (Democratic Republic of Viet-Nam) said that his delegation appreciated the ICRC text of article 48. In the war in Viet-Nam, the imperialist aggressor had systematically attacked and destroyed foodstuffs, crops, livestock, water supplies, irrigation works, forests and so forth for the purpose of starving the civilian population and forcing them to become refugees. The list in article 48 did indeed correspond to the cruel reality of the situation in Viet-Nam, but his delegation would like the word "namely" to be replaced by "such as".
10. In relation to amendment CDDH/III/64 on the protection of the natural environment, he stated that in South Viet-Nam phosphate bombs and noxious chemical products had been spread over vast areas of forest, totally disrupting the ecological balance for many decades to come. The reason given by the enemy had been the destruction of vegetation presumed to serve as coverage for the revolutionary forces. That shed light on the last part of United States amendment CDDH/III/50, which read "unless they serve a direct military purpose, such as shielding the enemy from observation or attack". The use of high-power explosives, rockets, artillery and carpet-bombing had caused vast craters in many regions of South Viet-Nam, and superbombs of over seven tons had been used for the purpose of preventing activities taking place under the three layers of heavy jungle vegetation. Giant bulldozers had been used to clear ground, thus preventing the enemy from taking cover. All those forms of warfare had led to the irremediable destruction of the soil and the micro-organisms of rivers and forests, which was a crime against humanity.
11. His delegation therefore fully supported amendment CDDH/III/64. It drew attention to the amendment it had submitted in document CDDH/41 prohibiting as crimes against humanity the use of means or methods of combat, the immediate and long-term effects of which were genocide, biocide, destruction or disruption of natural conditions in the human environment.
12. Mr. BRETTON (France) said that his delegation considered that article 48 of the ICRC text served as a solid basis for discussion. The French delegation supported the proposal for the replacement of the word "namely" by "such as", which had the advantage of making the list illustrative rather than limitative. It was extremely difficult to produce a satisfactory list, since conditions varied from one country to another, and any omissions might imply exclusion.

13. It was important to ensure that, whatever the nature of the objects in question, provision was made for circumstances in which they might be used for military purposes, thereby losing immunity. His delegation therefore welcomed amendment CDDH/III/74, submitted by the Ukrainian Soviet Socialist Republic, which might perhaps be slightly modified by the addition of the word "direct" before the word "use".

14. Mr. MENCER (Czechoslovakia) said that the ICRC text of article 48 was well-balanced and it was significant that no amendments ran counter to the contents of the article. His delegation accepted the present wording but felt that it would be advantageous to incorporate most of the amendments proposed. It accepted amendments CDDH/III/13 and Add.1, CDDH/III/28 and CDDH/III/63. It also agreed with the proposal in amendment CDDH/III/74 for a new paragraph 2 covering the use of civilian objects for military purposes and, as a sponsor of amendment CDDH/III/64 concerning the protection of the natural environment, was anxious to join other delegations concerned with the same point. The protection of the natural environment was a most important matter, which could be provided for under articles 48, 49 or 33 of draft Protocol I. He felt that United Nations General Assembly resolution 3264 (XXIX) of 9 December 1974 was a good basis for future discussion.

15. Mrs. MANTZOULINOS (Greece) said that her delegation fully supported the ICRC text of article 48. It was in agreement with the Finnish representative's statement on the protection of the natural environment and supported amendment CDDH/III/64 proposing an additional paragraph to article 48 to cover that question. Her delegation congratulated the Union of Soviet Socialist Republics on the draft Convention in United Nations General Assembly resolution 3264 (XXIX), annex.

16. Mr. BLIX (Sweden) said that his delegation was in favour of the ICRC text, with minor changes, for instance the replacement of the word "namely" by the words "such as" and the addition of the phrase "or render useless" after the word "destroy", which would bring the article into line with article 27. His delegation was somewhat doubtful, however, about the other amendments submitted. It had sympathy for amendment CDDH/III/64 on the protection of the natural environment and welcomed amendment CDDH/III/67, which made specific reference to the prohibition of starvation of civilians as a method of warfare. In his view there was a three-pronged approach to the question of preventing starvation. Firstly, there was the <sup>1/</sup>comprehensive interpretation of the Protocol of Geneva of 1925

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<sup>1/</sup> Protocol of Geneva of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, signed at Geneva, 17 June 1925.

banning the use of chemical weapons, so as to include herbicides. His delegation welcomed the recent ratification by the United States of America of the 1925 Protocol, which appeared to include a limitation of the use of herbicides to the area within and around military bases. It was essential to prohibit the wholesale use of herbicides. Secondly, relief should be given, and be permitted to be given, in circumstances where there was a threat to the civilian population. Thirdly, article 48 of the present draft Protocol should be used to prevent attacks on food and food-producing areas.

17. It might be asked whether that proposal was in contradiction to the use of blockades, which could cause hardship for the civilian population. However, the purpose of a blockade was much broader - mostly to prevent war material and raw material for military production from reaching the blockaded country - and was not directed specifically against the civilian population.

18. It had been argued in connexion with guerrilla warfare that food should be denied to the civilian population, thereby denying it indirectly to the guerrillas. His delegation considered that practice to be ineffective because it was inevitably the civilian population that suffered first. The soldiers were the last to be without food. His delegation therefore considered it undesirable to make exceptions such as those in amendments CDDH/III/67 and CDDH/III/74 depriving objects indispensable for the survival of the civilian population of immunity if used for military purposes. Such exceptions, it was felt, would dangerously undermine the legal protection of food, food-producing areas etc., as it could always be alleged that some little use was made by the military of those objects. His delegation doubted whether the marginal effects upon an enemy of attacks on food for the civilian population could justify such attacks.

19. With reference to the question of objects shielding the enemy from attack, which had been raised in United States amendment CDDH/III/50, his delegation would understand an amendment which would permit the destruction of vegetation in areas around military bases, but it could not accept that case as merely an example of permitted destruction. His delegation also had some difficulty with the expression "in their own territory" used in amendment CDDH/III/50. Frequently sovereignty was disputed. However, his delegation understood a scorched-earth policy which was used to stop enemies invading a Party's own territory. That was a deep-rooted practice which should be taken into account.

20. His delegation appreciated amendment CDDH/III/49 as an attempt to broaden the scope of the article. However, he feared that its effect would be to qualify the protection given. He noted that amendment CDDH/III/67 did not include the phrase "such as" which he favoured.

21. He welcomed amendment CDDH/III/63 but felt that the value of fuel reservoirs for trucks, tanks, etc. in war was such that belligerents could hardly give immunity to those objects. Similarly, in amendment CDDH/III/28 the provision that arterial roads were to be protected would also be open to exceptions, in view of their military importance.

22. His delegation supported the Finnish views on ecological warfare and felt that it would be useful to have some general reference to the problem in the Protocols. The total ban of herbicides was one of the most important measures in that connexion, and his delegation felt that the wording of amendment CDDH/III/64 needed much improvement in order to be satisfactory. A reference to the ecological balance would be preferable to placing a ban on the impairment of the natural environment.

23. Mr. DIXIT (India) said that agreement on article 48 was most desirable. The words "essential" and "indispensable" were being frequently used in the amendments, but both words were somewhat vague. In fact, on close examination article 48 was itself loosely worded. The principle underlying the article needed to be strengthened. It was a mistake to consider articles 47 and 48 identical; a distinction must be made between them. The important point to stress was that civilian objects should not be destroyed in any circumstances. There were occasions when civilian objects could be used for military purposes, but when they were clearly identified as civilian, in the case, for example, of stocks of grain and wheat, there was no room for doubt. His delegation was not in favour of listing examples under article 48, but was more concerned with laying down principles.

24. His delegation supported the amendment in favour of protecting the natural environment (CDDH/III/64) and of the prohibition of chemical and biological weapons. It considered the Australian amendment (CDDH/III/49) an improvement on the ICRC draft and suggested that the words "it is forbidden to attack or destroy things or objects essential to the survival of the civilian population" should be added.

25. Mr. FISSENKO (Byelorussian Soviet Socialist Republic) said that realistic measures were needed for the protection of civilian populations in armed conflicts. A reference to the United Nations resolution on the definition of aggression should certainly be included in the Protocols; the preamble to draft Protocol I was perhaps a good place for it.

26. It was only right and proper that humanitarian law should extend equally to all Parties engaged in conflict, regardless of who was the aggressor. The ICRC text of article 48 was on the whole a good basis for discussion. Amendment CDDH/III/64 was timely, since protection of the natural environment was essential to civilian objects, both in peace and in war. As article 48 made no reference to the use of civilian objects for military purposes, the Ukrainian amendment (CDDH/III/74) served a necessary purpose. He considered it important and supported it. The experience of the Second World War, when Hitler's troops had used irrigation and other installations for military purposes, should be drawn on to ensure that the Committee's discussions were guided by practical realities. He did not support the inclusion of a reference to roads and highways in article 48, since they were, as a rule, used for military purposes.

27. Mr. RABARY (Madagascar) said that, while his delegation fully approved of the ICRC draft of article 48, it also supported amendments CDDH/III/13 and Add.1, CDDH/III/28 and CDDH/III/64. The representative of the Democratic Republic of Viet-Nam had revealed the subterfuge concealed in amendments CDDH/III/50 and CDDH/III/67 concerning a limitation of respect for the objects indispensable to the survival of the civilian population.

28. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that it was his impression that those who wanted a text which covered civilian populations in all circumstances, and those who did not think that a feasible proposition, were prompted by the same idea, namely, maximum protection. Each side in a conflict naturally sought to gain military advantages. In formulating rules which could be applied, it was essential to be realistic. He was against those who wished to replace the text of article 48 by another but he supported the replacement of the word "namely" by "such as", since it was impossible to draw up an exhaustive list to cover every eventuality.

29. Amendment CDDH/III/64 was of paramount importance, since the protection of the natural environment was vital. It should be included in article 48 or it could be placed in article 33 as a general principle, though he thought the best place was article 48. With regard to amendment CDDH/III/28, he was not convinced that it would achieve what was being sought in article 48. It was only logical that roads, highways and communications networks were strategic objectives in military conflict, and as such they could not be protected.

30. The definition of aggression adopted by the United Nations General Assembly should be enshrined as a principle in the Protocols. Aggression should be stopped at the source, but once it had started equal protection should be given to and received by all Parties in the conflict. In any event, the position of the United Nations General Assembly on aggression could not be ignored (see United Nations General Assembly resolution 3314 (XXIX), annex). Recognition of it would give even greater protection to all concerned.

31. Sir David HUGHES-MORGAN (United Kingdom) said that the question with regard to article 48 was what it was intended to cover. In the ICRC text, there was a reference to objects indispensable to the survival of civilian populations and in that context food and water were mentioned as indispensable. A more exhaustive list could be drawn up but in the view of his delegation the list was already complete. To replace the word "namely" by "such as" would introduce an element of confusion. The articles were, after all, designed for commanding officers in the field and, for the sake of clarity, the precise scope of article 48 should be defined.

32. Mr. TODORIĆ (Yugoslavia) said that his delegation supported both the underlying principle and the wording of the ICRC text of article 48, but did not regard its provisions as of a limitative nature. It supported the amendments which sought to ensure the protection of the environment.

33. Mr. OCHOA TERAN (Venezuela) expressed his delegation's support for amendments CDDH/III/49 and CDDH/III/64.

34. Mr. HERCZEGH (Hungary) said that the ICRC draft was acceptable to his delegation as a basis for discussion, but required some modification. In particular, he supported the proposal to replace the word "namely" by "such as" (CDDH/III/13 and Add.1). He could not agree with the view expressed by the United Kingdom representative; in practice, it was almost inevitable that gaps would be found in the list of protected objects, however exhaustive that list was intended to be.

35. His delegation supported the Ukrainian amendment (CDDH/III/74). It was glad to note that the idea in amendment CDDH/III/64 had been well received. No delegation had denied the need to protect the natural environment; the only criticisms made of the amendment had related to points of drafting. The sponsors, together with any interested delegations, would try to improve the wording of the amendment, the adoption of which would not preclude further consideration of the question of protection of the environment when article 33 of draft Protocol I was discussed.

36. With regard to the proposed inclusion in draft Protocol I of a reference to the definition of aggression adopted by the United Nations General Assembly, he said that when rules relating to jus in bello were drawn up account should be taken of international regulations concerning jus ad bellum, since the two were closely inter-related. Consequently, his delegation supported the USSR proposal for the inclusion of a reference to the General Assembly's definition of aggression in draft Protocol I.

37. The CHAIRMAN declared the general discussion on article 48 closed. The related amendments would be referred to the Working Group, together with the comments made by delegations during the discussion.

38. He invited the Committee to take up, ad referendum, article 27 of draft Protocol II.

39. Mr. CRETU (Romania), introducing his delegation's amendment to article 27 (CDDH/III/12), said that it was designed to ensure greater protection for civilian objects in non-international armed conflicts. The category of objects to be granted such protection was the same as that covered by articles 47 and 48 of draft Protocol I. The reasons which had prompted his delegation to submit the amendment were the same as those which had prompted it to submit amendments to the corresponding section of draft Protocol I.

40. Mr. AMISSAH (Ghana) said that his delegation's amendment to article 27 (CDDH/III/28) was identical to the one it had proposed to article 48 of draft Protocol I. Since it was generally accepted that food and water supplies were indispensable to the survival of the civilian population, it was only logical to provide protection for the means of communication, such as roads and bridges, which were used to transport such supplies. The Conference's task was surely to make war as difficult as possible; that was the spirit by which his delegation had been guided.

41. Mr. MILLER (Canada) said that his delegation's proposal that article 27 should be deleted (CDDH/III/36) arose from its conviction that, if draft Protocol II was to represent an important evolution of humanitarian law, the effect its provisions would have on the sovereignty of States must be carefully weighed. In view of the fact that both parties to a non-international armed conflict were generally fighting on their own national territory, it would perhaps be inappropriate to suggest to them that they could not deal with certain objects as they saw fit. As the Canadian proposal might appear to run counter to the aims of the Conference, he wished to make it clear that his delegation was not in favour of attacks on the types of object in question. However, the situation in non-international armed conflicts was often very different from

that obtaining in international conflicts and it would be inappropriate to overburden draft Protocol II with provisions that were merely copies of those in draft Protocol I.

42. Mr. MAHONY (Australia), referring to amendment CDDH/III/47 to article 27, said that he had nothing to add to the comments he had made when he had introduced his delegation's amendment to article 48 of draft Protocol I (CDDH/III/49) at the Committee's sixteenth meeting (CDDH/III/SR.16).

43. Mr. EL GHONEMY (Arab Republic of Egypt) said that the comments he had made when introducing amendment CDDH/III/63 at the Committee's sixteenth meeting applied also to amendment CDDH/III/62/Rev.1 relating to article 27.

44. The CHAIRMAN said that, in the absence of any objection, he proposed to close the list of speakers on article 27 of draft Protocol II.

It was so agreed.

The meeting rose at 12.25 p.m.



SUMMARY RECORD OF THE EIGHTEENTH MEETING

held on Wednesday, 12 February 1975, at 10.20 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

ORGANIZATION OF WORK

1. The CHAIRMAN said that, contrary to his previous statement, Committee III would have to consider article 65 of draft Protocol I, although articles 63 to 69 as a whole were not within its terms of reference. The time-limit for the submission of amendments to paragraph 2 of article 24 of draft Protocol II had been fixed for noon on Friday, 14 February, as it was for amendments to articles 50 and 51.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 48 - Objects indispensable to the survival of the civilian population (CDDH/1, CDDH/56) (continued)

Draft Protocol II

Article 27 - Protection of objects indispensable to the survival of the civilian population (CDDH/1, CDDH/56; CDDH/III/13 and Add.1, CDDH/III/62/Rev.1) (continued)

2. The CHAIRMAN announced that representatives of five countries (Union of Soviet Socialist Republics, Ireland, United States of America, the Philippines and Canada) had put their names on the list of speakers for the ad referendum consideration of article 27 and that the list was now closed.

3. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that consideration of article 27 raised a question of principle. The question was, what was the purpose of draft Protocol II? Obviously, its essential object was to reduce the frightful effects of internal conflicts on the civilian population and to impose equal responsibilities on both Parties concerned. But the imposition of sanctions should also be envisaged. There could therefore be no question of deleting article 27, for that would be to endanger the civilian population and the objects indispensable to their survival. Whatever the point of view of the Parties to the conflict, it was essential to avoid reprisals being taken against civilian objects. His delegation therefore hoped that the text proposed would be retained, with the addition of the amendment proposed in document CDDH/III/13 and Add.1 and the second part of amendment CDDH/III/62/Rev.1.

4. Mr. GILL (Ireland) said he regretted that he had not been able to make a statement during the discussion on article 48. He would like to deal with that article and article 27 together, since they had points in common.
5. The Irish delegation, like the Finnish and several other delegations, considered that article 48 should prohibit all forms of warfare which would harm the ecology of a country and might endanger the life of the population for several generations. The provisions of that article and those of article 27 should plainly and totally prohibit any endangering of the productive capacity of the earth and the quality of the air and water, both inland waters and bordering seas. In order to avoid any question of proportionality, prohibition must be total, since the world today possessed the means to cause damage that would be irreparable.
6. His delegation considered that that prohibition should be extended to the entire territory of the Parties to the conflict. It did not, therefore, share the opinion expressed by the Canadian representative at the seventeenth meeting (CDDH/III/SR.17) that such a prohibition would affect the sovereignty of States. Just as the exercise of property rights entailed obligations to others so international law imposed obligations towards other countries. The seas sometimes washed the shores of several countries, some rivers flowed through several countries and the winds blew from one country to another. Such matters must be taken into account in articles 48 and 27. In any event, there could be no question of prohibiting the destruction of stocks to prevent them from falling into the hands of the enemy.
7. Mr. REED (United States of America) pointed out that some of the problems raised in draft Protocol II were not dealt with in draft Protocol I. In his delegation's opinion, draft Protocol II should be based entirely on the principle of the sovereignty of States within their own borders and should be limited to humanitarian considerations. He agreed with the Canadian representative that the wording of article 27 amounted to interference in the internal affairs of States. Those provisions should be modified, for they were too broad. Their scope should be limited to a simple ban on starving out the civilian population.
8. Mr. SORIANO (Philippines) recalled that at the first session of the Conference his delegation had emphasized that the Additional Protocols should respect the sovereignty of States. That applied more particularly to Protocol II, since it dealt only with the territorial jurisdiction of States and the activities of their citizens. The text submitted, however, seemed to encroach upon the field of internal jurisdiction. Since article 1 of draft

Protocol II made a distinction between "armed conflicts" and "situations of internal disturbances and tensions", it was to be feared that States might give it false interpretations. As far as article 27 was concerned, his delegation approved of the ICRC draft and of the amendments submitted by Finland and Sweden (CDDH/III/13 and Add.1).

9. Mr. WOLFE (Canada) said he considered that unless article 1 was modified the provisions of draft Protocol II would be inappropriate to several types of conflict to which that Protocol would apply. Protocol II as a whole must necessarily contain only provisions of a humanitarian nature. For example, though a State could not be required to treat rebels as prisoners of war, it should be possible to require it to treat them humanely. To be capable of being applied, the text as a whole should be simple, and it should be limited to the banning of arbitrary treatment, acts of violence, etc.

10. Contrary to what the Soviet délégation seemed to think, there was no question of authorizing the destruction of civilian objects. The Canadian delegation was also in favour of reducing acts of violence, but with due regard for the internal law of States.

11. So far as concerned article 27 in particular, consideration could be given to the United States delegation's proposal that a ban be placed on attempts to reduce the civilian population to starvation.

12. With reference to the Irish delegation's proposal, he said he doubted whether a Government would take the risk of damaging the ecological structure, in view of the obvious danger of alienating the population. Rebels would probably adopt the same attitude.

13. Supporting the Philippine amendment he stressed the need for drawing up a really comprehensible text, for the possibility of a conflict comparable to the American Civil War or the Spanish Civil War did not arise in that connexion. Self-determination was not the concern of Protocol II, which was concerned only with rebels seeking to overthrow a Government. That was why no text as complete as that governing international conflicts could be drawn up. Though the protection of civilians must not be neglected in conflicts of a non-international character, it would be inappropriate to lay down excessively detailed rules to achieve that.

14. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) using his right of reply, said that Protocol II should in no case open the way to interference in the internal affairs of a State. The Conference should certainly not attempt to bind Governments, which

would freely accept the Protocol and take account of it in their legislation. It was the task of the Committee to draw up articles in such a way as to avoid any possible loopholes or abuses.

15. The CHAIRMAN said that the Working Party would have to consider eleven amendments to article 27 and the comments of delegations.

#### Draft Protocol I

Article 49 - Works and installations containing dangerous forces (CDDH/1, CDDH/56; CDDH/III/4, CDDH/III/10, CDDH/III/49, CDDH/III/59/Rev.1, CDDH/III/65, CDDH/III/74, CDDH/III/76 and Add.1, CDDH/III/79)\*

#### Draft Protocol II

Article 28 - Protection of works and installations containing dangerous forces (CDDH/1)\*

16. Mr. VEUTHEY (International Committee of the Red Cross), introducing article 49, said that the civilian works and installations mentioned in the article required special measures of protection since, if they were attacked, the results could be truly catastrophic. The enumeration of the works was exhaustive, but it should be made clear in the English text that the generating stations referred to were nuclear ones. The protection proposed was absolutely automatic and no distinction was made between military, civilian or combined uses. The intention of the article was not to protect the works, but to avoid the release of dangerous forces. The protection was, however, subject to the condition that no military objective should be located in the vicinity of installations in question, in order not to increase the risks; any attack should be launched in conformity with the provisions of article 50. In that connexion it should be remembered that Article 53 of the fourth Geneva Convention of 1949 prohibited any destruction of such installations in occupied territories.

17. It should be pointed out that the protection provided for in article 28 of draft Protocol II, which corresponded to article 49 of draft Protocol I, was more summary and simply a compromise between the protection given to works or installations which had fallen into the hands of the enemy party and that relating to works and installations located in the national territory of a country.

18. The CHAIRMAN invited the sponsors of amendments to introduce their amendments.

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\* Resumed from the fourteenth meeting.

19. Mr. QUACH TONG DUC (Republic of Viet-Nam) explained that the purpose of his delegation's amendment (CDDH/III/4), based on article 49, paragraph 1, of draft Protocol I and on article 28, paragraph 2, of draft Protocol II on the same subject, was to replace the opening words of paragraph 2 of article 49, "The Parties to the conflict shall endeavour to avoid locating" by the words "It is forbidden to locate". The Parties to the conflict must not be permitted to take advantage of the immunity of works and installations containing dangerous forces in order to protect military objectives. It was understood, however, that military guard over such works and installations could not be regarded as military tactics depriving the installations of their immunity.

20. For that reason, the delegation of the Republic of Viet-Nam considered that stronger and clearer wording was desirable.

21. Mr. CRETU (Romania) said that his delegation had submitted an amendment (CDDH/III/10) to paragraphs 1 and 2 of article 49 of draft Protocol I. The purpose of the amendment to paragraph 1 was to ensure absolute protection for works and installations containing dangerous forces, since their destruction would have serious repercussions both on the civil population and on the natural environment.

22. He therefore stressed that the prohibition should cover not only destruction, attacks and reprisals, but also any damage to such works and installations.

23. Since in certain countries guard over such works and installations was delegated to the armed forces in peacetime as in wartime, his delegation considered that a sentence should be added at the end of paragraph 2 to the effect that the enemy should not seize on that pretext to damage the works and installations in question.

24. The Romanian delegation could accept the ICRC's texts of paragraphs 2 and 3 of article 49.

25. The CHAIRMAN asked the Australian representative to introduce his amendment to article 49 (CDDH/III/49), adding that Australia also intended to propose a text on the protection of the environment which would constitute article 49 bis and would be introduced after the general debate.

26. Mr. MAHONY (Australia) pointed out that when the ICRC experts had drawn up the text of article 49, which was intended to protect the civilian population against the disastrous effects of the destruction of, or damage to, installations containing dangerous forces, they had taken two different attitudes. Some of them had

considered that absolute immunity should be accorded to such installations, while others considered that installations containing dangerous forces would certainly be utilised for the war effort and that consequently they would become a military objective which did not enjoy any immunity. Moreover, it would be necessary to identify more completely the works and installations that should benefit from absolute immunity, since the ICRC draft mentioned only dams, dykes and nuclear generating stations. The Australian amendment (CDDH/III/49) was intended to provide that immunity should be given not only to the three kinds of installations listed in the ICRC draft, but also to all those whose destruction might cause serious harm to the civil population. An agreement to that effect might be entered into between the parties for times of peace as well as for times of war. His delegation also believed that it would be unrealistic to forbid a party whose works and installations had been damaged or destroyed to take reprisals. However, paragraph 2 of the amendment referred to the ICRC's articles 50 and 51, dealing with precautions to be taken before an attack.

27. Mr. GENOT (Belgium), introducing the amendment (CDDH/III/59/Rev.1) to paragraph 1 of article 49, submitted jointly by his delegation and that of the Netherlands, said that the addition of the words "without prejudice to the rights of the High Contracting Parties in their own territories" was intended to safeguard, in specific terms, the right of the High Contracting Parties to manage and to develop their own territory in time of war as in time of peace, as also their right to use all their resources for their defence, without prejudice, vis-à-vis their own nationals, to respect for the human rights which were maintained in time of war, and, vis-à-vis the enemy, to the right existing in a period of armed conflict.

28. The addition of the words "when the partial or total destruction of these objects would endanger the civilian population in the vicinity" was the result of balancing the humanitarian imperatives against the military necessities; such balancing was necessary in drawing up the rule in order to make it sufficiently realistic to have some chance of being respected.

29. There were several possible positions regarding the objects to be protected. Firstly, there was the position of the ICRC, which favoured absolute and unconditional protection. That did not seem realistic. Another position was that protection would be withdrawn only if the object in question, having lost its civilian character, could be attacked with full respect for the rule of proportionality. Such a level of protection corresponded to that provided in article 46 and therefore seemed unnecessary. The same would hold good, by virtue of article 47, if protection was lost

simply because the civilian object was changed into a military objective. The rule to be drawn up in the circumstances must lay stress on the particular character of the objects considered, while at the same time taking military requirements into account to as limited a degree as possible. The Belgian-Netherlands amendment, which was along the same lines as the ICRC text of article 28 of draft Protocol II, was an attempt to find what the sponsors hoped was a useful compromise between the ICRC position and the other positions he had mentioned.

30. Mr. EL GHONEMY (Arab Republic of Egypt), speaking on behalf of the sponsors of amendments CDDH/III/65 and CDDH/III/76 and Add.1 to paragraphs 1 and 2 of article 49, said that the wording of that article should be as flexible as possible, since it was a key article of draft Protocol I.

31. For that reason, an additional paragraph had been proposed, to ensure that installations did not lose their immunity through the introduction of means of protection.

32. He stressed that the article should cover any new installations that might be produced by modern technology in the future.

33. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) proposed the addition of a new paragraph to article 49 (CDDH/III/74).

34. The wording of that amendment was more precise and it would strengthen articles 48 and 49 by indicating that the use of works and installations for military purposes would lead to the loss of their immunity. Moreover, the protection of civilian populations, as laid down in articles 50 and 51 on precautionary measures, continued to be assured.

35. Certain delegations had proposed amendments to article 49 and also to article 48, and had expressed the fear, mentioned by the French representative, that the installations might be used for military purposes. The Ukrainian amendment tackled the problem lucidly and in conformity with humanitarian law. In essence, the purpose of the amendment was to prevent the use for military purposes of the objects mentioned in articles 48 and 49, while upholding the full and complete immunity of works and installations containing dangerous forces, in order to protect the civilian population and the environment.

36. He reminded the Committee of Soviet experience during the years of Hitlerite aggression and of the resolute struggle which had led to victory: during that struggle, the need to protect the civilian population had been borne in mind in the fiercest battles. Those lessons had not been forgotten and the Central Committee of the Communist Party had approved a decree relating to the thirtieth anniversary of victory over Nazi Germany.

37. He expressed his gratitude to the delegations which had supported an amendment providing realistically for the consequences of armed conflict in the contemporary age and took the requirements of humanitarian law into account.

38. Mr. WOLFE (Canada) explained that the purpose of his delegation's amendment (CDDH/III/79) was to introduce the idea of proportionality. In its existing form, article 49 did not take into account the fact that some works and installations containing dangerous forces were civilian objects, while others could be used for military purposes. Thus, dams were often used as lines of defence, and it might prove necessary to destroy them in order to expel the enemy. In submitting the amendment, his delegation sought to initiate a general discussion during which constructive suggestions would be made on ways and means of protecting those works and installations.

39. Mr. MAZZA (United States of America) observed that article 49 forbade attacks on dams, dykes and nuclear generating stations, without any question of determining whether the attacks might release dangerous forces or provided certain military advantages, or whether the damage to the civilian population or to civilian objects was disproportionate to the direct military advantage anticipated. Under international law, an object could be legitimately attacked if it was being used for military purposes: it was possible - and even probable - that dams, dykes and nuclear generating stations would be used for those purposes. Moreover, it was impossible to say definitely that every attack on those installations would release dangerous forces or even that such release would endanger the civilian population. To be sure, his delegation did not under any circumstances want the civilian population to be endangered needlessly: nevertheless, protection of the installations mentioned in article 49 must not be used as a cover to gain military advantage. A total ban on attacks against those installations, even when they were used for military purposes and when the damage to the civilian population was not disproportionate to the military advantage anticipated, could not be justified.

40. Those installations should be regarded as military objectives if, owing to their nature or use, they contributed effectively and directly to the enemy's military effort or if, at any given moment, their partial or total destruction or their neutralization offered a distinct military advantage. The United States delegation considered that it was within the power of the Party to the conflict in possession of such installations to protect them by ensuring that they were not used for military purposes and were not thus converted into military objectives.



41. In conclusion, if paragraph 3 of article 49 of the ICRC draft were adopted as it stood, the marking of works and installations containing dangerous forces should be so changed that it could not be confused with that of the hospital and safety zones specified in Article 6 of Annex I to the fourth Geneva Convention of 1949.

42. Mr. DIXIT (India) said that he could fully support article 49 of draft Protocol I. The works and installations in question, which were often monuments to the arts of peace erected with the aid of friendly countries and United Nations resources, were mostly used for non-military purposes and should be protected unreservedly. Moreover, he would like hydro-electric stations to be mentioned in paragraph 1.

43. With regard to the various amendments submitted, he did not consider the Australian amendment to be explicit enough to be acceptable, but supported the Romanian amendment (CDDH/III/10), which distinctly improved the text of paragraph 1 of article 49. He could not support the amendment submitted by Belgium and the Netherlands (CDDH/III/59/Rev.1), since it restricted the scope of the article. On the whole, his delegation was against any amendments involving restrictions or exceptions to the rules set out in article 49, for if the destruction of dams, dykes and nuclear generating stations were to be made permissible in certain circumstances, the survival of the civilian population, which was the subject of article 48, could not be guaranteed.

44. Mr. REZEK (Brazil) said that his delegation had proposed to add to article 28 of draft Protocol II a text which was identical in substance with the Romanian amendment to paragraph 2 of article 49 of draft Protocol I (CDDH/III/10). He therefore supported the proposed addition and hoped that agreement would be reached on its wording. On the other hand, it did not seem difficult to reconcile that amendment with that of the Ukrainian Soviet Socialist Republic, since the question of the use of such installations for military purposes was altogether different from that of their military guard.

45. Mr. JOVANOVIĆ (Yugoslavia) said that the ICRC text served as an excellent basis for the wording of article 49 on works and installations containing dangerous forces. Certain clarifications, such as those proposed by Romania (CDDH/III/10) and the co-sponsors of the amendment in document CDDH/III/65, might be added to paragraph 2 of the article, so as the better to ensure the protection of such works and installations. Likewise, the idea expressed at the beginning of the amendment submitted by Belgium and the Netherlands (CDDH/III/59/Rev.1) should be retained, as the destruction of dams and dykes could sometimes be a means of defence when a country was attacked.

46. Mr. CRETU (Romania), referring to the Australian amendment (CDDH/III/49), pointed out that belligerent countries could hardly be required to reach agreement on means of protecting works and installations containing dangerous forces. Even if such an agreement were reached, it might well be asked what kind of protection would be given. Besides, paragraph 2 of that amendment seemed to imply that it would be permissible to attack such works and installations.

47. After the explanations that had been given, he could accept the first part of the amendment submitted by Belgium and the Netherlands (CDDH/III/59/Rev.1), but could not endorse the proposal to add the words "when the partial or total destruction of these objects would endanger the civilian population in the vicinity", as the significance attached to those words could be interpreted as a condition under which an attack would be permissible. He could also support the proposal to replace the word "namely" by "such as" in paragraph 1, as well as amendment CDDH/III/65, which was similar to the Brazilian and Romanian amendments. On the other hand, he could not accept the Canadian amendment (CDDH/III/79), for the proportionality rule introduced a subjective criterion with regard to the possibility of attacking or destroying works and installations containing dangerous forces. He doubted whether the Ukrainian amendment (CDDH/III/74) was necessary in view of the wording of article 47. Finally, he could not support the United States amendment (CDDH/III/202), which merely supplemented the Canadian proposal.

48. Mr. GRIESZLER (Austria) said that, although the ICRC text of article 49 was an excellent compromise, it should be amended in some ways. For instance, the proposal to substitute the words "such as" for the word "namely" in paragraph 1 of article 49 should be adopted, and in view of the proposed amendment to article 47 (CDDH/III/57), the last sentence in paragraph 1 of article 49 should be deleted.

The meeting rose at 12.25 p.m.

SUMMARY RECORD OF THE NINETEENTH MEETING

held on Thursday, 13 February 1975, at 10.25 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 49 - Works and installations containing dangerous forces (CDDH/1, CDDH/56; CDDH/III/4, CDDH/III/10, CDDH/III/46, CDDH/III/49, CDDH/III/59/Rev.1, CDDH/III/65, CDDH/III/74, CDDH/III/76 and Add.1, CDDH/III/79, CDDH/III/202) (continued)

1. Mr. NGUYEN VAN HUONG (Democratic Republic of Viet-Nam) said that his delegation endorsed the ICRC's concern that article 49 should regulate the protection of works and installations containing dangerous forces, damage to or the destruction of which would be catastrophic for the civilian population.
2. Stressing the vital importance of dykes in agricultural countries, he said that aggressors always tended to attack them in order to starve the civilian population, and referred, as an example, to the dykes which had been destroyed in the Netherlands during the Second World War by order of the Nazi Seiss Inquart. During the recent war in Viet-Nam, 661 sections of dyke had been either damaged or destroyed, in pursuance of a strategy disclosed in the I.F. Stone Review of 12 July 1965. It had been calculated that the bombing of the dykes in North Viet-Nam, carried out systematically with explosive and penetration bombs, could have effects comparable to those of a hydrogen bomb: flooding of the delta, destruction of the summer and autumn rice harvest and the death of two or three million inhabitants by drowning or starvation. Those bombardments mostly carried out before the seasonal floods, were specially designed to cause underground fissures which would be difficult to detect, so that when the waters rose, they would infiltrate and enlarge the fissures, thereby increasing the danger of bursting and making the work of consolidation difficult. That system of influencing the degree of compactness of the soil had been denounced by Professor Yves Lacoste during an investigation carried out in North Viet-Nam.
3. The Pentagon had accused Viet-Nam of stationing anti-aircraft defence sites on the dykes and thereby transforming them into military objectives, but in fact the inhabitants of the country took the utmost care of the grass covering and did not allow water buffaloes to wander on the dykes. That explained the significance

of the last part of the sentence of the United States amendment to paragraph 1 of article 49 concerning the prohibition to attack dykes - an amendment which would give the aggressor the sovereign right to decide whether his attacks against the life and living conditions of the population were proportionate to the direct military advantage allegedly anticipated.

4. His delegation therefore fully endorsed the amendments submitted by the Romanian delegation (CDDH/III/10) and by sixteen countries (CDDH/III/65), which stipulated in absolute terms that dykes should always be protected and that the establishment of installations designed to protect those objects should not deprive them of their immunity.

5. Mr. CASTREN (Finland) said that his delegation regarded the text of article 49 submitted by the ICRC as a good basis for discussion.

6. His delegation could also accept the two Romanian amendments (CDDH/III/10), although the second one might require some clarification. The English text of the latter departed slightly from the original French, the term "garde militaire" having been translated as "military protection" ("protection militaire"), which was broader and vaguer. In his view, the French term probably meant a small group of soldiers armed with light weapons, as in the case of protection for medical units in Article 22 of the first Geneva Convention of 1949. The amendment submitted by the Republic of Viet-Nam (CDDH/III/4) was based on a principle which he endorsed. The words "shall endeavour" in paragraph 2 of the ICRC's draft should be interpreted as condemning any abuse. Similarly, the principle on which the Ukrainian amendment (CDDH/III/74) was based could be accepted as a general principle, but his delegation considered that the sanctions in cases of abuse provided for in that amendment were too strict, since they did not take into account the various degrees of gravity of violations. His delegation thought that the other amendments were unnecessary, and preferred the ICRC text.

7. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that the two schools of thought which were evident throughout the Committee's deliberations were also apparent in the discussion of article 49. The text submitted by the ICRC seemed to offer possibilities of a compromise, in that it took into account both the need to protect works and installations containing dangerous forces and the realities of possible abuse. It provided a basis for strengthening the protection of those objects, the destruction of which could have disastrous consequences, particularly for small countries, and might even affect countries which were not involved in the conflict. His delegation was therefore in favour of the ICRC text.

8. With regard to the amendments, he drew attention to the proposal of the Ukrainian Soviet Socialist Republic, which emphasized the need for full protection and restriction of abuse and could play a part in the compromise that was being sought. The Finnish representative had said that the sanction provided for in that text was insufficiently precise in that it did not differentiate between degrees of gravity of abuse: he himself did not share that view and, in any case, abuse would not cancel out the protection provided for in articles 50 and 51.

9. Amendment CDDH/III/76 and Add.1, submitted by several Arab States, was sensible: it was impossible to give a complete list of the objects in question since their number increased daily with the advance of technology. Amendments CDDH/III/10 and CDDH/III/65 were also acceptable. Possibilities for a compromise seemed to be emerging, and he hoped that a working group would be able to combine amendments CDDH/III/10, CDDH/III/65, CDDH/III/74 and CDDH/III/76 and Add.1 in a single text.

10. Mr. EL-MISBAH EL SADIG (Sudan) said that his delegation supported amendments CDDH/III/76 and Add.1 and CDDH/III/65. The former made paragraph 1 more flexible and enlarged its scope so that it could apply in future to objects which were as yet unforeseen. Amendment CDDH/III/65 met a vital need: if the objects in question were to be granted full immunity, it was only natural to extend that immunity to installations erected solely to ensure defence of the objects, since their purpose was non-military and they were intended exclusively to protect the life and living conditions of civilian populations.

11. Mr. BLIX (Sweden) said he wished to compare articles 47, 48 and 49, which were in fact complementary. Article 49 provided for the immunity and protection of certain categories of works and installations which were not covered by the preceding articles and damage to or the destruction of which would endanger the civilian population - as had already occurred in a number of instances. Technological advances would obviously increase the number of those costly installations, which contributed to the production of consumer goods, but might also prove to be sources of disaster if they were damaged or destroyed. Belligerents might be tempted to threaten their destruction as a means of blackmail. They might be of a certain value for the war effort, since they might contribute to industrial production, for example, munitions. Their destruction by a party on its own territory in the face of an invading enemy was different. Such action could be part of a scorched earth policy; their protection might require defensive military installations to be set up in their vicinity.

12. The Swedish delegation was prepared to accept the ICRC draft without any change. Nevertheless, it did not reject the underlying motives of some of the amendments, although it was still sceptical concerning the value of others. The purpose of amendment CDDH/III/76 and Add.1 was to replace the word "namely" in paragraph 1 by the words "such as", in order to broaden the scope of immunity. But as the United Kingdom representative had pointed out at an earlier meeting, if the number of categories to be protected were increased, it would be more difficult to strengthen immunity. It would therefore be wiser to grant a considerable degree of immunity to limited categories of installations than to provide a lesser degree of immunity for many categories. With regard to amendment CDDH/III/59/Rev.1, he pointed out that article 27 of draft Protocol II already contained wording similar to one point that was proposed in the Belgian and Netherlands amendment. He understood that point which sought to limit protection explicitly to cases where destruction would cause grave losses to the civilian population. If the purpose of that amendment was to allow the destruction of the works and installations concerned in pursuance of the scorched earth policy, the wording was perhaps not entirely adequate, and a more precise text should be drafted. He considered that amendment CDDH/III/79 might render the entire article inoperative. Amendment CDDH/III/202 could have the same effect and, moreover, introduced the idea of proportionality. The Ukrainian amendment could have the effect of neutralizing the article or of weakening its meaning. It was not clear what was meant by the term "for military purposes": for example, some of the electricity produced could be used for military purposes. Would that make the dam a permitted target? Amendment CDDH/III/4 submitted by the Republic of Viet-Nam was too absolute: the Power to which the territory belonged might well fear that the enemy would not respect the objects in question and install means of defence in their vicinity. But it would be quite different if a factory producing war material were to be set up in the vicinity in order to benefit by the immunity granted to an installation. Amendments CDDH/III/10 and CDDH/III/46 were more reasonable, although amendment CDDH/III/10 went rather too far: a distinction should be drawn between attacks with a view to destruction and simple sabotage which might have no effect on the surrounding area. Amendment CDDH/III/49 entailed a different approach, but its efficacy was doubtful: agreement between two countries was never easy, even in peacetime, and was certainly more difficult in wartime.

13. Mr. WOLFE (Canada) said that the presence of arms intended for the defence of installations containing dangerous forces might lead to misunderstandings during military operations. Such defensive arms must not endanger the immunity of the works. Moreover, the list of objects should not be unduly expanded, but should

be limited to those whose destruction would have catastrophic results. Some delicate problems were involved. For instance, dykes were often used as lines of communication: what would the situation be if military vehicles used them for military purposes, however limited? Such use should not necessarily entail the destruction of those works, but it might result in their becoming the object of attack. Amendment CDDH/III/74 could serve as a basis for provisions giving extensive protection.

14. Mr. DENEREAZ (Switzerland) drew attention to the importance of article 49 of draft Protocol I and article 28 of draft Protocol II, especially for the future. His delegation could not support the principle of proportionality, but recognized that military necessity was not to be brushed aside. The ICRC text served as a sound basis for discussion, but could be improved without prejudice to its intent. Objects containing dangerous forces were part of a country's infrastructure, and in peacetime the population had to be protected from disasters arising from ruptures and explosions. The problem was a serious one, since the number of works and installations containing dangerous forces was increasing. In wartime, there was a temptation to attack such installations, since the active life of a country depended on them, but their destruction could far exceed the strategic aims involved. Accordingly, attacks on such installations must be formally banned, in accordance with the intention of the ICRC. At the same time, the fact that the objects concerned contributed directly to the war effort led to ambiguities. ICRC experts would give their views on the desirability of instituting special markings for such installations. Indeed, he wondered whether it was possible to reach agreement on the protection of objects; as he saw it, protection should be confined to persons.

15. Mr. EIDE (Norway) said that the guiding principle should be to provide for the maximum protection of persons, in other words, of the entire civilian population. The ICRC text prohibited attacks on objects. He supported the principle set forth in amendments CDDH/III/65 and CDDH/III/10, namely, that the prohibition to attack continued to exist even if the installations were under military protection.

16. He considered that the Ukrainian delegation went too far in its amendment (CDDH/III/74): everything should be done to prevent disasters. He could not support the texts proposed in amendments CDDH/III/49 and CDDH/III/59, but advocated adoption of the ICRC text, with the Romanian amendment (CDDH/III/10) and the joint amendment of the Arab countries (CDDH/III/76 and Add.1). The aim was to achieve a high degree of immunity for a limited list of objects, and the ICRC text met that requirement.

17. Mr. FISSENKO (Byelorussian Soviet Socialist Republic) said that the ICRC text served as an excellent basis for discussion, since it prohibited the destruction of works and installations containing dangerous forces, such as dams, dykes, and nuclear generating stations, and provided for the marking of such objects. But article 49 presented by the ICRC, like article 48, neglected one important point, that of the situation prevailing in the event of use for military purposes. The experience of many countries showed that such situations could occur. Guidance could be derived from articles 46 and 47, under which the protection of persons and civilian objects was assured so long as their civilian character was maintained; otherwise, they lost their immunity. That concept should be set out clearly in article 49. The Ukrainian delegation's amendment (CDDH/III/74) was a compromise that merited study. Other amendments followed a similar line of thought (amendments CDDH/III/79, and CDDH/III/202) but were worded less clearly, and were inferior to the Ukrainian amendment. He also expressed interest in amendments CDDH/III/10, CDDH/III/65 and CDDH/III/76 and Add.1, which might be combined with that of the Ukrainian delegation.

18. Mr. AGOES (Indonesia) said that in his view article 49 was closely linked with article 48. Dams, dykes and nuclear generating stations were objects of vital importance, and their destruction would have an effect almost as serious as that referred to in article 48. Such objects should be protected and shielded against attacks and destruction. The United States amendment (CDDH/III/202) acknowledged that an attack on those installations was permissible if the damage inflicted would not be disproportionate to the direct military advantage anticipated. That concept was debatable, since it was subject to the personal interpretation of military commanders, but his delegation had no formal objection to the amendment. He supported the ICRC's views concerning the proximity of military objectives to the protected objects (article 49, paragraph 2), and was in favour of amendments CDDH/III/10 and CDDH/III/65, which might be combined in a second sentence to be added at the end of paragraph 2. Paragraph 3 seemed to be acceptable in its existing form.

19. Mr. REED (United States of America) said that the discussion had revealed two trends of opinion: for some, immunity was absolute and for others it was qualified, since it ceased to exist in the case of use for military purposes. The question arose, what would happen to nuclear generating stations supplying the factories of a whole country? In his opinion, the situation would be different if the object destroyed did not release dangerous forces. He was prepared to accept a compromise. He could also accept a drafting amendment to article 49, paragraph 1: in the French text, the words



"telles que" would be used. With reference to reprisals, he wished to know what was the real purpose of those who wanted them to be prohibited. It was necessary to be careful in choosing terms to be certain that they were used correctly. The rule permitting reprisals encouraged the Parties to the conflict to comply with the law. Reprisals were used against adversaries who violated the international rules of war. Accordingly, those who claimed to have had reprisals inflicted upon them must be admitting that they were guilty of illegal acts. He did not really believe that they intended such an admission but were using the term loosely. The victims of illegal acts could take action against objects of the adversary. In his view such reprisals should be carefully considered as an important deterrent to illegal acts.

20. Miss AHMADI (Iran) said she found the ICRC text satisfactory. She agreed with the delegations of Belgium and the Arab Republic of Egypt that it was justifiable for a Party to a conflict to take steps to put out of action objects on its own territory. She also accepted the use of the expression "such as" in article 49. The idea of proportionality expressed in amendment CDDH/III/202 was defensible, but the application of such a rule would raise awkward questions of competence. She was in favour of article 49, paragraph 2, with the addition of a new sentence expressing the idea presented in amendments CDDH/III/10 and CDDH/III/65.

21. Mr. MAHONY (Australia) said he hoped that an agreement could be reached on a provision intended to spare the civilian population the disastrous effects of certain acts of destruction. The objects mentioned in article 49 would certainly be objectives, and attacks on them might lead to reprisals. The ICRC draft prohibited such reprisals. Amendment CDDH/III/10 submitted by the delegation of Romania introduced the words "such as", and that extended the list of objectives. The list should not be exhaustive. The provision concerning general protection contained in amendment CDDH/III/10 was acceptable. He accepted amendment CDDH/III/79 on proportionality submitted by the Canadian delegation, as well as amendment CDDH/III/202 on the same lines submitted by the United States of America. He also supported amendment CDDH/III/74, submitted by the delegation of the Ukrainian Soviet Socialist Republic, which offered the possibility of greater protection for the objects referred to in article 49.

22. Mr. EL GHONEMY (Arab Republic of Egypt), referring to the United States amendment (CDDH/III/202), stressed the risks that the civilian population would incur as a result of any degree of tolerance, and urged the need to maintain the clause prohibiting reprisals.

23. His delegation was in favour of the amendments proposed by Romania (CDDH/III/10) and by Belgium and the Netherlands (CDDH/III/59/Rev.1).
24. Mrs. DARIIMAA (Mongolia) said that the ICRC draft provided a good basis for discussion.
25. She thought that the Australian amendment (CDDH/III/49) inviting the High Contracting Parties to "agree, in time of peace, on means which will provide protection against unwarranted attacks on works and installations ..." and to "agree, in time of armed conflict, on means by which ... such works and installations shall be immune from attack" would be difficult to apply in practice, since for want of a clear definition of that principle, each of the Parties would be free to choose how to interpret it. The question was whether a bilateral, multilateral or international agreement was meant, or an agreement between all the Parties to the Geneva Conventions. If the amendment was adopted, precise criteria on that point would have to be established.
26. Amendment CDDH/III/59/Rev.1 was acceptable in principle, but should be made more precise, so that it could not be interpreted in the sense of the principle of proportionality.
27. The Canadian amendment (CDDH/III/79) and the United States amendment (CDDH/III/202), under which the possibility of serious damage to the civilian population could be justified by the principle of proportionality, were unacceptable.
28. In the Romanian amendment, (CDDH/III/10), the notion of "military protection" was too vague and required clarification.
29. The amendment by the Ukrainian Soviet Socialist Republic (CDDH/III/74) offered a useful compromise text containing a new norm of international law which was of special interest to the developing countries.
30. Her delegation supported the amendment submitted by the Arab countries (CDDH/III/76 and Add.1).
31. Mr. Moun Seun JANG (Democratic People's Republic of Korea) said it was essential that the civilian population and civilian objects should be protected and not made the object of reprisals. He mentioned in that connexion the destruction and bombardments carried out by the imperialist forces of the United States of America as reprisals during the Korean war. The prohibition of reprisals should be clearly stated in article 49. He supported the Romanian amendment (CDDH/III/10).

32. Mr. FISCHER (German Democratic Republic) stressed the need for providing complete protection for works and installations whose destruction would cause serious damage to the civilian population. The ICRC text provided a good working basis from that point of view, particularly paragraph 1, which was entirely in accordance with international humanitarian law.

33. He was against the amendments submitted by Canada and the United States of America (CDDH/III/79 and CDDH/III/202), according to which the destruction of such works and installations might be permissible when justified by the military advantage to be derived therefrom.

34. He supported the amendments submitted by the Ukrainian Soviet Socialist Republic (CDDH/III/74), the Arab countries (CDDH/III/76 and Add.1) and Romania (CDDH/III/10).

35. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) stressed the value of his delegation's amendment to article 49 (CDDH/III/74) as a compromise.

36. Referring to the objections raised by the representative of Sweden, he drew the Committee's attention to the protective measures provided for in the subsequent articles of draft Protocol I, particularly article 50, and to the Australian amendment proposing a new article 49 bis (CDDH/III/60) which his delegation supported.

37. His delegation also supported the amendment to article 48 submitted by Czechoslovakia, the German Democratic Republic and Hungary (CDDH/III/64).

38. Mr. AJAYI (Nigeria) said that the ICRC text of article 49 was in the main acceptable. On paragraph 1, he supported the amendment submitted by the Arab countries (CDDH/III/76 and Add.1) but was against the Canadian amendment (CDDH/III/79), which was too subjective.

39. He supported the amendment submitted by the Ukrainian Soviet Socialist Republic (CDDH/III/74), which represented a sound compromise text, as well as amendment CDDH/III/65, which strengthened the protection envisaged.

40. The CHAIRMAN declared the debate on article 49 closed. The article would be referred back to the Working Group, together with all the amendments submitted.

The meeting rose at 12.30 p.m.



SUMMARY RECORD OF THE TWENTIETH MEETING

held on Friday, 14 February 1975, at 10.20 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 49 bis - Protection of the natural environment  
(CDDH/56; CDDH/III/60)

1. The CHAIRMAN called upon the representative of Australia to introduce his amendment, which was to add an article 49 bis to draft Protocol I (CDDH/III/60).
2. Mr. MAHONY (Australia) said that his delegation hoped that article 49 bis was worded in such a way as clearly to prohibit any action detrimental to the natural environment, which must be protected to meet the future needs of mankind. The adoption of the article might well fill a gap in humanitarian law applicable in armed conflicts.
3. At previous meetings, several delegations had subscribed to the principles laid down in the Australian amendment (CDDH/III/60); an example was to be found in amendment CDDH/III/64, submitted by Czechoslovakia, the German Democratic Republic and Hungary. Furthermore, the Union of Soviet Socialist Republics had submitted to the United Nations a draft Convention on the prohibition of action to influence the environment and climate for military and other purposes incompatible with the maintenance of international security, human well-being and health (see United Nations General Assembly resolution 3264(XXIX), annex). The draft Convention applied to the territory of a State as well as to that of its neighbours. The Australian proposal was more limited in scope and concerned only armed conflicts, so that it did not in any way duplicate the USSR draft Convention.
4. The Australian proposal could certainly be improved, if only with regard to the use of the words "to despoil". His delegation would welcome any constructive proposal to modify the wording of its amendment and would even be willing to place the article elsewhere, if that would give satisfaction to the delegations which had said that they would prefer it to form a new paragraph of article 34 or article 48.

5. Mr. GILL (Ireland) supported article 49 bis as introduced by the Australian delegation. He thought, however, that the wording should be slightly altered to reflect the position of the Canadian representative. The latter had stated that the idea of a country's right to use techniques of warfare on its own territory made little sense. He was convinced that the protection of the environment should not be a matter for the adversary alone, but also for the High Contracting Party itself, because in the event of national conflict or fratricidal war a country might resort to methods such as defoliation or the use of herbicides.

6. He drew the Committee's attention to resolution 2603 A (a) and (b) (XXIV), adopted by the United Nations General Assembly on 16 December 1969, in which that Organization recognized inter alia, that the use in international conflicts of any chemical agents of warfare - chemical substances, whether gaseous, liquid or solid - was contrary to the generally recognized rules of international law, by reason of their direct toxic effects on man, animals or plants, as also any biological agents of warfare which might cause disease or death in man, animals or plants. His delegation had voted in favour of that resolution and his attitude in the Committee was the same as it had been in 1969.

7. Mrs. BINDSCHIEDLER-ROBERT (International Committee of the Red Cross) asked the Australian representative whether the actions mentioned in article 49 bis could and should be regarded as grave breaches of the draft Protocol, within the meaning of article 74, which stipulated that: "The provisions of the Conventions relating to the repression of breaches, supplemented by the present Section, shall apply to the repression of breaches of the present Protocol; including that of the grave breaches committed against protected persons or protected objects within the meaning of Article 2 (c)". She wondered whether the environment could be considered a "protected object" and, in that case, whether a breach of article 49 bis would constitute a breach of Protocol I.

8. Mr. MAHONY (Australia) replied that article 74 dealt with a specific point - the repression of breaches. He therefore proposed that grave breaches should be listed in article 74 and that breaches of article 49 bis would consequently be included in the list.

9. Moreover, article 2(c) did not define either "protected persons" or "protected objects".

10. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) thanked the Australian representative who had drawn the Committee's attention to the draft Convention on the protection of the environment submitted to the United Nations General Assembly at

its twenty-ninth session by the Union of Soviet Socialist Republics. Since the concept in article 49 bis proposed by Australia was the same as that embodied in the draft Convention, his delegation gladly supported the Australian proposal.

11. Nevertheless, the USSR delegation thought that more precise wording was required to bring out the idea of protection of the natural environment; he considered that the amendment proposed by Czechoslovakia, the German Democratic Republic and Hungary (CDDH/III/64) would provide a solid basis for working out a satisfactory text.

12. On the other hand, he saw no need to list grave breaches in paragraph 3 of article 49 bis and suggested that the text should be retained as it stood.

13. Mr. HERCZEGH (Hungary) pointed out that the differences between amendments CDDH/III/60 and CDDH/III/64 concerned matters of form and not of substance; the two texts could be brought into line before the Working Group began to discuss articles 48 and 49 of draft Protocol I.

14. Mr. CRETU (Romania) said he subscribed to the idea underlying the Australian proposal, since the protection of the natural environment was one of the most important problems of the present day.

15. Nevertheless, he felt that paragraph 2 of article 49 bis should be broadened so as to make it more explicit for attacks and reprisals. He supported the statements made by the USSR and Hungarian representatives.

16. Mr. MUKHTAR (United Arab Emirates) said he was convinced that the natural environment must be protected and that a clause to that effect must be included in Protocol I. He was satisfied with the Australian amendment, subject to certain drafting changes.

17. Mr. BLIX (Sweden) said he had already made his comments on the need of environmental protection when article 48 was being discussed. While welcoming the Soviet initiative at the United Nations, he considered that article 49 bis proposed by Australia should figure in Protocol I.

18. He believed that too extensive a definition of all that could affect the environment was not desirable. The word "environment", which was not a precise term, should, he suggested, be replaced by "ecological balance". Likewise the word "despoil" could be replaced by "irreparable damage".

19. As to the first paragraph, he preferred the text of amendment CDDH/III/64. Indeed he could not see why a High Contracting Party should be allowed to carry out irreparable damage in its own territory which was likely to cause environmental damage also in other countries. To permit such damage was contrary to the concept of "one world".

20. Mr. DIXIT (India) supported the principle contained in article 49 bis. In some cases environmental damage could be repaired within reasonable time, but in others it might last till after the war and produce effects which for long could prove irreparable. Since it was thus not easy to determine what damage was temporary and what was beyond repair, he supported the views expressed by the representative of Romania regarding the broadening of the text of article 49 bis.

21. Mr. SORIANO (Philippines) supported the principle of the Australian proposal that all despoilment of the environment should be prohibited.

22. Mr. GRAHAM (Norway) said he did not wish to take a stand on article 49 bis for the time being. Furthermore, he asked the Australian delegation to explain to him why and on what basis, in the text proposed, a High Contracting Party had the right to cause destruction in its own territory in case of conflict and in the name of military tactics. He would also like to know whether a colonial army had the right to destroy the environment of a territory it did not regard as its own.

23. Mr. PASCHE (Switzerland) said that since the problem of environmental protection arose, he supported the representative of Sweden; he asked the Committee to draft an article which would not give rise to differing interpretations. He also expressed his agreement with the term "ecological balance" proposed by Sweden. He shared the doubts expressed by Norway as to the right of a High Contracting Party to destroy the environment in its own territory, and he was therefore of the opinion that destruction of the ecological balance should be prohibited absolutely.

24. In paragraph 1 he would prefer the words "methods and means of combat" to the words "technique of warfare".

25. Mr. MAHONY (Australia) thanked the representative of Norway for his comments. He noted that certain representatives had expressed the view that paragraph 1 of article 49 bis should have unlimited scope and not be restrictive, so as not to leave each Party full and absolute sovereignty in its own territory in respect



of the protection of the environment. He hoped that article 49 bis could be so amended by the Drafting Committee as to satisfy all those members of the Committee who had submitted comments and suggestions.

26. Mr. WOLFE (Canada) supported the principle contained in the Australian proposal. He doubted, however, whether such a complex problem could be solved in the context of one simple article in Protocol I.

27. The CHAIRMAN suggested that article 49 bis proposed by Australia should be referred to the Working Group, so that the amendments and suggestions relating to it could be taken into account in drafting the final text.

It was so agreed.

#### Draft Protocol II

Article 28 - Protection of works and installations containing dangerous forces (CDDH/1, CDDH/56; CDDH/III/12, CDDH/III/18, CDDH/III/36, CDDH/III/37, CDDH/III/46, CDDH/III/62/Rev.1 and Corr.1 and Add.1)\*

Article 28 bis - Protection of the natural environment  
(CDDH/56; CDDH/III/55)

28. The CHAIRMAN called on delegations to submit their amendments to article 28 of draft Protocol II.

29. Mr. CRETU (Romania) said that the amendment to article 28 of draft Protocol II submitted by his delegation (CDDH/III/12) was substantially identical with the one it had proposed for article 49 of draft Protocol I (CDDH/III/10).

30. Mr. REZEK (Brazil) said that his delegation proposed in amendment CDDH/III/18 that the words "whenever their destruction or damage would cause grave losses among the civilian population" should be deleted from paragraph 1 so as to confirm the absolute immunity which works and installations containing dangerous forces enjoyed under the provisions of article 49 of draft Protocol I. Furthermore, the protection of such objects should be even more extensive than during an international conflict, since in the circumstances it was to the advantage of both Parties to protect their common heritage.

31. His delegation also proposed in amendment CDDH/III/18 that the words "Nevertheless, an armed guard may be placed over these objects without prejudice to the prohibition laid down in paragraph 1 above" should be added at the end of paragraph 2.

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\* Resumed from the eighteenth meeting.

32. That amendment contained the same idea as the Romanian amendment, although it used the expression "armed guard" whereas the latter spoke of "military guard".
33. Mr. CHENIER (Canada) said that his delegation's amendment (CDDH/III/36) proposed the deletion of article 28 for the same reasons as those it had advanced for deleting article 27.
34. Mr. CASTREN (Finland) said that in amendment CDDH/III/37 his delegation proposed that the words "These objects shall not be made the target of reprisals" should be added at the end of paragraph 1 so as to bring the text into line with that of article 49 of draft Protocol I. He considered that the two Protocols should be identical on that point.
35. Mr. MAHONY (Australia) said he did not think the provisions of article 49 proposed by his delegation were applicable in the case of internal conflict. He had therefore proposed a text for article 28 (CDDH/III/46) fairly similar to that of the ICRC. In paragraph 1, the word "namely" had been replaced by the words "such as". Furthermore, the Australian text prescribed that the Parties to the conflict should endeavour to avoid attacks on or the destruction of works or installations containing potentially dangerous or destructive forces, whereas the ICRC text expressly forbade such attacks. For paragraph 2, his delegation merely proposed the insertion of the words "of the kind" after the words "in the immediate vicinity of objects".
36. Mr. EL GHONEMY (Arab Republic of Egypt) said that the delegations of Iraq, of the Syrian Arab Republic and of his own country simply proposed in amendment CDDH/III/62/Rev.1 and Corr.1 and Add.1 that article 28 should have the same content as article 49 of draft Protocol I.
37. Mr. MAHONY (Australia) said that in amendment CDDH/III/55 his delegation proposed the addition of an article 28 bis concerning protection of the environment. Destruction of the environment should be prohibited not only in international but also in internal conflicts.
38. The application of those provisions would naturally vary according to the class of armed conflict that the Conference decided to deal with in the context of Protocol II. Draft article 28 bis raised the same drafting problems as article 49 bis. Furthermore, in view of the principle of the sovereignty of States, there could be no question of inserting in article 28 bis a provision prohibiting reprisals.

39. Mr. PASCHE (Switzerland) said that his delegation had already explained its position when article 49 was being considered. He wished, nevertheless, to return to the question of the precautions that should be taken by the Party to the conflict which possessed the installations containing dangerous forces in order that the risks and losses should be minimized. In the case of dams, for example, that Party should lower the water level so as to reduce the risks of damage.
40. Mr. GILL (Ireland) said that he supported article 28 bis submitted by the Australian delegation. Furthermore, he would support any suggestions designed to protect the environment.
41. Sir David HUGHES-MORGAN (United Kingdom) said that article 28 bis should be drafted with the utmost care. The notion of reprisals had to do with international conflicts, and in the case of internal conflicts what international law termed "reprisals" could well become "measures of retaliation".
42. Mr. JOVANOVIĆ (Yugoslavia) said that the Yugoslav delegation was in favour of the protection of victims of war as set forth in draft Protocol II. However, it considered that to a certain extent the Protocol went further than Article 3 common to the Geneva Conventions of 1949 as regards protection and that it internationalized certain provisions in that regard.
43. The Yugoslav delegation therefore had reservations concerning those provisions as it considered that it was indispensable for the principle of sovereignty, the principle of the non-interference in the internal affairs of a State and the principle of the territorial integrity of a State to be respected when the articles in question were adopted.
44. His delegation approved the adoption of articles 49 bis and 28 bis on the protection of the natural environment and considered that the objects mentioned in articles 27 and 28 should not be the target for reprisals.
45. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said he agreed with the Yugoslav representative that the provisions of draft Protocol II should respect the principle of non-interference in the internal affairs of States. He supported article 28 as proposed by the ICRC, and could accept the Australian amendment (CDDH/III/46) to replace the word "namely" by "such as". On the other hand, the expression "shall endeavour to avoid attacks on" in the text proposed by Australia restricted the scope of the article. He approved the idea contained in the Brazilian amendment (CDDH/III/18) which, however, he did not consider really necessary in view of the Romanian amendment, which

expressed the same idea better. He also supported the Finnish amendment, since he believed that such facilities should not be the object of reprisals. Lastly, he found the Canadian amendment (CDDH/III/36) unacceptable, for the provisions of article 28 could only help towards accomplishment of the humanitarian task which was the object of draft Protocol II.

46. With reference to article 28 bis proposed by Australia (CDDH/III/55), he said his delegation believed that provisions to safeguard the environment should find their place in Protocol II.

47. Mr. CASTREN (Finland) said that while he approved article 28 submitted by the ICRC, he also accepted the Romanian amendments (CDDH/III/12). The idea contained in the second Brazilian amendment (CDDH/III/16) was excellent, but he feared that the expression "armed guard" might be interpreted to include air defence. He therefore preferred the words "military guard" contained in the second Romanian amendment.

48. Although approving in substance the article 28 bis, proposed by Australia, he urged the utmost caution in drafting the final text.

49. Mr. BLIX (Sweden) said he approved the amendment proposed by the Arab Republic of Egypt, Iraq, Mali and the Syrian Arab Republic (CDDH/III/62/Rev.1 and Corr.1 and Add.1), but considered that the words "without prejudice to the rights of a High Contracting Party" should not appear in article 28. On the other hand, he could not accept the Canadian proposal (CDDH/III/36) to delete the phrase altogether because, in an internal conflict, works and installations containing dangerous forces might be used for blackmail. He accepted the Australian proposal (CDDH/III/46) to replace the word "namely" by "such as", but thought that the amendment as a whole was too weak. Conversely, the Romanian amendment to article 49 of draft Protocol I (CDDH/III/10) and article 28 of draft Protocol II (CDDH/III/12) perhaps went too far.

50. He did not share the United Kingdom representative's misgivings concerning the notion of reprisals. One of the parties to a conflict might resort to reprisals even in an internal conflict, so draft Protocol II should contain a provision on the subject. As to the Romanian and Brazilian amendments, the expression "defence installations" might perhaps be preferable to "military guard" or "armed guard".

51. Mr. HERNANDEZ (Uruguay) said he wished to refer to a particular aspect of article 28. Referring to a very large hydro-electric power station which Uruguay was planning to build with a neighbouring country, he said the example showed that such works should be protected since they affected the future of several countries. The Romanian amendment seemed excellent in that respect, for to some extent it authorized the protection of such installations and prohibited their use for military purposes.

52. With reference to draft article 28 bis, he said that his delegation, like others, recognized that any harm to the environment might have an impact in bordering countries; draft Protocol II, however, concerned only the territory of a given State.

53. Mrs. DARIIMAA (Mongolia) said that the Working Group should consider the differences between article 28 of draft Protocol II and the corresponding article of draft Protocol I, since the practices and rules current in international and internal law were not the same. Unless that was taken into account, the Protocol would be inapplicable and might open the way to various forms of interference in the internal affairs of State.

54. Mr. GRIESZLER (Austria) said he agreed in principle with the text proposed by the ICRC, but would like the word "namely" to be replaced by "such as".

55. Mr. HASA (Jordan) said that his country wished to be included as a co-sponsor of the amendment presented by the Arab Republic of Egypt, Iraq, Mali and the Syrian Arab Republic.

56. The CHAIRMAN suggested that the Committee should refer articles 28 and 28 bis, together with the relevant amendments and observations by delegations, to the Working Group.

It was so agreed.

The meeting rose at 11.50 a.m.



SUMMARY RECORD OF THE TWENTY-FIRST MEETING

held on Monday, 17 February 1975, at 10.20 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 50 - Precautions in attack (CDDH/1, CDDH/41, CDDH/56; CDDH/III/3, CDDH/III/10, CDDH/III/13 and Add.1, CDDH/III/24, CDDH/III/28, CDDH/III/79, CDDH/III/83, CDDH/III/203/Rev.1, CDDH/III/205, CDDH/III/207)

1. The CHAIRMAN invited the Committee to consider article 50 of draft Protocol I.
2. Mr. MIRIMANOFF-CHILIKINE (International Committee of the Red Cross) said that the purpose of article 50 was to lay down rules that supplemented the other provisions relating to the conduct of hostilities. They were therefore rules that had to be interpreted and applied in conformity with the provisions of Part IV, Section I of draft Protocol I. It was not the intention of the ICRC that those precautionary measures should introduce derogations or exceptions.
3. Article 50 applied to the initiator of an attack within the technical and limited sense of article 44, paragraph 2, whereas article 51 was concerned with the party threatened by the attack. The two articles had been included in the same chapter because, in practice, they were interdependent. What had to be considered in the chapter was the incidental or accidental danger to civilians or civilian objects as a result of the hostilities themselves, for example in cases where the protected persons or objects were located in the immediate proximity of, or within the area of, a military objective, the purpose being to limit the danger or, if possible, to eliminate it in certain cases. Obviously, there was always a risk that any attack, even when directed against a clearly determined military objective, might affect the civilian population: it could arise from such factors as the configuration of the terrain (danger of landslide, or of ricocheting); the relative accuracy of the weapons used (relative dispersion according to trajectory, firing range, ammunition used, condition of the equipment); meteorological conditions (the effect of the wind, of atmospheric pressure, of cloud); the specific nature of the military objectives (ammunition stores, fuel tanks, army nuclear stations); or the combatants' mastery of techniques (the standard of technical training and technical ability in handling weapons).

4. Article 50 laid down precise directives to ensure that combatants were aware of the need for attention, as the first sentence of paragraph 1 emphasized. The measures enumerated were not alternatives but were complementary to each other at every phase of the attack. They were in two categories: the first of an objective nature, included the duty of identification (paragraph 1 (a)), of giving warning (paragraph 1 (c)), and of choosing weapons and methods of attack (paragraph 2). The second, of a subjective nature, included the idea of proportionality (paragraphs 1 (a) and (b)) and the choice between objectives (paragraph 3). Other useful measures could have been included in the article, as was mentioned in the commentary on paragraph 2 of article 50 (CDDH/3, p.66). Admittedly the idea of proportionality called for the exercise of judgement on the part of combatants. It might be open to criticism, since the combatants would have to strike a balance between civilian losses and military advantage; but the two values were not commensurate, as had sometimes been pointed out. It had become apparent, in connexion with paragraph 1 of article 47, defining military objectives, that the concept of military advantage could weaken the effective protection of the civilian population; for, when interpreted and applied by the combatants, the concept of military advantage would almost inevitably be given a wide meaning. But the rules laid down in article 50 were stricter than those in article 47, since they would cause the combatants to cancel or suspend an attack if civilian losses were disproportionate.

5. In order to balance humanitarian interests against military interests, it was also necessary that the combatants should take "reasonable steps" - an idea appearing in proposal II - which were to be based on humanitarian considerations; hence the importance of articles 71 and 72 of draft Protocol I. Furthermore it would appear to be more logical to include the notion of proportionality in article 50 than in article 46 (paragraph 3 (b)).

6. As to the level of command to which the provisions of article 50 were addressed, it should be borne in mind that at the sessions of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, it had been pointed out that those precautionary measures were vague. But in fact the ICRC had deliberately proposed a flexible wording for article 50 as it considered that it was for the parties concerned to make it more precise, in terms of the organization of their armed forces and of the kind of troops engaged.



7. Lastly, the ICRC constantly had to bear in mind the fact that the ideal was the complete elimination, in all circumstances, of losses among the civilian population. But to formulate that ideal in terms of an impracticable rule would not promote either the credibility or the effectiveness of humanitarian law. In order to establish a balance between the various factors involved, the ICRC was proposing a limited rule, the advantage of which was that it could be observed.

8. The CHAIRMAN invited delegations wishing to introduce amendments to article 50 to do so.

9. Mr. TRAN THIEN NGUON (Republic of Viet-Nam) drew attention to the wording proposed in his delegation's amendment (CDDH/III/3). His delegation was in favour of proposal I for paragraph 1 (a) of article 50, as that proposal did not impose a definite obligation on the Parties to the conflict to identify military objectives when drawing up plans prior to an attack. That was a matter for the military staff.

10. In the case of paragraph 1 (b), the purpose of his delegation's amendment was to make it an obligation for the units responsible for the attack to establish in advance, on the spot, that the objective in question was a military one. The use of the word "endeavour" would make it possible to reconcile as far as possible the duty of the units responsible for the attack to carry out an order from their superiors with the protection of civilians and of civilian objects.

11. Mr. CRETU (Romania) said that the first paragraph of article 50 contained ideas and formulas which were entirely acceptable to his delegation; there were others, however, which it could not accept, for example the proportionality rule referred to in paragraph 1 (a) and (b).

12. His delegation had submitted its amendment (CDDH/III/10) because it considered it natural that paragraph 1 (a) should define military objectives as well as stress the need to identify them. The words "if possible" should be deleted from paragraph 1 (b) in order to strengthen the obligation to cancel or suspend an attack when it had not been clearly established that the objective was not a military one or that the attack would cause losses in civilian lives or damage to civilian objects. The warning in paragraph 1 (c) should be given in good time, by suitable and reliable means, in order to make it possible for the civilian population to be evacuated.

13. Mr. CASTREN (Finland) said that his delegation was able to accept the ICRC text for article 50, apart from the wording of paragraph 1 (b), from which it proposed that the words "if possible" should be deleted, (CDDH/III/13 and Add. 1). It was usually possible to suspend an attack when the objective in question was not a military one or when losses were disproportionate to the military advantages anticipated. At the XXIInd International Conference of the Red Cross, held at Teheran in November 1973, one delegation had proposed that those ambiguous words should be deleted. Three amendments to the same effect had now been submitted. In exceptional circumstances where it was impossible to suspend or cancel an attack, certain mitigating circumstances might be invoked, but it would be better not to say so explicitly in the Protocol.

14. Mr. REZEK (Brazil) explained that the purpose of his delegation's amendment (CDDH/III/24) was to remove two ambiguities from the wording of article 50. The words "if possible" raised doubts about the effectiveness of the rule in paragraph 1 (b) and should therefore be deleted. The obligation to suspend an attack would be strengthened if the words "if it becomes apparent" were replaced by the words "if they perceive". He also wondered whether the words "if they perceive" in the English version fully rendered the meaning of the French "s'ils constatent".

15. Mr. WOLFE (Canada), introducing his delegation's amendment (CDDH/III/79), said that article 50 raised again the problem of formulating rules inspired by one type of warfare, e.g. air bombardment, which would be applicable to all forms of conflict, including for instance land warfare. Regarding paragraph 3, it was difficult to visualize when there was likely to be a choice between several objectives each of which would provide a similar military advantage.

16. Since absolute certainty was impossible, his delegation had thought it desirable to introduce the idea of reasonableness.

17. Mr. FISCHER (German Democratic Republic), introducing his delegation's amendment (CDDH/III/83), said that the ICRC text contained some constructive ideas and provided a good working basis. Nevertheless, he thought that paragraph 1 should be drafted with greater precision since the principal aim was to strengthen the protection of the civilian population and of civilian objects. There was no point in dealing at length in article 50 with any problems which might arise, since articles 43, 46 and 47 already went into the necessary detail.

18. In paragraph 1 (c) the words "they shall do everything in their power" seemed preferable to the words "whenever circumstances so permit" as they came nearer to the wording of Article 26 of the annex to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land.

19. Mr. MAHONY (Australia) said that his delegation preferred the wording of proposal II for paragraph 1 (a) to that of proposal I, which placed an absolute responsibility on those who planned an attack. Proposal II, on the other hand, established an objective standard.

20. Paragraph 3 of article 46 also contained a reference to the rule of proportionality. That rule should be stated in Chapter IV, entitled "Precautionary Measures", within Part IV of the Protocol, under the heading "Civilian Population". His delegation attached great importance to a proportionality rule and would assist in every way it could in finding a generally acceptable wording that could be included in both article 46 and article 50.

21. His delegation had proposed (CDDH/III/203/Rev.1) that in paragraph 2 the word "necessary" should be replaced by the word "reasonable" in order to align that paragraph on proposal II for paragraph 1 (a) of the ICRC draft. The replacement of the words "not to cause" by the words "to minimize" was in accordance with the proportionality rule. Moreover, the latter wording was more realistic.

22. Mr. AMISSAH (Ghana), referring to his delegation's amendments (CDDH/III/28), said he thought it necessary to refer not only to the losses of the civilian population, but also to the hardships they might undergo. The second change proposed by his delegation was designed to make the wording more specific.

23. Mr. EL GHONEMY (Arab Republic of Egypt) said he considered it would be premature to adopt a final text for article 50 at that stage in the discussion, since article 50 was closely linked to article 47. He would, however, give a brief account of the reflections of his delegation on the ICRC text and of the reasons leading to the submission of the amendment in document CDDH/III/205.

24. In the case of paragraph 1 (a), which restricted the freedom of action of those planning or deciding an attack, it would be sufficient to refer to article 47 which dealt with the circumstances in which a military objective might be attacked.

25. Paragraph 1 (b) was in contradiction with paragraph 2 of article 47, which ensured virtually absolute protection for civilians, whereas paragraph 1 (b) of article 50 implicitly allowed illegal attacks in two cases: when cancellation or suspension of attack was impossible, and when the conditions of proportionality and military necessity were satisfied.
26. The expression "in the immediate vicinity" in paragraph 2 which did not appear in the French text, introduced a certain ambiguity into the article without necessarily ensuring the protection of civilians, for the loss and the damage had to be considered regardless of the geographic factor so long as the link of causality existed.
27. The addition of the words "naming a reasonable time limit" was being proposed by the sponsors of the amendment because the effectiveness of the warning in paragraph 1 (c) of the ICRC text depended upon the inclusion of those words. The fact that, in 1956, the British and French troops had respected that practice showed that the proposal was not a purely theoretical one.
28. Sir David HUGHES-MORGAN (United Kingdom), introducing his delegation's amendment (CDDH/III/207), said that article 50 was important because it contained instructions to military commanders concerning the implementation of the rules given in previous articles. Those instructions must be both realistic and clear so that they could be easily understood.
29. In the introductory part of paragraph 1, his delegation proposed the replacement of the word "launching" by the word "execution", since the obligation continued throughout the attack, as in article 47, and did not apply only in the initial phase.
30. With regard to the beginning of paragraph 1 (a), both the United Kingdom text and the ICRC text were intended for "those who plan or decide upon an attack", for they were the only people concerned. The United Kingdom delegation had adopted the wording of the second alternative proposed by the ICRC "shall take all reasonable steps to ensure" since, in its opinion, the term "shall ensure" in the first alternative implied an absolute obligation which was not realistic. So far as the latter part of the same sub-paragraph was concerned, his delegation considered that it was often impossible not to cause incidental losses in civilian lives or damage to civilian objects, and that, in fact, the only aim of that sub-paragraph was to ensure the application of the proportionality rule. Consequently it would be an improvement to amend the ICRC text in the manner suggested in document CDDH/III/207.

31. The obligation expressed in paragraph 1 (b) had been put in the passive so that it would apply to all commanders who had the authority to cancel or suspend an attack, including those at the rear who often had better intelligence sources than those actually engaged in attacks.

32. He emphasized that paragraphs 1 (a) and (b), both in his delegation's text and in that of the ICRC, were based on the proportionality rule, which was valuable and had already been adopted by many States, although it was not yet to be found in any convention.

33. In the text it proposed for paragraph 1 (c), the United Kingdom delegation had sought to illustrate in part the word "circumstances" in order to indicate clearly that the operational and technical requirements were included.

34. In paragraph 2 of the ICRC text, accidental risks were not sufficiently taken into account and the obligation suggested was too absolute. His delegation considered, therefore, that it would be preferable that the obligation should be to take "all reasonable precautions" in order "to minimize losses".

35. He hoped that the Working Group would succeed in reconciling the principles behind the ICRC draft and his delegation's amendment, and in drawing up a convention that would be realistic and clear to those in command while affording the maximum possible protection to civilians.

36. The CHAIRMAN declared the general debate on article 50 open.

37. Mr. SCHUTTE (Netherlands) said that the purpose of article 50 was to ensure respect for certain prohibitions contained in articles 46, 47, 48 and 49.

38. He approved paragraphs 1 (a) and (b) of the ICRC text, for they took account of the internal structure of the armed forces: all armed-forces personnel, planning, deciding on or merely executing an attack had humanitarian responsibilities, but those responsibilities varied according to the individual's functions.

39. As his delegation had already pointed out in submitting its amendment CDDH/III/56 to article 47, it was strange that such a distinction had not been made in article 47.

40. In the English text of the initial part of paragraph 1 of article 50, the word "executing" would be preferable to "launching", in so far as it unambiguously pertained to those charged with executing an attack under the orders of their superior officers.

41. So far as concerned more particularly the beginning of paragraph 1 (a), he could not understand the intentions of those delegations which wanted to delete "shall take all reasonable steps to ensure" in ICRC proposal II. As to the rest of paragraph 1 (a), his delegation agreed with the United Kingdom proposal. It was unnecessary to express the idea of an attack that did not entail incidental losses in civilian lives and damage to civilian objects, since that idea was implicit in what was said at the end of paragraph 1 (a).

42. Paragraphs 1 (a) and (b), both concerned with proportionality, should tally with paragraph 3 of article 46.

43. The version proposed by the United Kingdom delegation for paragraph 1 (b) was preferable to that of the ICRC, for it covered cases where an attack was decided on and executed by the same persons and where the higher military authorities were better able to judge the military character of an objective and, thence, to take the initiative of cancelling an attack.

44. The addition proposed by the United Kingdom to paragraph 1 (c) improved the ICRC text.

45. It followed inevitably from what he had said that the Netherlands delegation could not support amendments CDDH/III/10 and CDDH/III/13 and Add.1 submitted respectively by Romania and by Finland and Sweden.

46. Finally, he believed that the idea which seemed to be expressed in paragraph 3 - which, incidentally, he found difficult to understand - had already been set out, and in more appropriate terms, in paragraph 2. He would not oppose the deletion of paragraph 3.

47. Mrs. OULD DADDAH (Mauritania) said that her delegation firmly supported amendment CDDH/III/205 submitted by the representatives of the Arab Republic of Egypt and several other countries, including Mauritania.

48. For maximum effect, the provisions regarding precautions for enhanced protection of the civilian population should be drafted in clear and unambiguous terms.

49. The expression "if possible" in paragraph 1 (b) was too lax and should therefore be deleted, along with the text pertaining to proportionality, which nullified paragraph 1 and deprived the civilian population of all effective protection.
50. In paragraph 1 (c), her delegation recommended the addition of the words "by effective means and within a reasonable time".
51. Mr. CASTREN (Finland), further to his earlier statement, expressed his preference for ICRC proposal I for paragraph 1 (a), since it afforded the civilian population better protection. At the same time, he recognized that - in contrast to "shall take all reasonable steps to ensure" (proposal II) - the expression "shall ensure" might create practical difficulties in certain cases.
52. Some of the amendments submitted by the other delegations were editorial in nature and could be sent direct to the Working Group.
53. In some respects, the amendments of the German Democratic Republic (CDDH/III/83), Ghana (CDDH/III/28) and Romania (CDDH/III/10) to paragraphs 1 (a) and (b) were somewhat unrealistic, for they did not take account of incidental losses and damage which could occur even if all the necessary precautions had been taken.
54. Moreover, the version proposed by Romania for paragraph 1 (a) contained again a definition of military objectives which duplicated article 47. The Romanian version for paragraph 1 (c) was unacceptable, for advance warning by effective means was not always feasible. The ICRC version was much more flexible and more in line with Article 26 of The Hague Regulations of 1907.
55. Nor could his delegation support the amendment submitted for paragraph 1 (b) by the Republic of Viet-Nam (CDDH/III/3), for it provided even less protection for the civilian population than did the original text.
56. The Canadian amendment for paragraph 3 (CDDH/III/79) would make the ICRC text too vague.
57. As against that, his delegation approved the German Democratic Republic's amendment for paragraph 1 (c).
58. Amendment CDDH/III/205 tended to modify paragraph 1 (b) on the lines advocated by his delegation, but he had doubts regarding the other changes suggested.

59. Turning to the United Kingdom amendment (CDDH/III/207), he said his delegation understood the concern underlying the proposal for paragraph 1 (a). It accepted the suggestion regarding paragraph 1 (c), but rejected that for paragraph 1 (b), which ran counter to the Finnish amendment of Finland and Sweden (CDDH/III/13 and Add.1). His delegation also rejected the suggestion for paragraph 2, which greatly weakened the original text.

60. Mr. GENOT (Belgium) drew attention to the complexity of the subject matter of article 50. The Highway Code was much more detailed than the rules which the Conference was trying to elaborate. At most, reference might be made to civil law, which distinguished between obligation as to means, simply requiring that everything possible should be done to carry out the obligation, and obligation as to result, requiring a specific result that could be made more relative only by certain strict general principles of law, such as force majeure.

61. It was the obligation as to means that was applicable in the case of precautionary measures. His delegation would therefore support any amendments which were judiciously drafted along those lines; from that point of view, the United Kingdom amendment offered interesting possibilities which deserved to be gone into by the Working Group.

62. Mr. JOVANOVIĆ (Yugoslavia) considered that the ICRC text constituted an acceptable basis, which could nevertheless be improved by the amendments of Finland and Sweden (CDDH/III/13 and Add.1) and of Brazil (CDDH/III/24).

63. The amendments of Romania (CDDH/III/10) and of the German Democratic Republic (CDDH/III/83) deserved careful study by the Working Group.

64. His delegation supported application of the principle of proportionality as expressed in proposal I for paragraph 1 (a) of article 50.

65. Mr. BLIX (Sweden) said that he found the amendments submitted by Romania (CDDH/III/10) and the German Democratic Republic (CDDH/III/83) relating to paragraph 1 of article 50 limited in scope. He also would prefer them to concord with articles 48 and 49.

66. The Ghanaian amendment (CDDH/III/28) went too far in inserting the word "hardship" in paragraph 1 (b).



67. The amendment submitted by the Arab Republic of Egypt and seven other delegations (CDDH/III/205) did not mention the principle of proportionality, useful though it was if carefully formulated.

68. He was surprised at the statement by the ICRC representative that it was more important to incorporate the principle of proportionality in article 50 than in article 46. In his view, the wording of article 50 was preferable to that of article 46, which did not mention the "damage" that the civilian population might suffer. It would be useful to see whether the principle of proportionality had to be mentioned in article 46 or whether it would be sufficient to introduce it in article 50.

69. As to the United Kingdom amendment (CDDH/III/207), he recalled the comparison drawn between the risk of accidents to which civilian lives and property were exposed as a result of hostilities and that caused by motor traffic in peacetime, the vital conclusion being that people must travel on the right side of the road. He could accept the text proposed by the United Kingdom for article 50, paragraph 1 (b). In the case of paragraph 1 (a), it did not seem necessary to speak of "those who plan or decide upon ..."; all that was needed was to indicate that the objective or objectives to be attacked must be identified according to article 47. He would like the expression "in the immediate vicinity", used in paragraph 2, to appear also in paragraph 1 (b).

70. Mr. MAHONY (Australia) said that he had explained his delegation's position when introducing his amendment (CDDH/III/203/Rev.1).

71. After considering the other proposed amendments to article 50, he felt that a few brief comments were necessary.

72. The Romanian amendment (CDDH/III/10) proposed a new wording for paragraph 1 (a). The obligations laid down in article 50 could not be imposed solely on those planning or deciding on an attack. He could not accept the Romanian proposal unless the principle of proportionality was clearly and specifically mentioned in other articles of Protocol I.

73. He found the amendment of the German Democratic Republic (CDDH/III/83) unacceptable since it laid down absolute requirements which took no account of the principle of proportionality.

74. Nor could he agree to the amendments submitted by Finland and Sweden (CDDH/III/13 and Add.1) and Brazil (CDDH/III/24), which suggested the deletion of the words "if possible".

75. The amendment submitted by the Arab Republic of Egypt and seven other co-sponsors (CDDH/III/205) was unacceptable. The amendment of Ghana (CDDH/III/28), introducing the term "hardship", was interesting but he could not support it unless that word appeared in some other provision of the Protocol. Deletion of the words "disproportionate to the direct and substantial advantage anticipated" and their replacement by the words "caused thereby" would not improve the ICRC text.

76. His delegation could not support the amendment of the Republic of Viet-Nam (CDDH/III/3) to paragraph 1 (b). The text would only be weakened if the words "cancel or suspend" were replaced by the words "endeavour to avoid".

77. He thought that the United Kingdom amendment (CDDH/III/207) was acceptable and expressed the same ideas as the Australian amendment; he had no objection to the Canadian amendment (CDDH/III/79), which tended to simplify and clarify the text.

78. Mr. NGUYEN VAN HUONG (Democratic Republic of Viet-Nam) said he had two comments to make on article 50 of draft Protocol I.

79. The first related to the words "military operations", which seemed to apply to military operations conducted by aggressive imperialism as well as to those conducted by its victim in exercising the right of self-defence. In positive international law, all acts of war on the part of aggressive imperialism which threatened either the lives or the property of the victim of the aggression were prohibited and should be punished like ordinary crimes.

80. If, however, the first sentence of paragraph 1 of article 50, was adopted, the new legislation would allow aggressive imperialism to conduct military operations against its victim. His delegation would like to see different regulations laid down for the acts of war of aggressive imperialism and for those of its victim. Nevertheless, he shared the view of several representatives who had asserted that all victims of acts of war finding themselves on the territory of one or the other of the Parties to the conflict should be given equal protection.

81. His second comment concerned the principle of proportionality. His delegation's point of view was clearly explained in the amendments proposed in document CDDH/41. The advocates of the principle of proportionality had spoken of military realities and of acceptable risks, and had maintained that the principle would serve to limit the risks to the civilian population. The United States delegation had even stated at the first session of the Conference that the rule of proportion was based on existing international law, and that it was important to incorporate and interpret it in article 46. He would like to know what documents in positive international law had provided any foundation for such an assertion. Other speakers, however, had pointed out that the principle of proportionality could open the door to abuses, and the representative of Hungary had even inquired whether it was necessary to introduce such an ambiguous rule into the Protocol.

82. His delegation believed that the principle was a dangerous one. He wondered what criteria could be used to determine whether a direct or substantial military advantage existed. The ICRC text made no comment on the subject.

83. Mr. HERCZEGH (Hungary) said he thought article 50 stated not a principle, but a special and very important rule with respect to measures for protecting the civilian population and civilian objects.

84. His delegation supported the amendments submitted by Romania (CDDH/III/10), Ghana (CDDH/III/28) and the Arab Republic of Egypt and its co-sponsors (CDDH/III/205). It was, however, the proposal submitted by the German Democratic Republic (CDDH/III/83) which, after detailed study, seemed to him best to reflect his delegation's point of view. He therefore supported that proposal, which would present no difficulties of interpretation.

85. Mr. REED (United States of America) noted that in dealing with article 50 the Committee was faced with the fact that military objectives, the civilian population and civilian objects were in many cases closely linked or interspersed. Because of that fact, if the military were to take precautions to provide protection to civilians and civilian objects, it was important that military forces be so instructed. Thus, the principle of proportionality was of crucial importance in instructing military personnel to evaluate possible losses prior to attack. The language of article 50 regarding military objectives should be in the same terms, and be compatible with article 47.

86. The amendment submitted by the German Democratic Republic (CDDH/III/83) had introduced a new term "objects of a civilian character". He questioned whether that term was the same as "civilian objects" and said that he would have preferred article 50 to use the same terms as article 47.

87. For paragraph 1 (a), his delegation preferred ICRC proposal II.

88. He noted with surprise that some delegations had requested the deletion of the words "if possible" in paragraph 1 (b). He viewed the obligation that an act be performed "if possible" as the highest degree of obligation and that without those words some legal system would hold that the law required only that which was reasonable in the circumstances.

89. He was in favour of the amendments submitted by the Australian (CDDH/III/203) and the United Kingdom (CDDH/III/207) delegations.

90. The Conference's task was to ensure maximum protection for the civilian population and civilian objects, whether the latter were in the hands of the aggressor or in those of the party defending its own territory.

91. As to the principle of proportionality, the aim was to draft a rule which was in his view already established by custom and in practice. Custom was one of the most important sources of international law and it was provided for in the Statute of the International Court of Justice. The rule already existed, and it must be explicitly codified in the documents designed to ensure the protection of the civilian population and civilian objects.

92. Mr. MENCER (Czechoslovakia) said his delegation was ready to accept the ICRC text. Its purpose was to strike a balance between two opposing notions; on the one hand, the principle of proportionality, and on the other hand, that of maximum protection of the civilian population and civilian objects. In the ICRC text, however, too much emphasis was placed on the possibility of invoking military advantage as a reason, for that would tend to justify or condone, attacks connected with some supposed military advantage and might, as it were, open the door to abuses.

93. He supported the amendments submitted by Romania (CDDH/III/10), the German Democratic Republic (CDDH/III/83) and the Arab Republic of Egypt and its seven co-sponsors (CDDH/III/205); as well as those

by Finland and Sweden (CDDH/III/13 and Add.1) and Brazil (CDDH/III/24), which reinforced the protection to be given to the civilian population and laid stress on the necessary precautions to be taken in case of attack.

94. Mr. EL GHONEMY (Arab Republic of Egypt) said he shared the point of view of the United States representative, who had declared that no one could be expected to do the impossible. The expression "if possible" had a subjective connotation, however, which might open the door to abuses.

95. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that article 50 was important because it applied during hostilities.

96. The task entrusted to the Conference called for the drafting of provisions of draft Protocol I reflecting the principle of the protection of the civilian population and of civilian objects. Texts that were not acceptable to all the Parties could not be adopted.

97. The ICRC text could be regarded as an excellent working basis and represented a compromise.

98. In the amendments proposed, two tendencies were noticeable: some of them provided a means of improving and clarifying the ICRC text, while others strayed from the basis of compromise. The Australian amendment (CDDH/III/203/Rev.1) could improve the ICRC text. Those of the Arab Republic of Egypt and its seven co-sponsors (CDDH/III/205) and of the United Kingdom (CDDH/III/207) deserved careful study.

99. Proposals I and II relating to paragraph 1 (a) of the text proposed by the ICRC were judicious; but the preference of the USSR delegation went to proposal I which offered better possibilities of implementation.

The meeting rose at 12.30 p.m.



SUMMARY RECORD OF THE TWENTY-SECOND MEETING

held on Tuesday, 18 February 1975, at 10.30 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol II

Article 24 - Basic rules (CDDH/1, CDDH/56; CDDH/III/23, CDDH/III/106)

1. Mr. MIRIMANOFF-CHILIKINE (International Committee of the Red Cross) explained that in order to present a simple, concise text, the ICRC had reproduced in article 24 the general rule that it was the duty of combatants to be diligent. Although the various regulations were not specifically mentioned, that did not mean that the parties were free not to apply them. The ICRC considered that it was for the parties themselves to take the necessary legislative and statutory steps to ensure the application of the general principle. The same applied to the whole of draft Protocol II.
  
2. Mr. REED (United States of America) said that, so far as paragraph 2 of article 24 was concerned, his delegation took the view that maximum humanitarian treatment should be ensured for all concerned, with minimum infringement of the sovereignty of whatever country might be the scene of a non-international conflict. His delegation had therefore proposed (CDDH/III/23) the deletion of the words "when conducting military operations" in paragraph 2 of article 24 and the redrafting of the paragraph to read: "The Parties to the conflict shall take constant care ...". The protection of the civilian population and of civilians and civilian objects would thus be ensured and two difficulties would be avoided: cases would not arise in which activities regarded as "military operations" by one of two parties to a non-international conflict were not so regarded by the other party; and it would obviate the risk that a Government in power, by designating the activities of armed movements or revolutionary forces as "military operations", might imply some measure of recognition of such movements or forces.
  
3. Once that amendment was made, the second sentence of paragraph 2 would become unnecessary and should be deleted.

4. Mr. CASTREN (Finland) said that the Finnish amendment (CDDH/III/106) proposing the deletion of paragraph 2, was linked to another amendment submitted by his country (CDDH/III/107), proposing the addition of a new article: "Precautions in attack". That article would be article 28 ter, since articles 28 and 28 bis would consist of the Australian amendment (CDDH/III/55).

5. Both Finnish amendments were based on humanitarian considerations which his delegation did not think were incompatible with military requirements. Amendment CDDH/III/107 proposed the addition of a new article to draft Protocol II reproducing the wording of article 50 of draft Protocol I entitled "Precautions in attack", but deleting the words "if possible" in paragraph 1 (b), which were too ambiguous. If accepted, that amendment would entail the deletion of paragraph 2 of article 24 of draft Protocol II.

6. The CHAIRMAN said that, since no other representative had asked to speak on the subject, he would refer both the amendments to the Working Group.

It was so agreed.

#### Draft Protocol I

Article 51 - Precautions against the effects of attacks  
(CDDH/1, CDDH/56; CDDH/III/10, CDDH/III/79, CDDH/III/204,  
CDDH/III/206, CDDH/III/208)

7. Mr. MIRIMANOFF-CHILIKINE (International Committee of the Red Cross) said that, where international conflicts were concerned, forcible transfers of population were already prohibited under the fourth Geneva Convention of 1949, Article 49. That provision could be retained in the draft Protocol. It would seem dangerous, however, to do no more than refer to the regulation in force, for it might then be concluded that other regulations in the fourth Convention which were not specifically mentioned would not be applicable. The ICRC took the view that, where non-international conflicts were concerned, the prohibition relating to forcible transfers of population should come under draft Protocol II, article 29. That, however, was for Committee I to decide.

8. Mr. CRETU (Romania), introducing amendment CDDH/III/10, said that the words "to the maximum extent feasible" were somewhat ambiguous and should be replaced by the insertion of the word "all" after the word "take".

9. Mr. WOLFE (Canada), introducing amendment CDDH/III/79, said that the use of the word "control" would impose obligations on the parties which would not necessarily be implied by the use of the word "authority". It referred to the de facto as opposed to the de jure situation.



10. His delegation withdrew the other proposals in document CDDH/III/79, since it had agreed to submit amendment CDDH/III/208 with the Irish delegation. The ICRC had tried, in its text, to avoid imposing absolute obligations and had used different expressions for that purpose, namely, "to the maximum extent feasible" (paragraph 1) and "shall endeavour" (paragraph 2). It would be preferable to show the identical nature of the two types of obligation by using the expression "to the maximum extent feasible" in paragraph 2 as well. That would require a slight redrafting of the text.

11. Mr. MAHONY (Australia) said that amendment CDDH/III/204 was intended to specify the obligations incumbent on the parties to the conflict towards the civilian population, individual civilians and civilian objects under their authority. The new text supplemented paragraph 3 of article 50.

12. Mr. EL GHONEMY (Arab Republic of Egypt) said that the sponsors of amendment CDDH/III/206 were anxious to give article 51 of draft Protocol I more coherence and internal logic from the legal point of view. The expression "shall, to the maximum extent feasible, take" was used in paragraph 1 of that article, whereas paragraph 2 used the words "shall endeavour". There was a lack of logic there which was not consonant with the hopes of those who espoused the humanitarian cause.

13. Furthermore, paragraph 2 referred to "densely populated" areas. The sponsors of that text had undoubtedly been influenced by the fact that the population of their country was generally concentrated in large urban areas, but that was not the case in developing countries, where the greater part of the population lived in small villages. The word "densely", for that matter, did not appear in a similar expression in article 46, which dealt with the protection of the civilian population.

14. The sponsors of amendment CDDH/II/206 were also proposing that the word "authority" in paragraph 1 should be replaced by the word "control". The Canadian representative had eloquently and ably explained the reasons that had prompted his delegation to submit amendment CDDH/III/79, directed towards the same end. He himself considered that "authority" was not the correct word to use in connexion with the activities of the occupying Power.

15. The CHAIRMAN suggested that all the amendments which had just been submitted should be sent to the Working Group.

It was so agreed.

The meeting rose at 10.50 a.m.



SUMMARY RECORD OF THE TWENTY-THIRD MEETING

held on Wednesday, 19 February 1975, at 10.20 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

ORGANIZATION OF WORK

1. The CHAIRMAN said that it had been suggested that a Working Group, consisting of members of Committees II and III, should be set up to reach agreement on certain military terms, such as "combat zone", which appeared in articles 15, 27, 52, 53 and 55 of draft Protocol I and in articles 8, 13, 32 and others in draft Protocol II. Committee II had already appointed military experts from the delegations of Sweden, the Ukrainian Soviet Socialist Republic and Mali. He suggested that Committee III should appoint corresponding military experts from the delegations of Brazil, the Libyan Arab Republic and New Zealand, whose names would be announced later.

It was so agreed.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (continued)

Draft Protocol I

Article 52 - Non-defended localities (CDDH/1, CDDH/56; CDDH/III/11, CDDH/III/61, CDDH/III/70, CDDH/III/96, CDDH/III/211, CDDH/III/218, CDDH/III/219)

Article 53 - Neutralized localities (CDDH/1, CDDH/56; CDDH/III/61, CDDH/III/71, CDDH/III/84, CDDH/III/85, CDDH/III/97, CDDH/III/212, CDDH/III/218)

2. The CHAIRMAN invited the representative of the International Committee of the Red Cross to introduce articles 52 and 53.

3. Mr. MIRIMANOFF-CHILIKINE (International Committee of the Red Cross) said that Chapter V of Part IV, Section I, had two purposes, first, to give absolute immunity to the civilian population against accidental or indirect effects of attacks directed at military objectives and, secondly, to preserve the localities as such for the sake of their social, economic, cultural or scientific value.

4. The first purpose was a fundamental one because, as had been seen in the case of civilian objects, some of them, according to their purpose or use, could lose their civilian character and be transformed into military objectives. For example, such objects as ports, railway stations, fuel depots and so forth, which in certain clearly defined situations might be temporarily considered to be military objectives as soon as they made an effective contribution to the military action, could not be attacked in localities enjoying a special status.

5. There were two reasons, arising from the experience gained in present-day armed conflicts, why Part IV, Section I, Chapter V of draft Protocol I was limited to localities - cities, towns, villages, and so forth - and did not include zones. First, the ICRC feared that the establishment of zones outside localities might lead to the forced transfer of the civilian population and to the establishment of assembly camps which might be prejudicial to the conditions of civilian life. Secondly, the establishment of zones outside localities entailed difficulties of organization, reception, nutrition, communication and financing which would be virtually insurmountable during an armed conflict, and even in peacetime: that explained why, since 1948, the cases where neutralized zones had been established in accordance with Article 15 of the fourth Geneva Convention of 1949 could be counted on the fingers of one hand.

6. Chapter V also brought out the distinction between the Geneva law and that of The Hague, since article 52 on non-defended localities brought up to date and made more specific Article 25 of The Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land, while article 53 on neutralized localities extended Article 15 of the fourth Geneva Convention of 1949.

7. There were four main differences between the two categories of localities with regard to the establishment of their respective status, control over them, their marking and the conditions which they had to fulfil. Under the customary international law codified at The Hague, non-defended localities acquired that status as soon as the de facto situation of "non-defence" came into being. That de facto situation was now described in article 52, paragraphs 2 and 5. Accordingly, any express agreement between the parties to clarify or strengthen that status was merely declaratory. The very opposite was the case of article 53, where agreement of the parties was of a constitutive character and in itself conferred protection on neutralized localities. In view of the stricter conditions which had to be met by neutralized

localities, marking and control had seemed indispensable; on the other hand, in the case of non-defended localities which the parties would have to recognize quickly and in the heat of conflict, marking and control should remain optional, for a requirement to the contrary would serve as an obstacle to their practical establishment.

8. Lastly, neutralized localities should fulfil the further condition of not permitting any activities connected with the military effort. That was not necessary for non-defended localities, since they were generally intended to pass from the control of one Party to the conflict to that of another, so that the latter could subsequently discontinue those activities or use them for its own ends.

9. If any priority had to be established between those two types of institutions, the ICRC would be clearly in favour of non-defended localities, since they required fewer formalities and conditions and could be more easily established in the course of hostilities.

10. He wished to make two observations concerning article 52. Although paragraph 2 of that article set out a principle, it might have been possible to provide for an exception, at the end of paragraph 4, under which the military commander of a locality under military control could nevertheless declare it to be non-defended, provided that he abstained from any idea of hostility as soon as his adversary received knowledge of his declaration and had withdrawn from the locality his able-bodied troops, weapons and mobile military equipment as soon as possible. In the latter case the agreement between the parties would not depend on an existing de facto situation, but rather on a future one. For that reason, an express agreement of a constitutive character would be necessary. With regard to paragraph 3 of article 52, the idea on which it was based seemed to be essential for preventing any ambiguities about the legal status of a locality. Of course, in the opinion of the ICRC, the Party to the conflict which was obliged to recognize the status of a non-defended locality could not behave in an arbitrary manner, but would not be justified in refusing to acknowledge the status unless it had reasons to believe that the required conditions had not been met. Paragraph 3 might be drafted in greater detail by stating that "The Party to the conflict to which the declaration of non-defence has been addressed shall be obliged to abide by it, unless it has serious doubts concerning the character of non-defence of the locality or concerning the intentions of the military commander who is in control of it; in such cases it shall state its refusal in express terms and shall give reasons for doing so".

11. No matter which text was adopted, it was above all necessary to safeguard the law. The legal situation in a locality must be clearly established, especially for civilian persons in the immediate proximity of military objectives, who had to know whether or not they should keep out of the way or take shelter. In those doubtful cases, it was conceivable that third parties such as Protecting Powers, substitutes or combined military control commissions might help to establish the status. In the case of a Protecting Power, the role would be a fairly new one and it would have to be determined which Protecting Power would be competent, that designated by the applicant party or that of the party applied to. In his opinion, the competent Protecting Power should be the one designated by the Party to the conflict under whose sovereignty the locality had been at the time of the opening of hostilities. He hoped that that question would be clarified by Committee I, which was dealing with the subject of the Protecting Power, although it would certainly be helpful to the latter if Committee III also held a preliminary exchange of views.

12. In conclusion, the ICRC had great hopes for those drafts, especially article 52, as supplementary articles, since the localities in question would have the inestimable advantage of being exempt during any attack, so that their inhabitants would not be threatened by the incidental or indirect risks that had been referred to in connexion with precautionary measures. Although the provisions did not appear in draft Protocol II, there was nothing to prevent parties to a non-international conflict from bringing them into force under article 38 of draft Protocol II, on special agreements.

13. Mr. WOLFE (Canada) said that his delegation agreed in principle with article 52, but was concerned by the fact that its provisions, which purported to apply to the combat zone, were not realistic, since it was impossible to control the ebb and flow of battle. It was difficult to imagine how a commander could resist the temptation to make use of the vast network of communications in an urban centre and the many other facilities which he needed to defend his position.

14. During the Second World War, two major cities, Paris and Rome, had been temporarily located in the combat zone, where the military commanders had chosen not to defend them. In those cases, the decision had been made while the commanders were still in occupation of the cities. The purpose of his delegation's amendment to article 52 (CDDH/III/219) was to provide a system by which a commander who was still in occupation of the locality could make a declaration that he did not intend to defend it. The system would also permit the negotiation of an orderly withdrawal of the defending forces and the prohibition of attacks in the locality while such negotiations were taking place.

15. Mr. HAMID (Pakistan) said that article 52, paragraph 3, of the ICRC draft made the establishment of "non-defended localities" dependent on the agreement of all the Parties to the conflict, with the result that a locality declared as non-defended by one party could be attacked if the other party or parties to the conflict refused to accept such a declaration. Since such a situation might have disastrous results, his delegation had introduced an amendment (CDDH/III/11) which required that the establishment of "non-defended localities" should not be made dependent on the agreement of all the Parties to the conflict. It suggested that a unilateral declaration by one party of an area as a "non-defended locality" should be sufficient, provided it fulfilled the conditions set out in paragraph 2 of that article. It was further suggested that the fulfilment of those conditions should be confirmed by the Protecting Power or an impartial international humanitarian organization.

16. Although that amendment might impose an additional burden on the Protecting Power, it nevertheless minimized the dangers that were inherent in the refusal by one Party to the conflict to accept a locality declared as non-defended by the other.

17. In its existing form, the ICRC draft did not cover many wartime situations. For example, what would be the result if a Party to the conflict refused to accept a locality declared by the other as non-defended and attacked it, thereby causing intensive damage to civilian life and property? And it might also happen that one of the Parties to the conflict declared as a "non-defended locality" an area which was a genuine military objective, in order to prevent any attack on it by the other party. While paragraph 1 of article 52 imposed an absolute prohibition against attacks on non-defended localities, it was ultimately left to the parties to decide whether or not a locality was non-defended. That introduced a subjective factor which might prove fatal in the event of disagreement. His delegation's amendment attempted to eliminate that factor by imposing on the Protecting Power or its substitute the obligation to verify the true character of the locality. Of course, that would happen only in the event of a dispute, since if the parties agreed, it would logically follow that no verification would be required.

18. His delegation's amendment to paragraph 2 of article 52 was a minor drafting change made necessary by the rewording of paragraph 3. His delegation considered that the rules in paragraph 2 and amended in paragraph 3 applied to the non-defended localities, and that the word "this" after the words "observance of" in the first line should therefore be replaced by the word "the".

19. Finally, his delegation was prepared to co-operate with all other delegations which had proposed similar amendments, with a view to reaching agreement on a compromise text.

20. Mr. HERNANDEZ (Uruguay) said that the general purpose of his delegation's amendment to article 52 (CDDH/III/61) was to give the article a very definite scope by changing the title to "Protected localities". In other words, his delegation was primarily interested in preventing attacks of any kind against any inhabited locality which was of special importance or formed part of the heritage of mankind.

21. With regard to the method of identifying a "protected locality", his delegation had reached the conclusion that the best solution was for the parties to draw up an agreement whereby protected localities would be made subject to certain fundamental demarcations and controls. The parties would, of course, undertake to mark those localities accurately in accordance with the provisions of the Geneva Conventions and the draft Protocols. His delegation had also provided for the possibility that a party might propose that a locality should be given "protected status" without having obtained the agreement of the other party, provided that once the proposal had been made, the other party had not replied to it within a reasonable time, the duration of which could be determined at the current Conference.

22. His delegation had also adopted the fundamental idea set out in paragraph 2 of the ICRC draft, since that procedure guaranteed that the locality would not be used for military purposes. It had preferred, however, not to limit the protection of such localities to those near or in a zone where armed forces were in contact. When speaking of armed forces "in contact", the intention was undoubtedly to refer to what was called "the front" or "line of contact", but that interpretation seemed to be somewhat limiting and dependent on a specific geographical location. It therefore thought that the concept and the scope of its application should be broader. It should also be borne in mind that the line of contact or the front might vary at the end of the day, so that within a short time a locality might lose its "protected" status merely as the result of a change in its geographical boundaries.

23. Mr. STARLING (Brazil), referring to paragraph 5 of article 52, said that his delegation had proposed the deletion of the word "civilian" (CDDH/III/70) because the main purpose of military police forces, like that of civilian police forces, was to maintain law and order. In some situations, their presence might be necessary in the localities in question, especially for



protecting the wounded and sick military personnel whose presence would be permitted in such localities. Moreover, in some States police forces constituted militarized forces, particularly in time of war. It would therefore be difficult and even impossible for those States to maintain other police forces in the localities concerned, simply because such forces would not be available.

24. With regard to paragraph 7, his delegation proposed the deletion of the words "or when it is occupied militarily", since it considered that if a locality was to keep its status as a non-defended locality, it must fulfil the conditions in paragraph 2 of article 52, including the prohibition of the presence in such localities of armed forces and all other combatants, as well as of mobile weapons and mobile military equipment.

25. The expression "military occupation" as used in the international law relating to armed conflicts had a broader meaning, because it signified placing a territory under the military authority of a hostile State. At least, that was the sense in which the expression was used in Section III of The Hague Regulations of 1907. Accordingly, if a locality continued to fulfil the conditions prescribed in paragraph 2 of article 52 after becoming a part of the general area occupied by the hostile army, it should be regarded as militarily occupied, without losing its status as a non-defended locality.

26. Under Section III of The Hague Regulations, the status of a militarily occupied locality was specifically related to the fact that the locality was actually placed under the authority of the hostile army, which would have in relation to it all the rights and duties prescribed in that Section.

27. In the case of a non-defended locality which was situated in a zone where armed forces were in contact, it could reasonably be expected that such a locality might be militarily occupied without necessarily violating the provisions of article 52, paragraph 2. In order to avoid misunderstandings, therefore, his delegation thought that the best solution would be to delete the phrase in question, since that would in no way modify the conditions laid down in article 52, paragraph 2, for the maintenance of a non-defended status.

28. Turning to article 53, paragraphs 4 and 6, he said that the basic arguments for his delegation's amendment (CDDH/III/71) were the same as those pointed out in relation to article 52, paragraphs 5 and 7. The proposed rewording of paragraph 6 was intended to make the draft text proposed by the ICRC more

precise without changing its purpose, which his delegation supported. The intention was to avoid the expression "military occupation", which, according to Section III of The Hague Regulations, had a specific meaning different from that of the ICRC text.

29. In his delegation's opinion, the purpose of paragraph 6 was to provide an absolute guarantee of respect for the status of the neutralized locality if the fighting came close to it. For that reason, none of the Parties to the conflict could unilaterally repeal its status or use the locality for military purposes.

30. If a neutralized locality became part of the general area occupied by the hostile army, its military occupation in the sense in which that expression was used in Section III of The Hague Regulations was unavoidable, particularly since the occupying Power would have certain duties in relation to the locality, such as that of maintaining the necessary conditions for life in it.

31. Mr. BIERZANEK (Poland) said that his delegation supported the underlying ideas of article 52 and particularly appreciated the provisions of paragraphs 2 and 5. Introducing the Polish proposal to delete paragraph 3 (CDDH/III/96), he said that article 25 of The Hague Regulations prohibited "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended" and that it had been a long-standing practice to declare certain historic cities as open cities which would not be defended. In his delegation's view, the prohibition to attack non-defended cities was absolute and could not depend on the consent of the adverse Party. Although acceptance of the aforesaid declarations was often notified by the adverse Party, such acceptance was a mere formality and there could be no refusal when the conditions of paragraph 2 were met. A declaration made when those conditions were not met would be covered by article 35 on prohibition of perfidy. It would be difficult, however, to allow of a situation in which the adverse Party refused immunity in advance on the assumption that the conditions of paragraph 2 might not be met. Bad faith should never be presumed.

32. He had listened with interest to the comments of the ICRC representative on the distinction that might be made between different cases: such distinctions were not covered by the text of article 52, which required substantial rewording.

33. His delegation's amendment to article 53 (CDDH/III/97), providing not only for the protection of neutralized localities but also of neutralized zones, had been made in order to bring the article into line with Article 15 of the fourth Geneva Convention of 1949 and cover geographical areas which might be composed of scattered dwellings or a number of separate villages. His delegation would be prepared to collaborate with other delegations which had submitted amendments on the subject.

34. Mr. DIAZ DE AGUILAR ELIZAGA (Spain), introducing his delegation's amendments to articles 52 and 53 (CDDH/III/211 and CDDH/III/212), said that it was proposed in each case to replace the word "localities" by the word "zones", which was less restrictive in that it could relate to broad areas composed of a number of localities. The amended wording would make for more precise forms of guarantee and supervision, which should be based not merely on presumption, but on an explicit declaration.

35. Mr. JOSEPHI (Federal Republic of Germany), introducing the amendments in document CDDH/III/218, said that his delegation strongly supported the ICRC's idea that the existing humanitarian rules relating to non-defended and neutralized localities should be reaffirmed and developed. Further development of such specific rules would greatly help to protect the civilian population and wounded or sick combatants and would also serve to protect the economic and cultural values, represented by the localities themselves.

36. Article 25 of the annex to The Hague Convention No. IV of 1907, protected undefended towns and other localities per se against bombardment or infantry assault and Articles 14 and 15 of the fourth Geneva Convention of 1949 contained provisions for the special protection of hospital and safety zones and of neutralized zones by mutual agreement.

37. The main purpose of article 52 of the ICRC text was to protect non-defended localities near or in a zone where armed forces were in contact against tactical bombardment. On the other hand, neutralized zones outside a zone where armed forces were in contact were to be established only by mutual agreement between the Parties to the conflict, for protection against strategic bombing or shelling. His delegation supported the ICRC view that non-defended localities were already protected by the de facto situation, that such protection did not depend on mutual agreement and that a unilateral declaration was unnecessary for establishing the status of a non-defended locality, although it would be useful to facilitate humanitarian protection. It would be difficult, however, to distinguish clearly between situations

inside, near or outside a zone where armed forces were in contact. The existing text was certainly an improvement on the first draft, which referred to "a zone of military operations". At the second session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, the representatives of Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary and Poland had proposed the deletion of that wording from the draft rules for non-defended as well as for neutralized localities. His delegation suggested that the distinction between situations in, near or outside contact zones should also be removed from articles 52 and 53. He supported the Uruguayan amendment (CDDH/III/61) in that respect.

38. His delegation's second substantive proposal was to include in article 52 the requirement that no activities linked to the military effort should be performed by the authorities or the civilian population. For example, a factory producing munitions in a non-defended zone some distance behind the infantry lines would remain a military objective. The amendment in question would be in the interest of the protection of civilians and civilian objects as well as in the interest of military necessity.

39. The proposal to add two sentences to the new paragraph 5 of article 52 was designed to provide, in cases where an adversary refused to accept a declaration of a non-defended locality, for the possibility of supervision by a Protecting Power or an impartial humanitarian body. The proposal was similar to the Pakistan amendment (CDDH/III/11).

40. His delegation's other proposals were largely concerned with drafting. It was proposed, in particular, to include a definition of non-defended localities.

41. Mr. FISCHER (German Democratic Republic), introducing his delegation's amendments to article 53 (CDDH/III/84 and CDDH/III/85), said that it had considered it useful to replace the restrictive term "locality" by the wider term "area". It should be possible to agree upon the status of a neutral area not only for a limited, but also for a broad area. His delegation could accept the Polish amendment (CDDH/III/97), which was based on the same idea.

42. A neutralized area might be located not only outside, but also inside a combat zone. It was proposed to amend the first sentence of paragraph 3 accordingly.

43. Mr. RONZITTI (Italy) said that his delegation supported the Brazilian proposal (CDDH/III/70) to delete the word "civilian" from paragraph 5 of article 52. The word would have great practical difficulties for some countries because of their particular domestic legislation. The Italian police forces, which were civilian in character, were concerned only with the maintenance of law and order and took no part in hostilities in case of armed conflict. They could not therefore be regarded as offensive forces within the meaning of paragraph 2. The existing wording of paragraph 5 caused his delegation some difficulty: although under Italian legislation the police forces were distinct from the army, they were described as an armed body of the State and their internal legal status would thus make it difficult for Italy to fulfil the requirements of that paragraph. On the basis of a literal interpretation of the expression "civilian police forces", a Party to a conflict might argue that those forces were not civilian and might thus refuse to consider as non-defended a locality which in fact met all the requirements of article 52, paragraph 2. To ensure immunity from attack, such a State would be obliged to evacuate its police forces from a non-defended locality - a very hard condition to fulfil without relinquishing the function of maintaining law and order, which was essential in peacetime and paramount in wartime. The retention of the word "civilian" would run counter to the spirit of article 52 which, because of its humanitarian aim, should be given the widest possible application.
44. For the same reasons, his delegation also supported the Brazilian amendment to article 53, paragraph 4 (CDDH/III/71).
45. Mr. WULFF (Sweden) said that article 52 was a new concept in international law, although it was connected with the idea of open or non-defended cities covered by The Hague Regulations annexed to The Hague Convention No. IV of 1907.
46. Non-defended localities could hardly be connected with any other form of warfare than land warfare. The amendments of Uruguay and the Federal Republic of Germany excluded the words "near or in a zone where armed forces are in contact" which appeared in paragraph 2 of the ICRC text. A non-defended locality might be declared at a late stage in the combat, when it might be practical to include only a limited area.
47. The ICRC text and the amendments of the Federal Republic of Germany (CDDH/III/218), Spain (CDDH/III/211) and Canada (CDDH/III/219), provided that the non-defended locality could be established by the declaration of one of the parties, the Uruguayan amendment (CDDH/III/61) stipulated that there should be agreement between the parties, while the ICRC text also provided

for such agreement in certain cases. If the rule were to be applied at a time when land forces were in close contact, it would be impossible to secure such agreement; accordingly, the ICRC text, providing for either a unilateral declaration or agreement, was the best solution.

48. The ICRC text provided that armed forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated from the locality and that no acts of warfare should be committed by the authorities or the population. That idea was also covered by the Spanish and Uruguayan amendments, while the amendment of the Federal Republic of Germany went somewhat further by stating that no activities linked to the military effort should be performed by the authorities or the civilian population. The broader area which the latter amendment was intended to cover might be difficult to define and his delegation would prefer a more limited scope.

49. The Canadian amendment (CDDH/III/219), providing that there need be no withdrawal before the declaration was made, might be difficult for the adverse Party to accept. Its effect would be close to that of a cease-fire.

50. According to the amendments of the Federal Republic of Germany (CDDH/III/218), Pakistan (CDDH/III/11), Spain (CDDH/III/211) and Uruguay (CDDH/III/61), the Protecting Power or any impartial humanitarian body could be responsible for supervision, while the ICRC text mentioned the Protecting Power only in relation to a particular responsibility. In some cases there might be no Protecting Power and it might be difficult to find a humanitarian body to carry out the task of supervision. His delegation therefore viewed the rule as mandatory.

51. Mr. SKELEMANI (Botswana) said that his delegation was concerned about the definition of non-defended localities and neutralized zones and considered that the armed forces and so forth mentioned in paragraph 2 of article 52 should be evacuated after and not before an area was declared a non-defended locality. Paragraph 2 was closely linked with paragraph 3, which implied an interval between the time when a locality was declared non-defended and the time when acceptance of the declaration could be assumed. His delegation considered that the period in question should be specified in paragraph 3.

52. It also supported paragraph 8 of the Uruguayan amendment (CDDH/III/61).

53. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that article 52 was one of the most important articles of draft Protocol I, the main purpose of which was to afford maximum protection to the civilian population and to civilian objects.

54. The many amendments submitted to the ICRC text deserved serious consideration. He pointed out that if no agreement was reached by the opposing parties concerning a non-defended area, there could be no guarantee that such an area would escape destruction. Accordingly, the idea of such agreement, mentioned in the ICRC text, was most important and should be accepted by the Committee.

55. His delegation supported the Uruguayan amendment (CDDH/II/61), but had certain doubts about some of the other amendments submitted. He thought that the amendment submitted by the Federal Republic of Germany (CDDH/III/218) was unrealistic, and could not support the Canadian amendment (CDDH/III/219), or that submitted by the delegation of Spain (CDDH/III/211).

56. His delegation could support the Polish amendment (CDDH/III/96) and all other amendments which would help to strengthen the protection of non-defended localities and civilian objects.

57. After endorsing the ICRC text of article 53, he said it would be inadvisable for the Committee to deal with that provision simultaneously with article 52 or to amalgamate the two articles. The ICRC text was clearly drafted. He could, however, support the amendment of the German Democratic Republic to paragraphs 1 and 3 (CDDH/III/84 and CDDH/III/85).

58. His delegation was unable to support the Spanish amendment (CDDH/III/211) because it introduced the idea of the arbitrary unilateral declaration of neutralized localities.

59. Sir David HUGHES-MORGAN (United Kingdom) observed that many of the amendments introduced during the meeting were designed to reduce the differences between articles 52 and 53 of draft Protocol I. The minimum aim of both articles was to implement effectively the general rule of prohibiting attacks on civilians and civilian objects. His delegation considered that the possibility of a declaration by a Party to a conflict might help to strengthen the prohibition. The admissibility of refusal to accept such a declaration and the circumstances of refusal were very important questions, and he hoped to hear the views of other members of the Committee on how the system of unilateral declaration, rather than agreement, would work in practice.

60. His delegation saw merit in the idea set out in the amendments submitted by the Federal Republic of Germany (CDDH/II/218) and Uruguay (CDDH/III/61) that non-defended areas should exist whether or not in or near a contact zone. Such areas might provide useful protection for the civilian population against air attack. The Canadian amendment (CDDH/III/219) rightly made the point that large cities might not fall into that category, on the other hand, the amendment of the Federal Republic of Germany might be useful in relation to smaller towns of no military or communications significance.

61. A possible solution might be to amalgamate articles 52 and 53, laying down minimum rules for the protection of the civilian population which would enter into force following a unilateral declaration. The article could refer to possible further measures of protection by agreement. The other article might be replaced by a text along the lines of the "open city" amendment suggested by the Canadian delegation, which would supplement the other measures of protection.

62. Mr. SORIANO (Philippines) said that his delegation supported the Brazilian amendments to articles 52 and 53 (CDDH/III/70 and CDDH/III/71) which suggested the deletion of the word "civilian" in paragraph 5 of article 52 and in paragraph 4 of article 53. The articles might then be considered to cover police forces which were not strictly civilian police forces. The Philippine police force was concerned only with the maintenance of peace and order and was not a military agency of the State.

63. Mr. EIDE (Norway), referring to the problems raised by the representatives of Botswana and Canada, said that the Committee would be moving towards a satisfactory and more comprehensive system if the various approaches to localities under special protection were combined. The unilateral declaration referred to in paragraph 2 of article 52 should suffice if the amendments submitted by Pakistan (CDDH/III/11) and the Federal Republic of Germany (CDDH/III/218) were adopted. He fully understood the problem raised by the Canadian representative, but thought it could be solved by adopting amendment CDDH/III/218.

64. With regard to the proposed systems of unilateral declaration and agreement, he pointed out that certain negotiations would be necessary concerning the withdrawal of armed forces. No time should be lost in entering into such negotiations, since the civilian population and civilian objects must be protected.



65. Mr. HERNANDEZ (Uruguay), introducing his delegation's amendment to article 53 (CDDH/III/61), said that the proposal to delete the article was motivated by the wish to give the concept of "protection" a much wider scope.

66. Mr. REED (United States of America) said that in general his delegation supported the ICRC text of articles 52 and 53.

67. With regard to article 52, his delegation believed that non-defended areas as defined in Article 25 of The Hague Regulations meant areas in the contact zone which could be occupied by the adverse Party without resistance or opposition, and that that was also the meaning conveyed in the ICRC draft of article 52.

68. Turning to paragraph 3 of article 52 of the ICRC draft, he said that a time-limit should be specified and suggested forty-eight hours.

69. With respect to paragraph 7 of article 52, which provided that a locality would lose its status of non-defended locality if it no longer fulfilled the conditions stipulated in paragraph 2 of the article or when it was occupied militarily, he expressed doubts as to the wisdom of the Uruguayan amendment (CDDH/III/61), forbidding the military occupation of non-defended localities: such a provision might not facilitate agreement, because the effect could be to deny strategic cover to a Party to the conflict when overrun by the enemy. Finally, the United Kingdom representative's suggestions along with those of Canada should be carefully studied.

70. The CHAIRMAN suggested that, since the Libyan representative had asked to be excused from membership of the three-member group which would meet with experts of Committee II, Mr. Sadek (Iran) should be appointed in his place.

It was so agreed.

71. Mr. BILGEBAY (Turkey) said he wished to stress the importance of preventing abuse of article 52, paragraph 5, which referred to the presence of "civilian police forces" in a non-defended locality. He suggested that the provision should be redrafted by the Working Group.

72. The CHAIRMAN announced that articles 52 and 53 would be referred to the Working Group.

The meeting rose at 12.30 p.m.



SUMMARY RECORD OF THE TWENTY-FOURTH MEETING

held on Tuesday, 25 February 1975, at 10.20 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

COMPOSITION OF JOINT WORKING GROUP

1. The CHAIRMAN suggested that Mr. Agudo Lopez (Spain) should participate in the deliberations of the Working Group composed of military experts from Committee III and jurists from Committee II, which was responsible for resolving the difficulties arising in the Spanish text in connexion with the term "military zone".

It was so agreed.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 44, paragraph 1 - Field of application (CDDH/1; CDDH/III/224, CDDH/III/227)(concluded)

Article 46 - Protection of the civilian population (CDDH/1; CDDH/III/224, CDDH/III/228)

Article 47 - General protection of civilian objects (CDDH/1; CDDH/III/229)(concluded)

Article 47 bis - Protection of cultural objects and of places of worship (CDDH/III/224, CDDH/III/230)(concluded)

Report of the Rapporteur on the work of the Working Group (CDDH/III/224)

2. The CHAIRMAN said that article 44, paragraph 1, and article 46 had already been discussed by the Working Group at the first session of the Conference. The members of the Group were to be commended for the efforts they had made to settle their differences and to draft proposals for article 47 and article 47 bis.

3. Mr. ALDRICH (United States of America), Rapporteur, pointed out that document CDDH/III/224 was in fact the report of the Rapporteur and not of the Working Group. The document outlined the work of the Group and recorded reservations which had been expressed during its sixteen meetings. Representatives should be able to express their views after the various texts had been adopted.

4. After a short procedural discussion between Mr. CRISTESCU (Romania) and Mr. ALDRICH (United States of America), Rapporteur, on the question whether the term "on land" and the whole of the second sentence of paragraph 1 of article 44 should be voted on separately, the CHAIRMAN put the two parts of the text and then the whole paragraph to the vote.

The term "on land" was adopted by 56 votes to one, with 7 abstentions. The part of the second sentence beginning with "but do not ..." and ending with "... or in the air" was adopted by 56 votes to one, with 9 abstentions.

Paragraph 1 of article 44 was adopted by 60 votes to none, with 7 abstentions.<sup>1/</sup>

5. Mr. ALDRICH (United States of America), Rapporteur, said that since article 46 was very complex, it might be preferable for the Committee to vote separately on paragraphs 1 and 2.

6. In accordance with a request by Mr. BLISHCHENKO (Union of Soviet Socialist Republics) that no vote be taken on paragraph 3 (b) until article 50 had been considered, the CHAIRMAN suggested that the introductory paragraph and paragraphs 1 and 2 should be adopted by consensus.

The introductory paragraph and paragraphs 1 and 2 of article 46 were adopted by consensus.

7. The CHAIRMAN suggested that the Committee should adopt paragraph 3 (a) of article 46.

8. Mr. ALDRICH (United States of America), Rapporteur, drew the Committee's attention to the sentence and phrases in square brackets and said he feared that it might be impossible to reach a consensus if the part of paragraph 3 (a) beginning with the words "unless the objectives ..." were retained. An attempt should therefore be made to reach a consensus by deleting that phrase, unless it was decided to vote on the two variants or to refer the text back to the Working Group, which should then submit a new proposal as soon as possible.

9. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said he thought it would be better to ask the Working Group to find a solution acceptable to all delegations.

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<sup>1/</sup> For the text of article 44 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex).

10. Mr. BRETTON (France) pointed out that the words "which are not directed at a specific military objective" in the introductory part of paragraph 3 did not appear in the French text. It was regrettable that delegations using that text should be required to take decisions under such conditions.

11. The CHAIRMAN suggested that paragraph 3 of article 46 should be referred back to the Working Group.

It was so agreed.

12. The CHAIRMAN invited the Committee to adopt paragraphs 4, 5 and 6.

13. Mr. ALDRICH (United States of America), Rapporteur, said that Committee I had not yet begun to consider the question of reprisals and that Committee III had not completed its work on that subject. It might therefore be desirable, at a suitable time and as soon as possible, to set up a Joint Working Group of the two Committees.

14. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that in his view the adoption of such a course would in no way preclude the Committee from taking an immediate decision on the article as a whole.

Paragraphs 4, 5 and 6 of article 46 were adopted by consensus.

15. The CHAIRMAN pointed out that the question of reprisals also arose in connexion with article 47, and asked whether the Committee would agree to the establishment of a Joint Working Group with Committee I.

It was so agreed.

16. Mr. ALDRICH (United States of America), Rapporteur, said that he saw no objection to taking a vote on paragraph 1 of article 47, since the only point to be decided was whether to retain or to delete the words "nor of reprisals".

Paragraph 1 of article 47, including the words "nor of reprisals", was adopted by 58 votes to 3 with 9 abstentions.

17. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that, although he had no objection to the adoption of paragraph 2 by consensus, his delegation considered that the wording of the Russian text of that paragraph should be revised by the Drafting Committee, to bring it into line with the English text.

Paragraph 2 of article 47 was adopted by consensus.

18. Mr. ALDRICH (United States of America), Rapporteur, said that paragraph 3 contained new and important provisions of international humanitarian law concerning civilian objects. The words "except in contact zones where the security of the armed forces requires a derogation from this presumption" had given rise to differences of opinion in the Working Group. Certain delegations had feared that that provision might authorize infantry in the front line to attack civilian objects located in a zone of military operations, while others had considered such an exception necessary for the safety of the soldiers.

After deletion of the words "except in contact zones where the security of the armed forces requires a derogation from this presumption" by 36 votes to 12 with 23 abstentions, paragraph 3 of article 47 was adopted by 64 votes to none with 6 abstentions. 2/

19. Mr. ALDRICH (United States of America), Rapporteur, said that, in the opinion of the Working Group, the question of the protection of cultural objects and places of worship deserved to be dealt with in a separate article. Two variants of sub-paragraph (a) were submitted to the Committee, the first reading "to commit any acts of hostility directed against / historic monuments, places of worship or works of art 7", and the second, "/ places of worship, and those historic monuments or works of art 7". The second version gave more emphasis to historical value.

20. The CHAIRMAN suggested that the Committee should vote on each variant.

21. Mr. EL GHONEMY (Arab Republic of Egypt) said that his delegation had proposed the second version so that the protection afforded under article 47 bis should extend to places of worship and historic monuments, even when they were renovated or restored. If that idea were accepted, his delegation was prepared to withdraw its amendment.

22. Mr. CARIAS (Honduras) pointed out that, in the Spanish version, the two texts meant exactly the same. Only the English text conveyed the nuance of difference between the two variants. He proposed that the Drafting Committee should examine the Spanish version; his delegation would vote on the basis of the English text.

23. The CHAIRMAN said that the Drafting Committee would take note of the Honduran representative's comments.

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2/ For the text of article 47 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)

24. Mr. BLISHCHENKO (Union of Soviet Socialist Republics); Mr. GENOT (Belgium) and Mr. DIXIT (India) supported the Egyptian representative's interpretation with regard to the protection of monuments and places of worship, whether restored or not.

25. The CHAIRMAN said that, in those circumstances, the second variant in sub-paragraph (a) of article 47 bis could be deleted.

Article 47 bis was adopted by consensus, sub-paragraph (a) reading as follows: "to commit any acts of hostility directed against historic monuments, places of worship, or works of art, which constitute the cultural heritage of peoples;".<sup>3/</sup>

26. Mr. CRISTESCU (Romania) said that the words "on land", like the last phrase of the second sentence of article 44, paragraph 1, limited the scope of civilian protection. Accordingly, the titles of the Section and of draft Protocol I should be amended to show that they pertained only to the protection of the civilian population on land. The most important principle laid down by the General Assembly of the United Nations in its resolution 2675 (XXV) on "Basic principles for the protection of civilian populations in armed conflicts" was that human rights must always be respected on a basis of equality. Acceptance of the existing wording of article 44, paragraph 1, would introduce unfair discrimination in the protection of the civilian population, for the deciding factor would be its location at a given moment. The aim was to provide increased protection for the civilian population, not to facilitate military operations or to uphold the rights of belligerents in their actions against civilian populations.

27. His delegation understood paragraph 4 of article 46 to forbid any kind of reprisals, by whatever means. That interpretation was reinforced by article 47, paragraph 1, which prohibited reprisals against "civilian objects". It was inconceivable that the civilian population should enjoy less protection than civilian objects.

28. Mr. SCHUTTE (Netherlands) pointed out that article 47 bis began with the words "Without prejudice to the provisions of The Hague Convention ... of 14 May 1954 ...", and stressed that adoption of the article should not be construed as preventing countries which had not yet acceded to The Hague Convention from doing so.

29. States might imagine that, by signing and ratifying the Protocol under discussion, they would be excused from becoming High Contracting Parties to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, of 14 May 1954. The latter, a well-balanced document, apart from

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<sup>3/</sup> For the text of article 47 bis, as adopted, see the report of Committee III (CDDH/215/Rev.1, annex).

affording special protection to all cultural objects, also took into account the special responsibilities of States possessing in their territories cultural riches and historic monuments constituting the cultural heritage of an entire nation and even of mankind as a whole. Those States had an obligation to take adequate measures for protection and preservation, and The Hague Convention embodied an entire system of precautionary measures which the High Contracting Parties were bound to take in time of peace.

30. He urged all States which had not yet ratified or acceded to The Hague Convention to do so: the adoption of article 47 bis of draft Protocol I would not serve them as a dispensation. He intended to submit a draft resolution to that effect in due course.

31. Mr. PASCHE (Switzerland) said that, although his delegation had not opposed the consensus on article 47 concerning the protection of civilian objects, it had certain reservations with regard to the wording of paragraph 2. The term "effective contribution to military action" was imprecise, and the words "military action" should be examined by the Drafting Committee in order to avoid any ambiguity.

32. Mr. TODORIĆ (Yugoslavia) said that his delegation had abstained from voting on article 44, paragraph 1, because the text seemed to be inconsistent with paragraph 3 of the same article which had been adopted by Committee III at the first session. The latter paragraph explicitly stated that the provisions laid down by the Committee were complementary to other international rules relating to the protection of humanitarian law in armed conflicts.

33. There could be no question of amending or revising rules applicable to such conflicts, since the High Contracting Parties had the right to amend an international instrument of which they were signatories. The Conference was therefore not competent to reaffirm provisions of international instruments relating to the law of war. He believed, however, that Protocol II should include a clause on the conflict of the norms of international law relating to the protection afforded by humanitarian law in armed conflicts, in order to ensure the best protection.

34. Sir David HUGHES-MORGAN (United Kingdom), referring to article 46, paragraph 2, said that his delegation had joined in the consensus but hoped that the wording agreed upon did not restrict the meaning of the word "hostilities". The wording should be flexible enough to cover not only acts of violence, but preparation for and participation in acts of violence.



35. Indeed, it would be unfair to allow a civilian who had just thrown a bomb to enjoy all the protection afforded by the section of the Protocol under discussion.

36. Mr. SABEL (Israel) pointed out that in article 46, paragraph 1, reference was made to "military operations", whereas the original ICRC text contained the word "attack". He believed that, as reflected in the Working Group's report, there was broad agreement that the use of the phrase was not intended to derogate from or narrow the protection of the civilian population proposed by the ICRC.

37. He therefore supported the Rapporteur's proposal that the Drafting Committee should examine the phrase carefully, to ensure that there was no inconsistency with the prohibitions laid down in paragraph 1. That could perhaps be done by transferring the phrase "acts of violence" to the beginning of article 46, where they would follow the words "military operations" or the word "attack" used in the original ICRC text.

38. Mr. HERCZEGH (Hungary) pointed out that the Committee had decided at its first session that in article 44 the words "on land" should be interpreted as covering all waterways included in the English term "inland waters": rivers, streams, canals and so forth. The Committee had therefore retained that interpretation in adopting article 44, paragraph 1.

39. Mr. REED (United States of America) said that the United States delegation wished to note its reservation on the issue of reprisals as contained in article 46, paragraph 4; article 47, paragraph 1, and article 47 bis to the effect that those provisions must be consistent with and subject to the work and determinations on the question of reprisals to be taken up by Committee I under article 74 - repression of breaches - and by the proposed special study group which would consider that matter.

40. Mr. SHERIFIS (Cyprus) said that he thought that the application of the provisions of the articles just adopted by the Committee should be as broad as possible. The need to avoid any increased suffering among civilian populations should prevail over military considerations. That opinion was based on the events that had recently occurred in his country.

41. Mr. AJAYI (Nigeria) explained that his delegation had abstained in the vote on article 47, paragraph 3, in the belief that, in the case at issue, the presumption should be a total one. The introduction of an exception weakened that presumption.

42. Mr. BILGEBAY (Turkey) said he thought it desirable to specify that the Committee did not only take recent events into account in its discussions.

43. The CHAIRMAN thanked the members of the Working Group and congratulated the Rapporteur on the excellent work that had been done.

#### Draft Protocol II

##### Article 29 - Prohibition of forced movement of civilians (CDDH/1, CDDH/56; CDDH/III/12, CDDH/III/40, CDDH/III/220)

44. Mrs. BINDSCHIEDLER-ROBERT (International Committee of the Red Cross) said it had been observed that the displacement of the civilian population during an internal conflict had caused great suffering. Since Article 3 common to the four Geneva Conventions of 1949 was silent on that point, the ICRC had judged it desirable to introduce special provisions for the protection of the civilian population. The provisions of article 29, like all the others in draft Protocol II, applied to both Parties to the conflict.

45. The first phrase of article 29, paragraph 1, was based on the second paragraph of Article 49 of the fourth Geneva Convention of 1949, which stated that "the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand". In that connexion, it should be explained that the adjective "imperative" which was used in the proposed article placed the maximum limitation on cases where the displacement of the civilian population might be ordered. The second phrase of that paragraph was based on the third paragraph of Article 49 of the fourth Geneva Convention and stipulated that the Parties to the conflict should take all possible measures in order that the civilian population be received under satisfactory conditions of hygiene, health, safety and nutrition. The word "safety" referred to the site where the camps for receiving the civilian population would be set up: those camps should not be in the vicinity of military operations or military objectives.

46. Paragraph 2 of article 29 repeated the first paragraph of Article 49 of the fourth Geneva Convention of 1949. Civilians could, of course, go into voluntary exile, in order, for example, to reach a neutral country; but they could not be compelled to leave their own national territory.

47. The wording of article 29 was much simpler than that of Article 49 of the fourth Geneva Convention, which gave more details; but all the essential points were included.

48. Mr. CRETU (Romania) explained that the amendment submitted by his delegation (CDDH/III/12) laid stress on deportations of the civilian population and the transfer of civilian objects or installations across the frontiers of the country of origin. Such deportations and transfers should be strictly prohibited.

49. Mr. NYATHI (Zimbabwe African People's Union, ZAPU) proposed that a new paragraph 2 should be inserted in article 29, reading as follows: "Whether or not civilians are displaced, they shall not be subject to forced or compulsory labour" (CDDH/III/40). His delegation had submitted the same amendment to article 65 of draft Protocol I, but thought it essential also to include the provision in article 29 of draft Protocol II, dealing with forced displacements.

50. Mr. WOLFE (Canada) said that his delegation had proposed the deletion of article 29 (CDDH/III/220) because its provisions were out of place in draft Protocol II. In the case of an insurrection, or non-international conflict, Governments had the right to transfer part of the civilian population from one region to another if they considered it necessary. The prohibition of forced movement of civilians was justified in draft Protocol I, which applied to international conflicts, but in the case of an internal conflict it became interference in the domestic affairs of a country.

51. Mr. AJAYI (Nigeria) said he supported the ZAPU amendment (CDDH/III/40), but suggested that the two paragraphs of the ICRC text should be retained and that the ZAPU text should be added as paragraph 3 at the end of article 29.

52. Mr. STARLING (Brazil) drew attention to the field of application of article 29. If a party hostile to the Government was in control of a considerable part of the territory of the State where the conflict was taking place, the two parties could fulfil the obligations laid down in article 29. If, on the other hand, the Government controlled the entire region and the hostile party controlled no part of the territory, the obligations laid down in that article could be fulfilled only by the Government. Under these conditions, it would be difficult for some Governments to accept the provisions of article 29.

53. Mr. PASCHE (Switzerland) said that he could accept the text proposed by the ICRC. The provision was extremely important and should not be deleted, as was proposed in the Canadian amendment (CDDH/III/220). The prohibition of forced movements was completely justified, and a further provision might well be added, stipulating that the property of civilians should not be transferred across the frontiers of the country of origin, as it was proposed in the

Romanian amendment (CDDH/III/12). Furthermore, the protection of the civilian population must be ensured when the Parties to the conflict were obliged to order displacements, and such protection should correspond to the provisions of article 8 relating to persons whose liberty had been restricted.

54. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said he could support the ICRC text, since it provided an additional guarantee for the protection of the civilian population involved in a conflict. He was therefore unable to accept the Canadian amendment, which called for the deletion of article 29.

55. The additional text proposed by ZAPU was extremely important and of particular significance in the struggle against racist régimes. It should therefore be considered by the Committee. Nevertheless, he agreed with the Nigerian representative that the proposed addition should constitute paragraph 3 of article 29.

56. Referring to the amendment proposed by Romania (CDDH/III/12), he considered that it was improbable, in the case of an internal conflict, that civilian objects or installations would be transferred across the frontiers of the country of origin. That amendment, however, was not in contradiction with paragraph 2 of the ICRC text.

57. Mr. CARIAS (Honduras) was opposed to the deletion of article 29 and accepted the text proposed by the ICRC. In his opinion, the first sentence of paragraph 1 of article 29 should dispose of the concern which led to the Canadian amendment. He considered that the Romanian amendment went perhaps too far in prohibiting the transfer of civilian objects or installations across the frontiers of the country of origin, since it might be a question of objects taken by civilians leaving the national territory. The ZAPU amendment, however, was useful and worth consideration by the Committee.

58. Mr. CASTREN (Finland) said that his delegation accepted the ICRC text and thought that the prohibition of forced displacements could be of great importance in internal conflicts. Moreover, the ICRC text provided for exceptions to the rule, since it specified "unless the security of the civilians involved or imperative military reasons so demand".

59. Referring to the Romanian amendment (CDDH/III/12), he suggested the addition of the word "forced" before the word "transfer". Furthermore, in order to make the ZAPU amendment (CDDH/III/40) more specific, he proposed the addition of the words

"of the opposing party" after the word "civilians". In point of fact, it was impossible to prohibit all forced labour, for some was necessary in order to ensure the survival of the population. Some exceptions to that prohibition were in fact provided in the third and fourth Geneva Conventions of 1949.

The meeting rose at 12.30 p.m.



SUMMARY RECORD OF THE TWENTY-FIFTH MEETING

held on Wednesday, 26 February 1975, at 10.20 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol II

Article 29 - Prohibition of forced movement of civilians  
(CDDH/1, CDDH/56; CDDH/III/12, CDDH/III/40, CDDH/III/220)  
(continued)

1. Mr. EIDE (Norway) said that he supported article 29 of draft Protocol II which was concerned with a prohibition of crucial importance for the protection of the civilian population in non-international conflicts. In the past there had been too many cases of forced displacements of the civilian population, especially of ethnic and national groups opposed to the policy of the central Government.
2. It had been asserted that sovereignty must mean that the Government of the country concerned enjoyed full freedom of action within the territory of that country.
3. Of course, sovereignty was important in that it afforded protection against outside interference, but it had ceased to be a screen behind which Governments had unrestricted freedom to act in their relations with the nationals of the country. The development of international humanitarian law had shown that Governments were ready to accept restrictions on their freedom of action.
4. Unfortunately, article 29 was rather too weak. The words "unless the security of the civilians involved or imperative military reasons so demand" might give rise to abuses. The security of civilians should not require their forced displacement, because if their security was genuinely threatened, civilians would be prepared to move of their own accord. The idea of "imperative military reasons" was also ambiguous, but rather more acceptable. Only purely military reasons were acceptable, but not political reasons such as the need to exercise greater control over a dissident ethnic group. Although he had some reservations about the exceptions, he would not press for changes to be made, especially as they were covered by Article 49 of the fourth Geneva Convention of 1949.

5. He supported the Romanian amendment to paragraph 2 (CDDH/III/12) since in the past Governments had sometimes collaborated in controlling groups of dissidents within their territory, and had agreed to the transfer of groups coming from other countries. Nevertheless, paragraph 1 remained the fundamental provision, prohibiting forced movements even within the national territory.
6. He was in favour of the amendment of the Zimbabwe African People's Union (CDDH/III/40), the effect of which was to eliminate one of the main reasons for many compulsory displacements. He agreed with the views expressed by the Finnish representative at the twenty-fourth meeting (CDDH/III/SR.24) regarding certain restrictions that might perhaps be incorporated in that amendment.
7. Mr. REED (United States of America) said he wished to refer to a problem which, in his opinion, affected Protocol II as a whole, and article 29 in particular.
8. One of the reasons for draft Protocol II was the non-application of Article 3 common to the 1949 Geneva Conventions, presumably because no country had ever considered, or admitted, that a conflict occurring in its territory was of the kind or of the level of violence of those referred to in that article.
9. As it stood, draft Protocol II provided for strong protection, thus clearly implying a conflict of considerable violence. Incidentally, Committee I did not appear to have come to an agreement about the degree of violence that would make the provisions of Protocol II applicable.
10. The fact was, however, that article 29, as drafted, would undoubtedly lead to the non-application of Protocol II. No State was likely to admit that existing authority within its territory was challenged to the point at which the provisions of Protocol II would apply. A lesson should be learnt from the non-application of Article 3 of the Geneva Conventions, and attention should be paid not only to the measures for protection to be envisaged, but also to the likelihood of their being applied in practice.
11. The United States delegation was therefore of the opinion that the solution suggested by the Canadian representative, namely the deletion of the article (CDDH/III/220), would afford better protection to the innocent victims of conflicts than that given by the more detailed and ambitious approach to be found in draft Protocol II.



12. Mr. SHERIFIS (Cyprus) said that he supported article 29, paragraph 1, and associated himself, in that connexion, with the arguments put forward by the ICRC representative at the twenty-fourth meeting (CDDH/III/SR.24). His country had had the greatest proportion of displaced persons, since two out of five had been uprooted in inhumane conditions.

13. He was also in favour of paragraph 2 of the ICRC text, as amended by the Romanian proposal (CDDH/III/12), which was a useful addition. He was also in favour of the amendment submitted by the Zimbabwe African People's Union (CDDH/III/40).

14. Mr. TRANGGONO (Indonesia) said that he wished to reaffirm the opinion expressed by his delegation in Committee I. Assuming that Protocol II was really necessary, the decisions reached in connexion with it must not give the slightest impression of infringing State sovereignty. His delegation shared the ICRC's view that maximum protection must be provided for the civilian population; but, since draft Protocol II was completely different from draft Protocol I, the approach would also have to be different.

15. In his opinion, article 29 could be interpreted as leading to interference in the internal affairs of sovereign States, which had the right to decide on the measures required for their safety and that of the population, even where the displacement of the civilian population was concerned. Questions such as the security of the civilians involved or imperative military reasons were for the Governments concerned to decide. He fully understood the reasons which had led the Canadian delegation to propose the deletion of article 29 and he was in favour of that proposal.

The meeting rose at 10.35 a.m.



SUMMARY RECORD OF THE TWENTY-SIXTH MEETING

held on Thursday, 27 February 1975, at 10.25 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 33 - Prohibition of unnecessary injury (CDDH/1, CDDH/56; CDDH/III/7, CDDH/III/11, CDDH/III/91, CDDH/III/222, CDDH/III/225, CDDH/III/237, CDDH/III/238 and Add.1)

1. Mr. de PREUX (International Committee of the Red Cross) introduced article 33, which was based on The Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land and the Declaration of St. Petersburg of 1868 on the Effect of Prohibiting the Use of Certain Projectiles in Wartime. Paragraph 1 reaffirmed principles which the General Assembly of the United Nations had endorsed on many occasions; in particular, it contained elements which were relevant to the work of the Ad Hoc Committee on Conventional Weapons. It was based on Article 22 of The Hague Regulations, with a slight change of wording. Its underlying principle applied to a field which was not governed by regulations, since it had no practical limits. The current trend was to introduce the qualifying principles of "just war" and of unequal weapons, which tended to absolve the weaker party from its obligations.
2. Paragraph 2 was based on Article 23 of The Hague Regulations and on the Declaration of St. Petersburg. Its purpose was, in substance, to prohibit unnecessary injury, a concept which was well known but difficult to define. The text referred to methods and means which aggravated suffering or caused death. The question of weapons per se was being dealt with by the Ad Hoc Committee on Conventional Weapons. Moreover, all weapons could cause unnecessary suffering and have indiscriminate effects. The "inevitable death" referred to in the text was a question of proportionality.
3. Mr. HERNANDEZ (Uruguay), introducing his delegation's amendment (CDDH/III/7), questioned the use of the term "disabled adversaries" and suggested that that concept should be deleted in order to extend the scope of the article.

4. Mr. HAMID (Pakistan), introducing his delegation's amendment (CDDH/III/11), said that it was designed to supplement the ICRC text. The ICRC draft embodied two important principles. First that the combatants' choice of means of combat was not unlimited, and that the use of weapons, projectiles and substances which cause unnecessary suffering was prohibited. The amendment introduced a third principle, forbidding the use of "weapons and methods of warfare which may affect both combatants and civilians without discrimination". His delegation also suggested that the High Contracting Parties should meet under the auspices of the ICRC with a view to prohibiting particularly cruel methods and means of warfare. Any list of prohibited weapons would soon be out of date, given the rate of technological progress. A more flexible procedure, adaptable to the circumstances, should be adopted. The prohibition of weapons which caused unnecessary suffering should be a continuing process, and that could be achieved through periodic meetings of the High Contracting Parties at which military and legal experts could exchange views.

5. Mr. CASTREN (Finland), introducing his delegation's amendment (CDDH/III/91), said that article 33 was of fundamental importance in that it established the basic principles governing the conduct of combats, which affected not only the combatants, but also the civilian population: the greatest care should therefore be taken in drafting article 33. The title and text prepared by the ICRC should be made more specific and brought up to date. The title should be changed to "Basic Rule". The words "and of members of their armed forces" were superfluous, since that concept was covered by the words "Parties to the conflict". He thought that the words "to adopt" in the English text should perhaps be replaced by "to choose", and suggested a number of drafting changes. The fate of disabled adversaries was defined in sufficient detail in article 38 of draft Protocol I. Finally, article 33 should be supplemented by the prohibition of the use of methods and means which struck at combatants and the civilian population indiscriminately and of those which disturbed the ecological balance of the human environment. In the latter connexion, his delegation had become a sponsor of amendment CDDH/III/222 and could support the German Democratic Republic's amendment to article 33 (CDDH/III/225) subject to some drafting points.

6. Mr. FISCHER (German Democratic Republic), introducing the joint amendment on the protection of the environment, (CDDH/III/222) said that such a provision had already been deemed necessary in connexion with article 48 bis. The insertion of the new text at that stage of the Committee's work was justified by the fact that it dealt with a matter of general concern: the environment was vitally important and thus warranted two references in the same Protocol.

7. Introducing his delegation's amendment CDDH/III/225, he pointed out that it was more in line with present-day international law and differed little from the ICRC text which stated that the right of Parties to the conflict and of members of their armed forces to adopt methods and means of combat was not unlimited, whereas his delegation's text stated that the choice of means and methods of combat by the Parties to the conflict and by combatants was not unlimited. Having studied United Nations General Assembly resolution 2444 (XXIII) entitled "Respect for human rights in armed conflicts", his delegation considered that the assumption that there would be a right to use force should be avoided in the text of article 33. The purpose of paragraph 2 of the amendment was to prevent "unnecessary suffering" or the use of "particularly cruel means and methods" of combat. The term "unnecessary suffering" was used in The Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land, and also appeared in the Australian amendment (CDDH/III/237) and the Finnish amendment (CDDH/III/91). His delegation was ready to **support** the latter amendment. Paragraph 3 of his delegation's amendment reiterated article 46 in condemning the indiscriminate use of means and methods of combat. It was most important that article 33 should contain that principle, since indiscriminate warfare was contrary to international law not only with regard to the civilian population but also with regard to protected military units and objects such as medical units and medical installations. Paragraph 4 of his delegation's amendment provided for the adoption of a provision in the form of the Martens clause. If, however, reference to that clause was maintained in article 1 of draft Protocol I, his delegation would be willing to withdraw paragraph 4.

8. Mr. MAHONY (Australia), introducing his delegation's amendment (CDDH/III/237), said that its purpose was to replace article 33 by a new and shorter text. The scope of The Hague Regulations and the St. Petersburg Declaration was, in his view, limited. The reference to means and methods of combat in the ICRC text represented a considerable extension of the law, and it was essential to develop that instrument to give it greater clarity.

9. Mr. NGUYEN VAN HUONG (Democratic Republic of Viet-Nam) said that the name of Uganda should be added as co-sponsor of the amendment to article 33 submitted by his delegation (CDDH/III/238 and Add.1).

10. Before introducing that amendment, he wished to stress once again the fact that in any international conflict there was always one party which was the aggressor and another party which acted in its legitimate self-defence. Furthermore, any provision of the Protocol which referred to the acts of the "Parties to the conflict"

should be interpreted in the light of the prohibition of aggression laid down in the Charter of the United Nations. In the case of article 33, the methods and means of combat used by an aggressor State were therefore criminal acts or instruments of war, since a crime of aggression was being committed. If the methods and means used by an aggressor transgressed the laws and customs of war, and more specifically the provisions of the Geneva Conventions supplemented by Protocol I, the crime of war stricto sensu would be added to the crime of aggression. But if the Party to the conflict exercising the right of legitimate self-defence violated those same provisions, it would be guilty only of the crime of war stricto sensu. That reservation had to be made in order not to run counter to the rules of modern positive international law in legislating with regard to acts of the "parties to the conflict" within the context of humanitarian law.

11. Having made those points clear, his delegation proposed to add three paragraphs to article 33 which expressed in legal terms the humanitarian requirements arising out of the armed struggles that the peoples of Asia, Africa and Latin America had had to wage since the adoption of the Geneva Conventions of 1949. The provisions of those paragraphs were necessary, since the peoples in question would have to continue their struggle against colonial domination, foreign occupation or racist régimes during the coming decades. Since 1949, the structure of colonial and neo-colonial wars of aggression had changed radically, the process having culminated in the Viet-Nam war: on the one hand, there was the imperialist aggressor, supplied with all the latest and most cruel methods and means of war, bent on overcoming as quickly as possible the resistance of ill-armed and economically undeveloped peoples; on the other, there was a whole people united in resisting foreign aggression in order to defend its independence and its right to self-determination. The result had been the large-scale extermination of the civilian population and the systematic destruction of entire regions.

12. During the Viet-Nam war, that policy had been clearly expounded by General Westmoreland in the following words: "We are going to bleed them white ... until this assumes the proportions of a national catastrophe and they have their work cut out for decades ahead", while MacConnell, Chief of Staff of the United States Air Force, had declared: "... it is better to bomb blindly than not to hit military objectives". The whole of Viet-Nam had thus become a testing-ground for a series of new tactical and strategic methods, such as special warfare, local warfare, ecological warfare, vietnamization of the war, and so forth, which could thereafter be applied against other countries of Asia, Africa and Latin

America fighting against imperialist aggression, colonialism and neo-colonialism. A statement by Senator Gaylor Nelson in 1970 and a report by the scientist Westing in 1971 described the use of 90,000 tons of defoliants and plant-killers over an area of 2.5 million hectares in South Viet-Nam. In the I.F. Stone Review of 12 July 1965, it was stated that if the bombing of the dykes in North Viet-Nam was successful, it "could produce a result comparable to that of a hydrogen bomb: the entire delta would be destroyed and two or three million people would be drowned or would die of starvation".

13. The purpose of the proposed new paragraph 3 was to prohibit the employment of such methods and means of combat which caused mass extermination or the destruction of entire regions. That question should be included in Part III, as it constituted a general rule with respect to methods and means of combat.

14. The purpose of the proposed new paragraph 4 was to forbid a method which was practised systematically in South Viet-Nam by the imperialist aggressor and the Saigon puppets, - the so-called policy of "pacification", set up as a national policy with the purpose of destroying the forces of liberation. Dozens of plans for speeding up pacification had been worked out, each new plan comprising crueller and more sophisticated means than the previous one. Specially trained teams accompanied the American Expeditionary Force, the regular troops and the regional puppet troops on operations "for draining the pool to catch all the fish". Every possible means was employed, such as dive bombing, carpet bombing, mass poundings, infantry fire, indiscriminate fire and levelling by means of giant bulldozers. The object was to spread terror among the civilian population and force it to submit at all costs. The idea was to destroy everything and to kill or imprison all those who dared offer any resistance. Those remaining alive were then subjected to mass transfers and were usually herded into camouflaged concentration camps which went under the name of "new life hamlets". That so-called pacification policy had become one of the two aspects of the programme for vietnamizing the war. Its object was to force the civilian population to give up the struggle for self-determination, to seize all the material, financial and human resources of the civilian population, to bolster up the puppet armed forces and to restore a political administration hated by the people. So the adversary to be crushed was the entire civilian population. Colby, who had been in charge of the pacification programme in South Viet-Nam, had himself admitted that over 5,800,000 people had been either killed, wounded or forcibly evicted from their homes from the beginning of the war of aggression to 21 April 1971. Such inhuman methods and means of combat, which were designed to subdue an entire people, must be forbidden.

15. The purpose of the proposed new paragraph 5 was to fill a gap in international humanitarian law by forbidding any disruption or destruction of the ecological balance. Along the South Viet-Namese coast, some 36 per cent of the mangrove forests had been destroyed, on the grounds that they served as cover for the revolutionary forces. The provisions of this new paragraph were, moreover, in conformity with United Nations General Assembly resolution 2603 (XXIV), under which the use in international armed conflicts of any chemical agents of warfare was contrary to the generally recognized rules of international law because of their direct toxic effects on man, animals or plants. It should be added that the destruction of the human environment was also brought about by many other means and methods of combat, such as area bombing, mass poundings which had made craters in many regions of South Viet-Nam, fires started by napalm, phosphorus, thermite and flame-throwers, and the use of giant bulldozers for levelling wooded areas.

16. The protection of the environment had its place in Part III of the draft Protocol, since it would become a rule of general application and a guideline for the preparation of rules of international humanitarian law.

17. Mr. ALDRICH (United States of America), Rapporteur, said that the Working Group was at present examining an article on the protection of the environment. He proposed that the decision regarding the part of the Protocol in which that article should be placed should be deferred until the Committee had a definitive text before it. Depending on the content of the article, the Committee would be able to decide whether protection of the environment should appear in the section dealing with protection of the civilian population or in that dealing with methods and means of combat. In his opinion, the provisions relating to the protection of the environment should be grouped in a single article.

18. Mr. TRAN THIEN NGUON (Republic of Viet-Nam) said that the question of the nature of the conflict in South Viet-Nam had been examined, discussed and settled in plenary; there was no need for the Committee to revert to it, but if it did, his delegation would ask to be allowed to exercise its right of reply.

19. On the pretext of submitting an amendment, the North Viet-Nam delegation had indulged in ill-judged propaganda with the idea of misleading international opinion about the war of aggression which North Viet-Nam was at present waging against South Viet-Nam.



The Hanoi delegation had therefore digressed from the subject under discussion, and had taken advantage of the Committee's proceedings to renew its unwarranted attacks against other delegations designated by name.

20. The CHAIRMAN said that the general debate on article 33 of draft Protocol I was now open.

21. Mr. TODORIĆ (Yugoslavia) said that the provisions of article 33 on the protection of victims of armed conflicts, which had been drafted in general terms in the mid-nineteenth and early twentieth centuries, could be of vital importance to the success not only of the work being done in Committees III and the Ad Hoc Committee on Conventional Weapons, but of the Conference itself. It was therefore indispensable to define the scope of the prohibition or restriction of the use of certain weapons and of the prohibition of unnecessary suffering, and to supplement article 33, by the provisions of article 34 on new weapons which should be more concrete.

22. The United Nations General Assembly had invited the Conference to continue its search for agreement on rules of international law prohibiting or restricting the use of certain conventional weapons, particularly incendiary weapons, that might be deemed to cause unnecessary suffering. That task had been entrusted to Committee IV, but the other Committees should help by seeking to establish humanitarian rules that could contribute to the real protection of the human person when threatened with extermination through the use of conventional and new weapons, which destroyed the environment, caused unnecessary suffering and struck without distinction at members of the armed forces and civilians.

23. His delegation would spare no effort in seeking solutions that would command general support, since it was not only a matter of maintaining and strengthening world peace: vital interests and the very future of the international community were also involved. His delegation supported all the amendments submitted with that purpose in view, particularly the amendment submitted by ten States (CDDH/III/222) on the protection of the human environment.

24. Mrs. MANTZOULINOS (Greece) said that she supported the Finnish proposal (CDDH/III/91) amending the title of article 33 to "Basic Rule", which emphasized the scope of the article. Moreover, such a title would correspond to that of article 43 in Part IV of draft Protocol I.

25. The ICRC text reaffirmed a fundamental principle of international law, that the only legitimate aim of belligerents was to weaken the military forces of the adverse Party, and the provision of The Hague Regulations, prohibiting the use of certain weapons causing unnecessary suffering; but it did not cover the obligation of the parties to the conflict to spare the civilian population. The idea of the protection of the civilian population was implicit in the Finnish and Australian (CDDH/III/237) amendments, which broadened the scope of article 33. The Pakistan amendment (CDDH/III/11), on the other hand, was explicit on the subject, since it proposed that weapons and methods of warfare likely to affect combatants and civilians indiscriminately should be prohibited. Her delegation supported that amendment, but thought that it should supplement rather than replace the ICRC text. With regard to the amendment proposed by the German Democratic Republic (CDDH/III/225), the Martens clause, which appeared in paragraph 4, could be added at the end of paragraph 2 of the ICRC text, provided it was not retained in the preamble to Protocol I.

26. Mrs. DARIIMAA (Mongolia), referring to the Australian amendment (CDDH/III/237), pointed out that the concept of "unlimited right", like that of limited right, would remain imprecise so long as no specific criteria for defining it had been adopted.

27. With regard to the amendment of the Democratic Republic of Viet-Nam and Uganda (CDDH/III/238 and Add.1), it was clear that it had a lofty aim in that it tried to avoid a repetition of the suffering experienced by the Vietnamese people and also to avoid other peoples experiencing similar suffering. In that sense the amendment was a worthy contribution to the future development of international humanitarian law. That amendment was far closer to the realities of life than were the theories of experts and it made an indispensable contribution to humanitarian law. Paragraph 3 was particularly important since experience had shown that mass extermination and the destruction of entire regions often extended to neutrals and inhabitants not taking part in the conflict. Paragraph 4 rightly prohibited methods and means of combat employed by colonial and racist régimes to crush liberation movements. Paragraph 5 should be examined at the same time as amendment CDDH/III/222. As the Rapporteur had said, the latter document needed to be put into final form, but it must obviously be included in Protocol I.

28. Sir David HUGHES-MORGAN (United Kingdom) said that his delegation supported the Finnish amendment (CDDH/III/91) as a whole. In paragraph 1 of article 33, it was sufficient to mention the "Parties", because that term necessarily covered their armed forces. In the same paragraph, the verb "to choose" would be preferable to "to adopt". In paragraph 2, it would be better to follow The Hague Regulations of 1907 which had become the expression of customary international law, rather than the Declaration of St. Petersburg; that indeed was what the authors of the United Kingdom Manual of Military Law had done. The English version of that rule should be corrected however, because it contained some errors of translation: "calculated to cause unnecessary suffering" could not be regarded as a good translation of "propres à causer des maux superflus"; it might perhaps be better to translate the French words "propres à" by "of a nature to", and to say "injury" instead of "suffering". ICRC Commentary (CDDH/3, p. 41).

29. He considered that the amendments submitted by the delegations of Pakistan (CDDH/III/11) and the Federal Republic of Germany and others (CDDH/III/222) raised certain difficulties regarding the "incidental effects", which could be both tragic and unavoidable (see CDDH/3, p. 65). Concerning the Australian amendment (CDDH/III/237), the United Kingdom delegation saw no objection to the prohibition of methods being extended to means. On the other hand, the amendment submitted by the Democratic Republic of Viet-Nam and Uganda (CDDH/III/238 and Add.1) seemed unacceptable, since it introduced a derogation to the universality of humanitarian law.

30. Mr. Moun Seun JANG (Democratic People's Republic of Korea) considered that the strict prohibition of certain methods and means of combat would ease the sufferings of humanity; he therefore recommended that the text of article 33 should be revised. Contemporary history showed that the United States imperialists had wished to subjugate the Korean nation by massacring its people and devastating its territory. All sorts of atrocities had been committed, in total disregard of the international conventions governing the law of war, and going far beyond the criminal acts of Hitler's armies.

31. Article 33 should be considered parallel with article 34, since the contemporary era was largely dominated by science and technology. The United States imperialists had not hesitated to use biological and chemical weapons in the wars in Korea and Viet-Nam. Even at the present time they were installing atomic and remote-controlled atomic weapons in South Korea, close to the demarcation line, with the risk of plunging the Korean people into a nuclear war. For that reason the production, testing and use of

such weapons should be prohibited and existing stocks should be destroyed. The text of articles 33 and 34 should therefore be redrafted in order to take those facts and the experience of the Korean people into account.

32. Mr. SHERIFIS (Cyprus) said that his delegation was in full agreement with the ICRC text. Certain ideas embodied in the various amendments could only be accepted to the extent that they complemented that text and broadened its field of application. Among those ideas, his delegation gave particular support to the prohibition of the use of methods and means which adversely influenced the ecological balance of the human environment and those calculated to spread terror among the civilian population and aimed at forced mass transfers. His delegation also took a firm stand against any attempt to subjugate a people struggling to withstand foreign occupation. He was confident that delegations would understand the reason for that attitude.

33. Mr. STARLING (Brazil) considered that article 33 should be limited to the general rules related to the prohibition of unnecessary injuries. The text submitted by the ICRC presented a good basis for discussion, and perhaps for adoption by the Conference as it stood, as a compromise solution. His delegation considered that the problem of defining specific weapons and related questions should be dealt with by the Ad Hoc Committee on Conventional Weapons. The question of weapons with indiscriminate effects had perhaps been sufficiently discussed during the consideration of article 46, paragraph 3, which the Committee had already approved.

34. Mr. PASCHE (Switzerland) said that he considered article 33 to be of particular importance, since it was designed to limit certain evils and abuses which would make the return to peace and reconciliation more difficult. As the ICRC had indicated in 1971, at the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, the situation had changed considerably since the beginning of the twentieth century: the rules of humanitarian law had been frequently violated, the international community had welcomed a number of States which had adopted a new attitude towards international law, and the absence of new international instruments was being felt more and more. Consequently, he considered that the Committee should adopt the text proposed by the ICRC, which had the merit of being clear and well-balanced.

35. The Swiss delegation had considered with interest the various amendments submitted and thought that the Uruguayan amendment (CDDH/III/7) could usefully be considered by the Working Group. Although the Pakistan amendment (CDDH/III/11) was interesting, it would be somewhat difficult to organize the proposed meetings to study that question, which would in any case be considered when article 34 was taken up. The Finnish delegation had rightly suggested that the title should be changed to "Basic Rule" or "Basic Rules" (CDDH/III/91). With regard to that same amendment, he thought it would be preferable to retain the explicit reference to "armed forces", which could apply to the ordinary soldier who in the field was obliged to conform to humanitarian rules. The amendment submitted by Australia and a number of other delegations (CDDH/III/222) raised a question which was at present under consideration. Paragraph 4 of the amendment submitted by the German Democratic Republic (CDDH/III/225) brought in a new element, which was based on the Martens clause and would be worth incorporating at some point in Part III of draft Protocol I. Regarding the Australian amendment (CDDH/III/237), he considered that it would be preferable to retain a text in which the words "methods" and "means" appeared.

36. Mr. CASTREN (Finland) thanked the delegations who had supported the Finnish amendment (CDDH/III/91) and said that the ways in which it differed from the other amendments could easily be overcome by the Working Group. As far as the second part of the Pakistan amendment (CDDH/III/11) was concerned, his delegation endorsed the ideas expressed by the representative of Switzerland. It considered, too, that paragraphs 3 and 5 of the amendment submitted by the Democratic Republic of Viet-Nam and Uganda (CDDH/III/238 and Add.1) should be accepted. The Finnish delegation reserved the right to revert to the other proposals later.

37. The CHAIRMAN announced that Mr. Hediger, Legal Secretary, who had rendered great services to the Committee, would be replaced by Mr. Friedrich as from the twenty-seventh meeting.

The meeting rose at 12.25 p.m.



SUMMARY RECORD OF THE TWENTY-SEVENTH MEETING

held on Monday, 3 March 1975, at 10.25 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 33 - Prohibition of unnecessary injury (CDDH/1, CDDH/56; CDDH/III/7, CDDH/III/11, CDDH/III/91, CDDH/III/222, CDDH/III/225, CDDH/III/237, CDDH/III/238 and Add.1)  
(continued)

1. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said he wished to stress the basic character of article 33 of draft Protocol I. In his opinion, it was for the Conference to set forth the principles which would be respected by all the parties and which could be applied without discrimination in order more effectively to protect the victims of conflicts.
2. His delegation had given careful study to draft article 33 proposed by the ICRC, which was designed to strengthen the protection of the civilian population and civilian objects. It had no objections to raise, but wished to suggest that it would be useful to improve the form of the article in order to achieve a compromise that would be acceptable to all. The principles set out in the ICRC text should be made more specific; the expression "means which uselessly aggravate the sufferings", appearing in paragraph 2, was particularly vague. Moreover, Committee IV had been confronted by the same problem. It was not clear where the limits of "unnecessary sufferings" should be drawn, and a term must therefore be found to strengthen the prohibition to use weapons or means which were likely to aggravate sufferings unnecessarily.
3. Amendment CDDH/III/225, submitted by the German Democratic Republic, had the effect of improving the wording of several provisions. Paragraph 1 limited the choice of means and methods of combat, and reference was made to "combatants" rather than to "armed forces". The USSR delegation accordingly supported the amendment, which improved the ICRC text.
4. The amendment submitted by Australia and nine other delegations (CDDH/III/222) provided clarifications with regard to protection of the ecological balance, to which the ICRC had tried to give expression in articles 47, 48 and 49 of draft Protocol I.

5. The Australian amendment (CDDH/III/237) did not run counter to the ICRC text, but restricted the rights of the parties.
6. The amendment submitted by the Democratic Republic of Viet-Nam and Uganda (CDDH/III/238 and Add.1) proposed the addition of three new paragraphs with the main effect of prohibiting the employment of methods and means which would cause mass extermination of the civilian population and the destruction of entire regions, or which would disrupt the natural conditions of the environment.
7. The Brazilian amendment to article 34 (CDDH/III/32) took little account of realities, since it limited the scope of article 33, paragraph 2.
8. He could support the Pakistan amendment (CDDH/III/11). It was obvious that a prohibition of the use of weapons and methods of warfare which were likely to affect combatants and civilians indiscriminately fell exclusively within the competence of States, or of the High Contracting Parties, not of an international humanitarian body like the ICRC.
9. All the amendments proposed at the first or at the current session were designed to strengthen the protection of the civilian population and civilian objects and deserved the Committee's full attention.
10. Mr. OKWONGA (Uganda) said that, although the ICRC draft text constituted an excellent basis for discussion, article 33 in its existing form did not cover all situations and was limited in its application. For that reason, the delegation of the Democratic Republic of Viet-Nam and his own delegation had proposed the addition of three new paragraphs (CDDH/III/238 and Add.1). The first was specifically designed to cover wars of liberation in Africa and Asia, where the parties to the conflict were not of equal military strength and where the aggressor might attempt to use methods and means of combat likely to cause mass extermination or the destruction of entire regions, which would be incompatible with accepted methods of warfare.
11. Certain representatives had suggested that the ideas contained in those new paragraphs had already been expressed in other articles and that there was consequently no reason to repeat them. He himself was not of that opinion. Article 33 was a fundamental provision; his delegation attached special importance to it and considered that it should be strengthened by joint amendment CDDH/III/238 and Add.1.



12. Mr. CRISTESCU (Romania) said that article 33 set forth a fundamental rule and served as a useful basis for work. The amendments designed to supplement and improve that article should therefore be examined in detail.
13. His delegation considered that the prohibition of methods and means of combat that aggravated suffering should be as broad and specific as possible.
14. He endorsed the amendment submitted by the Democratic Republic of Viet-Nam and Uganda (CDDH/III/238 and Add.1) proposing the addition of three new paragraphs.
15. He also endorsed the Finnish amendment (CDDH/III/91), designed to replace the existing title of article 33 by "Basic Rule" and to simplify the text; the amendment of the German Democratic Republic (CDDH/III/225), which departed very little from the ICRC text and replaced the "right" of the parties by the "choice" of means and methods of combat, and the Pakistan (CDDH/III/11) and Australian (CDDH/III/237) amendments, which were designed to prohibit the use of weapons likely to affect combatants and civilians indiscriminately.
16. With regard to the latter point, he considered that greater precision was required and that the categories of weapons to be prohibited should be stated. The United Nations General Assembly had already adopted a resolution (resolution 2936 (XXVII)) on the non-use of force in international relations and permanent prohibition of the use of nuclear weapons, and the Institute of International Law, at its session held in Edinburgh in September 1969, had adopted two resolutions, one on the distinction between military and non-military objectives and the other on the problems raised by the existence of weapons of mass destruction.
17. He was convinced that the Conference should formulate standards prohibiting all weapons of mass destruction.
18. Mr. RABARY (Madagascar) said that his delegation could accept article 33 as it appeared in draft Protocol I, although that article envisaged a conventional war situation. On the other hand, while the development and use of new weapons and new methods might be more effective, they were certainly more inhumane and devastating, and led to new situations which brought into conflict, on the one hand, colonial or racist power, and, on the other, impoverished peoples determined to struggle for their freedom, sovereignty and dignity.
19. His delegation warmly endorsed the amendment of the Democratic Republic of Viet-Nam and Uganda (CDDH/III/238 and Add.1) reflecting the cruel experience of the peoples of the

third world in their struggle against colonial and alien domination and racist régimes, all the more so because the United Nations General Assembly had proclaimed in resolution 3103 (XXVIII) of 12 December 1973 that armed conflicts involving the struggle of peoples against colonial and alien domination and racist régimes were to be regarded as international conflicts in the sense of the 1949 Geneva Conventions.

20. He nevertheless wished to suggest some slight changes in that amendment, first, to add the words "directly or indirectly" after the words "methods and means of combat which ..." in paragraph 3, and, secondly, to insert the words "open or" before the words "camouflaged concentration camps" in paragraph 4.

21. He was in favour of the amendment submitted by Australia and nine other delegations (CDDH/III/222) on the subject of ecological balance, which had already been thoroughly dealt with in another article currently under consideration by the Working Group. The same remark applied to paragraph 5 of the amendment submitted by the Democratic Republic of Viet-Nam and Uganda (CDDH/III/238 and Add.1).

22. His delegation agreed with those who had already expressed interest in the ideas contained in the Pakistan amendment (CDDH/III/11), but would prefer to see them reflected in article 34.

23. With regard to article 34 itself, his delegation supported the Brazilian amendment (CDDH/III/32).

24. Mr. MOKHOTHU (Lesotho) said that article 33 raised a thorny issue in that it called upon Governments to prohibit weapons which were likely to cause unnecessary suffering or have indiscriminate effects. The problem was a vast one which should be studied in detail and considered by a conference on general disarmament. The aim of the ICRC text was to restrict the use of certain types of weapons enumerated in paragraph 2, but he wondered whether the list drawn up by ICRC was sufficiently exhaustive and whether the matter really fell within the terms of reference of the Conference.

25. Nevertheless, he was in favour of the ICRC text and of the amendments designed to improve the substance and form of article 33.

26. Some dangerous and poisonous weapons were being used by colonial and racist minority régimes in Africa to exterminate the civilian population and freedom fighters, and were thereby helping to produce a most unsatisfactory state of affairs which was preventing the majorities from exercising their right to self-determination.

27. The Diplomatic Conference was in duty bound to work out humanitarian standards applicable in armed conflicts.

28. Mr. HAMID (Pakistan) thanked those delegations which had supported his country's amendment (CDDH/III/11).

29. In his view, the Committee should study paragraph 2 of that amendment when considering article 34, as the representatives of Switzerland (CDDH/III/SR.26) and Madagascar had already pointed out.

30. The CHAIRMAN said that article 33 and the amendments thereto would be referred to the Working Group for consideration.

Article 34 - New weapons (CDDH/1, CDDH/56; CDDH/III/28, CDDH/III/32, CDDH/III/92, CDDH/III/225, CDDH/III/226, CDDH/III/231, CDDH/III/235)

31. Mr. de PREUX (International Committee of the Red Cross), introducing article 34 of draft Protocol I, said that it was based on a proposal which had been made at the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts and had then been adopted and simplified by the ICRC. Although the text was similar to others already existing in certain bodies of domestic legislation, it now appeared for the first time in international law, unless account was taken of the last paragraph of the Declaration of St. Petersburg, which was somewhat broader in scope.

32. Mr. NAMON (Ghana) said that, in submitting its amendment (CDDH/III/28), his delegation had sought to strengthen article 34 by enlarging its field of application. However, he wished to withdraw it in favour of the amendment of the German Democratic Republic (CDDH/III/225) which seemed to be more precise.

33. Mr. REZEK (Brazil), introducing his delegation's amendment (CDDH/III/32), explained that it was designed to make the obligation set out in article 34 more precise and effective. His delegation had thought it better to refer to article 33, paragraph 2, listing weapons whose use was prohibited, than to retain the concept of unnecessary injury. It should be clear that if, after study, new weapons were found to fall within the prohibition set out in article 33, it would thenceforth be impossible to proceed with their development. Lastly, his delegation considered that the language used should be as moderate as possible; the text should in no way suggest that the study and development of new weapons or methods of warfare were normal activities.

34. Mr. BIERZANEK (Poland), introducing his delegation's amendment to article 34 (CDDH/III/92), said that its object was to extend the obligations of States developing new weapons to include protection of the natural environment. He supported the proposals already advanced in amendments CDDH/III/238, paragraph 5, and CDDH/III/222, in connexion with article 33. Convincing arguments had already been put forward by the Working Group and in plenary meetings in favour of prohibiting weapons and methods of combat which might profoundly disrupt the ecological balance and have disastrous long-term consequences for the civilian population. He would therefore confine himself to stressing that, in accordance with the requirements of sound logic, protection of the environment must be assured from the period preceding the use of those weapons and methods, i.e. at the time when new weapons were being studied and manufactured. His delegation was prepared to collaborate with other delegations in defining what had to be protected in the most appropriate terms.

35. Mr. SCHUTTE (Netherlands), commenting on the amendment submitted by his delegation jointly with those of Norway and Sweden (CDDH/III/226), said that the sponsors had introduced the notion of acquisition because States which acquired weapons were more numerous than those producing them and they should also be conscious of the legal consequences of the employment of the weapons acquired; moreover, there might be cases where the acquiring State was a High Contracting Party to the Protocol, but the State studying, designing, producing and selling the weapons was not.

36. The sponsors had further added the words "or other means", which had a broader scope than the word "weapons".

37. Provision was made for placing responsibility on each individual State, not merely on the High Contracting Parties as a collectivity.

38. In the English text, the word "use", had been replaced by "employment", which the Working Group had adopted for article 46, paragraph 3.

39. Reference was made not only to article 33, paragraph 2, setting out the principle of prohibition of unnecessary injury, but also to article 46, paragraph 3, containing the principle of prohibition of indiscriminate attack.

40. The words "or be incompatible with any other rules of international law applicable in armed conflict" had been added with the Declaration of St. Petersburg, the three Hague Declarations of 1899 and the Protocol of Geneva of 1925 for the Prohibition of the use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological methods of Warfare, in mind.

41. Lastly, it was obvious that many States were willing to accept restrictions on the use of weapons or means of combat only on a basis of reciprocity, and the text submitted by Norway, the Netherlands and Sweden (CDDH/III/226) should not be regarded either as prohibiting the study, development and stocking of weapons or means in question, or as prejudging the solution of general disarmament problems.

42. Mr. FISSENKO (Byelorussian Soviet Socialist Republic) said that the text proposed by the ICRC raised only one aspect of the use of new types of weapons, namely the principle of unnecessary injury which in his opinion was undefined. It was not always possible to consider that problem objectively outside the general problem of the use of weapons without taking other principles into account. In his opinion, when considering the question of new types of weapons and methods of their use, consideration should likewise be given to other important principles and factors, namely political, legal, technological and economic factors which, as a general rule, came within the purview of bodies especially set up to study the problem of disarmament. Among them, for instance, was the Conference of the Disarmament Committee, which had done useful work and had promoted the conclusion of several most important agreements relating to the non-proliferation of nuclear weapons, the prohibition of biological (poisonous) weapons, and so forth. A world disarmament conference should play a most important part in the complex task of solving the problem of disarmament.

43. The amendment submitted by the Byelorussian SSR (CDDH/III/231) supplemented the ICRC text of article 34 and indicated in a concrete way how agreement could be reached on the problem of prohibiting new types of weapons. He hoped that it would be accepted by the Committee. His delegation was prepared to examine the other amendments in detail.

44. Mr. MAHONY (Australia), introducing his delegation's amendment (CDDH/III/235), said he wished to draw the Committee's attention to the term "methods of warfare" in the ICRC text of article 34; he had already commented on the term "methods of combat" when introducing the Australian amendment to article 33 (CDDH/III/237). In his opinion, the term used, whatever it might be, should be identical and should convey the same meaning in both articles, and that that meaning should be clearly defined.

45. The CHAIRMAN declared open the general debate on article 34.
46. Mr. CASTREN (Finland) said that the existence of article 34 was justified but that the article could be of no great practical value, since the study and development of new weapons and methods of warfare were generally carried out in secret, making any kind of supervision difficult. Furthermore, the nature and effects of such weapons might be subject to different interpretations.
47. He thought that amendment CDDH/III/226 deserved particular attention, as did amendment CDDH/III/92 on the protection of the natural environment and amendment CDDH/III/235 which imposed an obligation on States, not only on the High Contracting Parties. He was equally aware of the progressive intentions which had motivated amendments CDDH/III/231 and CDDH/III/32, but feared that their adoption might create practical difficulties.
48. Mr. CRETU (Romania) said that his delegation attached great importance to the problems dealt with in article 34 and agreed with the terms of the ICRC draft. Since article 34 derived directly from the general principle set out in article 33, his delegation supported the Brazilian amendment (CDDH/III/32). It also supported the introduction of the concept of acquisition proposed by the Netherlands, Norway and Sweden (CDDH/III/226).
49. Mr. BLIX (Sweden), speaking as a sponsor of amendment CDDH/III/226, said that article 33 set out the general principles governing the prohibition of certain weapons, and article 34 pointed to the national duty to determine whether a weapon could be used. The text proposed by the ICRC was too narrow and should be expanded.
50. At each successive stage, namely study, development and acquisition, the Government concerned should determine whether the use of new weapons fell under a general prohibition, directed not only at weapons which caused unnecessary injury, but also at those which had indiscriminate effects, or under some specific prohibition, such as the Protocol of Geneva of 1925 on chemical and bacteriological warfare.
51. It should be made clear, however, that article 34 and amendment CDDH/III/226 were not designed to prohibit the acquisition or stocking of certain weapons, means or methods, but rather called for a determination regarding their permissibility of use. The rule related to the laws of war, not of disarmament.

52. The Polish proposal on the protection of the environment (CDDH/III/92) would be taken into account if amendment CDDH/III/226 was adopted, for that amendment referred to other articles of the Protocol which, in their final form, would contain a provision prohibiting weapons or other means that had very severe effects on the environment.

53. Amendment CDDH/III/226 dealt solely with national means of determining whether the use of a weapon fell under a prohibition. Such means already existed. In Sweden, for instance, the Government had set up a special committee of jurists, military experts and doctors to consider all projects for the incorporation of new weapons into the arsenals of the State, and to advise the Government on their compatibility with the rules of international law in force. A similar system existed in the United States of America. But such national means were inadequate and should be supplemented by international machinery. In that connexion, the Pakistan amendment (CDDH/III/11) to article 33 deserved particular attention. It called for meetings under ICRC auspices. Although the Byelorussian amendment (CDDH/III/231) to some extent was unrealistic, its intention was similar. It called for consideration of new weapons in the disarmament sphere. Another approach would be to ask the depositary Government to convoke meetings periodically or when so requested by a large number of parties.

54. A provision on international machinery could be placed in article 34 or article 86 or, indeed, in a new Protocol III. It was clearly too early to determine that matter now and his delegation reserved its opinion on that point.

55. Mr. SORIANO (Philippines) said that he was inclined to support the ICRC draft of article 34, since it would bolster the humanitarian thrust of draft Protocol I. However, article 34 should be read together with article 33 on prohibition of unnecessary injury and other relevant portions of the Protocol. The expression "shall determine" did not go far enough. His delegation was therefore in favour of the amendment in document CDDH/III/32, supplemented by the concept of compatibility with the principles set out in article 33, paragraph 2, and article 46, paragraph 3, and with any other rules of international law applicable in armed conflicts (amendments CDDH/III/235 and CDDH/III/226). His delegation was also in favour of the reference to the concept of "acquisition" proposed in amendment CDDH/III/226.

56. Furthermore, the medical, legal and military experts at the Conference of Government Experts on the Use of Certain Conventional Weapons, held at Lucerne in 1974, had failed to produce any definition of the term "unnecessary injury". Until that term was clearly defined, it would be extremely difficult to enforce the provisions of the Protocol in which it was used.

Article 34 with the amendments thereto and the comments of representatives was referred to the Working Group.

Article 35 - Prohibition of perfidy (CDDH/1, CDDH/56; CDDH/III/6, CDDH/III/7, CDDH/III/81, CDDH/III/93, CDDH/III/223, CDDH/III/232, CDDH/III/233, CDDH/III/234)

57. The CHAIRMAN invited the Committee to consider article 35.

58. Mr. EIDE (Norway), speaking on a point of order, drew attention to the close relationship between articles 35, 39, 40, 41 and 42, and proposed that, in order to speed up the Committee's work, consideration of article 35 should be deferred until article 39 was discussed.

59. The CHAIRMAN said that, according to the method of work adopted by Committee III, the amendments submitted to any article were first introduced and were then discussed in a general debate. All the texts were referred to the Working Group, and if the latter considered it desirable, the adoption of a text might be postponed, as in the case of article 46.

60. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) and Mr. GENOT (Belgium), speaking in response to a request by Mr. EIDE (Norway) that the Committee should hear delegations' opinions on his point of order, said that they shared the Chairman's views, although they appreciated the arguments put forward by the Norwegian representative.

61. Mr. EIDE (Norway) said he was obliged to insist that the Working Group's report on article 35 should not be considered until the Committee had discussed article 42.

62. The CHAIRMAN said that he was not in a position to rule on the matter.

63. Mr. EIDE (Norway) said that he reserved the right to submit a proposal in due course.



64. Mr. de PREUX (International Committee of the Red Cross) pointed out that article 35 was based on Article 23 b) of The Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land, which referred to treachery, and on Article 24, which dealt with ruses of war.

65. The solution adopted for both paragraph 1 and paragraph 2 of article 35 consisted in the statement of a general rule followed by a list of examples. To draft a general definition of perfidy was a difficult task, although the prohibition of perfidy was undeniably the necessary complement of every rule of prohibition or protection. The rule in question was most easily explained through examples: if it were stated that civilians as such should not be attacked, there was an evident advantage in disguising combatants as civilians, so that they would not be attacked while the subterfuge remained undiscovered; discovery would often come too late, after the subterfuge had succeeded.

66. A further characteristic of an act of perfidy appeared to be that it was always inherently unlawful, perfidy being the means of performing an act which had become unlawful. Perfidy accordingly consisted in disguising a prohibited act under the appearance of a lawful act. A soldier who killed an adversary in combat did not commit an unlawful act, but a soldier who feigned surrender in order to kill his adversary committed murder, since by his apparent surrender he, like any other prisoner, had forfeited the right to kill. The difference between that and an unlawful act committed by a true prisoner of war lay in the perfidious intent. It might perhaps be said that there was the same difference between a simple unlawful act and an act of perfidy as there was between robbery and armed robbery.

67. Ruse, on the other hand, implied the simulation of an unprohibited act. A person resorting to ruse dissimulated one authorized act under the guise of another: he let it be understood that he was attacking from the left when, in fact, he attacked from the right; but both acts were permissible. There was thus a perfectly distinct contrast between the two positions - ruse and perfidy - and that contrast was most clearly expressed by juxtaposing the two rules, as it had been done in article 35.

68. With regard to the general definition, the proposed text was based on the objective notion of good faith and on the subjective notion of intention. The good faith of the adversary was the attitude that he should normally adopt with respect to the rules known to him and recognized by him. But his intention would be to create surprise precisely where security and confidence might normally be expected.

69. Mr. QUACH TONG DUC (Republic of Viet-Nam) said he thought that the definitions proposed by the ICRC were on the whole clear enough to allow a distinction to be made between acts of perfidy and ruses of war: the former relied on the good faith of the adversary with the intention of taking advantage of it, which was not so in the case of the latter. On further reflection, however, it would be seen that ruses of war also took the good faith of the adversary by surprise. Between the two definitions, there might be a category of borderline acts. That was why the Republic of Viet-Nam had proposed in its amendment (CDDH/III/6) not to describe ruses of war as "lawful", in order to prevent that term from serving as a cover for certain acts, the perfidious nature of which might be questioned. The proposed phrase "are not considered as acts of perfidy" would bring article 35 of draft Protocol I into line with article 21, paragraph 2, of draft Protocol II.

70. Mr. HERNANDEZ (Uruguay) pointed out that the title of article 35, "Prohibition of Perfidy", was precisely the subject dealt with in paragraph 1 (a), (b) and (c). He asked whether, for example, the fact of painting the Red Cross emblem, or that of the Red Lion and Sun, on the walls and roof of a huge munitions depot could be regarded as an act of perfidy; the pilot whose mission it was to bomb that depot would refrain from doing so. Yet the aforesaid sub-paragraphs did not provide for such cases.

71. The raison d'être of paragraph 2 was not clear since the relevant provision already existed in Article 24 of The Hague Regulations. That was why his delegation had submitted its amendment (CDDH/III/7) proposing the deletion of that paragraph; its views were therefore identical with those expressed in the Australian amendment (CDDH/III/234). The amendments submitted by Belgium (CDDH/III/223) and by Canada, Ireland and United Kingdom (CDDH/III/233) raised points of fundamental importance.

72. Mr. de PRÉUX (International Committee of the Red Cross) said that the question raised by the Uruguayan representative was dealt with in article 36. Moreover, there could be no doubt that articles 35, 36 and 37 were closely related.

73. Mr. BIERZANEK (Poland), introducing his delegation's amendment (CDDH/III/93), pointed out that the definition of perfidy had given rise to considerable difficulties. For example, in the preliminary draft studied at the second session of the Conference of Government Experts in 1972, the word "confiance" in the French text had been replaced by the words "bonne foi", whereas the word "confidence" had been retained in the English text. Yet the expression "bonne foi" could be given a variety of interpretations. Did it mean the will

to comply with the law in force? Or did it, rather, imply a sort of "decency" or "fairness"? The term "good faith" might raise doubts with respect to some categories of lawful ruses of war. His delegation believed that the intention not to fulfil a legal obligation was one of the essential ingredients of perfidy. There were certainly cases where an attempt was made to mislead the adversary by resorting to dissimulation, and that could happen without misusing the protective emblem or infringing other rules of international law. The party which was the victim of such a ruse might consider that its good faith had been abused and take measures of reprisals. The matter was of particular concern to countries which were invaded by a more powerful adversary.

74. Mr. GENOT (Belgium) said he agreed with the ICRC on the need to emphasize the prohibition of perfidy, in order to strengthen the confidence which combatants should have in the law governing armed conflicts and in the word given by the enemy. Therein lay the undoubted importance of draft article 35. His delegation had proposed some changes (CDDH/III/223) which were intended to clarify the ideas expressed in article 35 and would be explained in greater detail in the Working Group.

75. It would be seen that his delegation's proposal contained no definition of perfidy, but merely drew attention to the existence of a series of prohibited acts deemed to be perfidious. It then proceeded to describe lawful ruses of war, without defining them.

76. Perfidy could take such different forms that it was difficult to encompass it in a unanimously acceptable definition. Moreover, an illustrative list would not suffice to characterize the offence: indeed, the mere literal formulation of such examples would certainly reveal practical applications which were in no way connected with perfidy. The text therefore did not meet the requirements of the general legal principle nullum crimen sine lege. The problem of defining the offence known as "perfidy" was made all the more delicate by the fact that no jurisprudence would be capable of delimiting it in a universally acceptable manner.

77. The essential purpose of the Belgian proposal was to draw the Committee's attention to the possibility of approaching the problem more specifically from the point of view of criminal law, by reminding combatants of the existence of perfidy and of its treacherous nature. Judges should be provided with a list of offences punishable for the simple reason that they were acts of perfidy. Acts of perfidy which did not appear in the list would still be punishable, not because they were perfidious, but because they infringed the legal rules of war and represented unlawful ruses of war.

78. Mr. TRANGGONO (Indonesia), introducing his delegation's amendment (CDDH/III/232), said that the article should be limited to a general definition of perfidy. The Indonesian delegation could accept paragraph 1 (a) and (b) of the ICRC draft, but not paragraph 1 (c), which it wished to have deleted for the following reasons:

79. During and after the Second World War, methods of warfare in many countries had changed from conventional warfare to a guerrilla warfare often conducted in armed conflicts where the opposing forces were of unequal strength.

80. Not infrequently, as the result of the destruction of textile industries or for similar reasons, the guerrilla combatants could have no uniforms, but they carried arms openly and were clearly distinguishable from the civilian population during military operations. They fulfilled the conditions set out in Article 4 A (1), (2), (3) and (6) of the third Geneva Convention and article 42 of draft Protocol I.

81. The fact that they appeared to be wearing civilian clothes for lack of uniforms could not be used as a pretext for accusing those combatants of perfidy.

82. Mr. EIDE (Norway) and Mr. GILL (Ireland) said that they wished to introduce their delegations' amendments at the twenty-eighth meeting.

The meeting rose at 12.30 p.m.

SUMMARY RECORD OF THE TWENTY-EIGHTH MEETING

held on Tuesday, 4 March 1975, at 10.20 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 35 - Prohibition of perfidy (CDDH/1, CDDH/56; CDDH/III/6, CDDH/III/7, CDDH/III/80, CDDH/III/81, CDDH/III/93, CDDH/III/223, CDDH/III/232, CDDH/III/233, CDDH/III/234, CDDH/III/236) (continued)

1. Mr. GILL (Ireland), introducing amendment CDDH/III/233, said that the sponsors of the amendment regarded perfidy as a particularly grave military crime, since many of the articles of the Geneva Conventions and the Protocols depended for their effectiveness on the extent to which combatants had the will to apply them. Thus anything that tended to sap that will was particularly wicked. Such resolve was dependent on the trust of each combatant in the honesty with which the other side would respect and apply the rules. It was therefore essential to define perfidy in such a way as to make it clear that the crime lay in betraying the trust and confidence of the adversary.
2. The amendment in question generally followed the plan of the ICRC draft, but differed from that text in certain respects. It provided a sufficiently complete definition of perfidy, and set out all the factors necessary to establish the criminal nature of the act. The ICRC draft used the terms: "Acts inviting the confidence of the adversary with intent to betray that confidence...". It seemed preferable, however, to say: "Acts inviting the confidence of the adversary that he is entitled to, or is obliged to accord, protection under international law with intent to betray that confidence ...".
3. The amendment went on to give examples of acts of perfidy, but the expression "in particular" indicated fairly clearly that the list of such acts was not exhaustive. It might be more precise and less ambiguous to repeat the terms employed at the beginning of the paragraph, namely "... when carried out in order to kill, injure or capture an adversary ..." rather than to say "... when carried out in order to commit or resume hostilities ...". The latter phrase, which had been used in the original draft, was open to misinterpretation.

4. Paragraph 1 (a) and (b) had been taken from the ICRC draft, but paragraph 1 (c) had been changed. It was important to remember that paragraph 1 was designed to protect civilians. It was not mandatory for all combatants to wear uniform, but a combatant wishing to kill or capture an adversary must distinguish himself from a civilian and must not feign non-combatant status.

5. Paragraph 2 of the amendment began with a statement of the law relating to ruses of war. It was followed by a definition of such ruses which, in his opinion, was sufficiently explicit to eliminate any need for an illustrative list of acts coming under that category.

6. Mr. MAHONY (Australia), explaining his delegation's proposal (CDDH/III/234) to delete article 35, paragraph 2, said that, since that paragraph was concerned with ruses of war, it had no place in an article defining and proscribing perfidy. Moreover, it added nothing to the definition and description of perfidy set out in paragraph 1. To devote one paragraph to defining and describing such practices, and then to attempt to define and describe in another paragraph ruses which were lawful and in law constituted a different subject matter, was not a useful procedure. His delegation did not think that paragraph 2 adequately defined ruses of war, which in itself was a subject as complex and varied as perfidy.

7. Mr. NGUYEN VAN HUONG (Democratic Republic of Viet-Nam), introducing his delegation's amendment (CDDH/III/236), said that the legislation being prepared by the Conference should reflect the conditions of modern warfare. In contemporary international conflicts, it was not the armed forces of the big industrial nations that confronted one another. Since 1945, most international armed conflicts had taken place between aggressive imperialism and the impoverished, ill-armed peoples of Asia, Africa and Latin America, fighting either to defend their independence or to exercise their right of self-determination. Those peoples lacked the necessary means to provide uniforms for members of their national forces or their rural and urban militia. To regard that state of affairs as perfidy would be to legislate against nations defending their right to self-determination. Logically speaking, the question was not one of perfidy, since that implied the intention to betray an adversary's good faith. That was why his delegation had proposed the deletion of paragraph 1 (c) of article 35.

8. Mr. LONGVA (Norway), introducing his delegation's amendments (CDDH/III/80 and 81), said that his country had no difficulty in accepting paragraph 1 (a) and (b) of article 35 of the ICRC draft,

as well as paragraph 2. On the other hand, paragraph 1 (c) did not seem to provide the best solution to all the problems arising in that connexion. His country's approach was conditioned by its general attitude towards articles 40, 41 and 42 of draft Protocol I. If international humanitarian law applicable in armed conflicts was not to become a dead letter, it was essential, first, that the rules of that law should place the parties on an equal footing -- in other words, that the rules should be equally binding on all the parties to the conflict; secondly, that those rules should constitute a well-balanced compromise between humanitarian considerations and military necessity; lastly, that they should be drafted in such a way as to ensure that all the parties to the conflict would have an equal interest in their application.

9. His delegation did not consider that the ICRC draft articles 35, 40, 41 and 42 took those principles sufficiently into account. In particular, with regard to article 35, military necessity, in guerrilla operations, was disregarded. His delegation therefore proposed that paragraph 1 (c) should be replaced by "the creation, prior to attack of an impression with the enemy of being a non-combatant". That wording retained the distinction between combatant and non-combatant and took into account the military necessities of guerrilla operations.

10. The Norwegian proposal (CDDH/III/81) for a new paragraph 3 to article 35 read: "Attacks from ambush, even if carried out in civilian clothing, are not prohibited". In fact, it did not contribute anything new to the ICRC text, but stated explicitly what was already implied, namely, that combatants who attacked from ambush would always carry their arms openly at that moment and, hence distinguish themselves from the civilian population. The enemy would first of all be aware that he was being fired on; only afterwards would he notice the civilian clothing. It should be borne in mind that attack from ambush was one of the main means of operation in guerrilla warfare. It should therefore be stated clearly that that means was not prohibited.

11. Mr. CASTREN (Finland) said that it was very difficult to give complete and precise definitions of prohibited perfidious means of combat and of authorized ruses of war. Nevertheless, an attempt could be made to lay down certain general criteria and to enumerate the cases most frequently encountered, as the ICRC had done. The original draft was fairly satisfactory. The Committee could improve it by following the example of the amendment submitted by Canada, Ireland and the United Kingdom (CDDH/III/233), and adding the words "in particular" to the first and second phrases of paragraph 2, to indicate that the list was not exhaustive. It might be advisable to add to the end of that

paragraph the examples given at the end of paragraph 2 of the ICRC draft. The other amendments seemed to refer only to the drafting, except perhaps for the Polish amendment (CDDH/III/93), which would make the text more precise.

12. Mr. ABADA (Algeria) pointed out that article 35 was one of a series of articles in Part III of draft Protocol I covering methods and means of combat. The Conference should study those articles with special attention.

13. The ICRC draft of article 35 contained relevant elements which enabled the subject to be grasped. Since it was admittedly almost impossible to arrive at an objective definition of perfidy, the solution was to draw up a list of the most obvious acts regarded as perfidious. Some of those examples were hardly contestable, and he saw no reason why they should not be listed in article 35. However, the case referred to in paragraph 1 (c), "the disguising of combatants in civilian clothing", seemed to be difficult to accept, since it did not take into account certain situations, particularly guerrilla operations. His delegation would therefore be inclined to endorse the Indonesian amendment (CDDH/III/232), proposing the deletion of that paragraph.

14. His delegation was prompted by the same concerns to endorse the Norwegian amendment (CDDH/III/81). The Polish amendment (CDDH/III/93), introducing the notion of "false belief" should be retained, if only as a kind of bonus for those who took care to respect the accepted rules. The same idea was reflected in amendment CDDH/III/233.

15. Furthermore, his delegation had no objection to the ICRC text of article 35, paragraph 2.

16. In pursuance of a remark made earlier by the Norwegian representative, he suggested that, after the general debate on article 35, the Committee might do well to postpone referring that article to the Working Group until the time came to consider articles 40, 41 and 42: it seemed to be both wiser and more logical to study all four articles in the same context. Indeed, some delegations had already started negotiating and exchanging ideas along those lines.

17. The CHAIRMAN said that, although he understood the Algerian representative's concern, the Committee should continue its work and that it would be difficult not to transmit the amendments submitted to article 35 and delegations' comments to the Working Group. On the other hand, there was nothing to prevent the Algerian representative from offering suggestions to the Rapporteur at the appropriate time.



18. Mr. ABADA (Algeria) said that a special effort was needed in respect of articles 35, 40, 41 and 42, which should be carefully worded, particularly in view of the new situations arising from guerrilla warfare. He would get in touch with other delegations and let the Rapporteur know what they thought was the best way of advancing the Committee's work.

19. Mr. DENEREAZ (Switzerland) said that, after listening to the sponsors of the amendments to article 35, his delegation preferred the text proposed by the ICRC.

20. As the Polish representative had pointed out, there had been a rather unsuccessful attempt to define the term "perfidy" not so much in its philosophical sense as in contrast to its opposite connotations: ruse, guile and stratagem. It might therefore be asked whether "perfidy" could be defined in a straightforward manner to the complete satisfaction of those who sought to prohibit it. Battlefield conditions were never very clearcut, and the differences between the armed forces involved made it impossible to confine matters to a single type of warfare. Moreover, differences in equipment engendered different types of training: instruction in ruses of war might well be rudimentary in highly technical armies, whereas it was fundamental in "amateur" armies, whose tactics were based largely on surprise, ambushes, trickery, switching of uniforms, incitement of the enemy to rebellion, and so forth. A long list, which those disposing of multiple facilities might regard as fairly complete, would appear by no means comprehensive to others who had to fight from a position of numerical or technical inferiority. His delegation therefore considered article 35 as drafted by the ICRC to be extremely realistic: it laid down the principle of the prohibition of perfidy and set out in paragraphs 1 (a), (b) and (c) the three examples most discreditable to combatants. Nevertheless, his delegation was not entirely satisfied with the wording of paragraph 1 (c), which seemed to be incomplete.

21. With regard to the amendments to the ICRC draft article 35, he agreed with the statement made by the representative of the Democratic Republic of Viet-Nam at the twenty-seventh meeting (CDDH/III/SR. 27) that the ICRC text drew the only line possible between perfidy and ruses, and, unlike the Uruguayan representative, he believed that ICRC had provided for enough hypothetical cases. His delegation was therefore in favour of paragraphs 1 and 2 of the ICRC draft. The only problem requiring further consideration was that of the disguising of combatants in civilian clothing and, in that connexion, special attention should be given to the prohibition of the use of the enemy's distinctive emblems. Moreover, the text of paragraph 1 (c)

should not be adopted until it had been considered in conjunction with other articles which related to the use of distinctive emblems of the armed forces, but did not all fall within the competence of Committee III.

22. Mr. REED (United States of America) said that the ICRC text of article 35 represented a proper attempt to affirm, develop and clarify the provisions of Article 23 b) and Article 24 of The Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land. Whether that article would make one of the most significant contributions to the protection of innocent civilians, or would be reduced to ineffective words incapable of practical application would depend on the Committee's decision.

23. The ICRC text of article 35 was presented in a form which would allow of practical instruction to combatants, easy application by them and understanding by all others. It was conceived and presented with much logic. In the English text, however the word "confidence" seemed to relate that notion to a feeling of legal or moral obligation. In his delegation's view, that was a very imprecise concept. Experience showed that there was no uniform standard of morality in the world in general, and still less in time of war. His delegation was convinced that the notion of perfidy should relate solely to legal obligations recognized in international law. His delegation favoured the text in the amendment submitted by the Canadian, Irish and United Kingdom delegations (CDDH/III/233), which set forth a uniform standard that was capable of universal application and would not be difficult to explain to combatants. The list of acts of perfidy in the three sub-paragraphs of paragraph 1 was explicit. The principle expressed in paragraph 1 (c) lay at the very heart of the problem of protection against the effects of hostilities, dealt with in Part IV of draft Protocol I, to which the Committee had devoted so much time. He mentioned in particular articles 44, 45, 46, 48 and 49, which he analysed in relation to the provisions of article 35, emphasizing the extreme importance of paragraph 1 (c). The wording of the principle in that sub-paragraph was perhaps unfortunate in that it referred to the civilian clothing of combatants. There was, in fact, no rule in draft Protocol I which required combatants to wear uniform, nor did he know of any recognized definition of what constituted a uniform. What was important for the protection of civilians was that all combatants, whether members of regular or irregular forces, whether from developed or under-developed countries, whether fighting to put down a liberation movement or fighting to seek true freedom, should

distinguish themselves from civilians by some means. Paragraph 1 (c) could of course be worded in various ways. His delegation preferred the wording of amendment CDDH/III/233.

24. His delegation did not favour the amendment submitted by the delegation of Norway (CDDH/III/81), proposing a new paragraph 3, for it thought that that addition would introduce an element of confusion. With regard to paragraph 2 of the ICRC text, it felt that the wording might be somewhat modified, but the principle remained valid.

25. Mr. SORIANO (Philippines) said that his delegation supported the principle embodied in the ICRC text of article 35 but felt that paragraph 1 (c) should be deleted. The particular situation in which his country had found itself during the Second World War had given rise to a new type of warfare, namely, guerrilla warfare. Guerrilla fighters did not wear uniform, firstly because in that type of warfare it was essential that combatants should blend with the masses after hitting the aggressor and, secondly, because they had no means of acquiring a uniform. It would be basically unjust to brand the wearing of civilian clothing by a combatant as perfidy when such circumstances were brought about by the superior military strength of the aggressor. He stressed that guerrilla fighters complied with the requirements of Article 4 of the third Geneva Convention of 1949 and with those of article 42 of draft Protocol I, except for the wearing of uniform, which was not, moreover, a sine qua non since Article 4 A (2) (b) of the third Geneva Convention of 1949 merely required a "distinctive sign".

26. His delegation therefore supported the amendments proposed by the delegations of Indonesia (CDDH/III/232) and the Democratic Republic of Viet-Nam (CDDH/III/236) for the deletion of paragraph 1 (c) of the ICRC text of article 35. It supported paragraph 2 of that article.

27. Mr. AGUDO (Spain) said that his delegation agreed in principle with ICRC text of article 35, as also with the amendments submitted by the Canadian, Irish and United Kingdom delegations (CDDH/III/233) and by Belgium (CDDH/III/223), which it found interesting. All those texts provided an excellent basis for discussion. It thought that the word "camouflage" would be better rendered in the Spanish text by a Spanish synonym such as "enmascaramiento", "disimulación", "simulación" or "ocultación" rather than by "camuflajes".

28. His delegation saw no real need for paragraph 2, since the question of ruses of war was dealt with by The Hague Convention of 1899, but would not oppose its retention.

29. In view of the amendments it had submitted to articles 41 and 42, his delegation could not logically support amendments CDDH/III/232 and CDDH/III/236 for the deletion of paragraph 1 (c). Nor could it support the amendment submitted by the Norwegian delegation (CDDH/III/81), proposing the addition of a new paragraph authorizing attacks from ambush by combatants in civilian clothing. If such a provision were accepted, any military unit would be authorized to treat all civilians present either in combat areas or in occupied territory as combatants. That would run counter to the efforts being made to increase the protection of the civilian population. If that protection was to be ensured, persons in civilian clothing must not be the subject of the slightest suspicion. Some representatives had maintained that the requirements of guerrilla warfare must be taken into account, but such warfare was irregular, not because combatants wore no uniform but because they used combat methods which were against the rules. In his delegation's opinion, paragraph 1 (c) must be retained to ensure the protection of the civilian population.

30. Mr. HERCZEGH (Hungary) said that his delegation was in favour of the ICRC text of article 35 but considered that it would be advisable to have a more precise definition of acts of perfidy. His delegation therefore supported the amendment submitted by the Polish delegation (CDDH/III/93), which ably supplemented the definition of perfidy. A mere reference to confidence seemed inadequate. Although the notion of legal obligation was also expressed in the amendment submitted by the delegations of Canada, Ireland and the United Kingdom (CDDH/III/233), his delegation preferred the Polish text. With regard to paragraph 1 (c) the question of the disguising of combatants in civilian clothing had given rise to several amendments. Without going further into that difficult question, he wished to point out that there was a divergence, if not a contradiction, between the provisions of article 35, paragraph 1 (c), and those of article 42, paragraph 1 (b). In the latter, which dealt with members of organized resistance movements, no mention was made either of uniforms or of distinctive signs recognizable from afar, but it was simply stated that combatants should distinguish themselves from the civilian population in military operations. He therefore considered that, in the wording of article 35, account should be taken not only of articles 36, 37 and 39 but also of the ICRC text of article 42 of draft Protocol I.

31. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that the ICRC text of article 35 which endeavoured to take account of the situations that might actually occur, constituted a good basis for discussion. It represented a compromise arrived at after two years of consideration by experts. The amendments proposed to it helped to bring out certain contradictions and should be useful in drawing up a text that would be acceptable to all.

32. The amendment proposed by Poland (CDDH/III/93) gave a more precise definition of perfidy and referred to international law, which was an important point that should be taken into consideration. In his view, the Polish proposal was not in contradiction with that of Norway (CDDH/III/80); the two texts could be combined with the ICRC draft to produce a compromise formula.

33. With regard to paragraph 1 (c), which was more controversial, a distinction should be made between two situations: the case of a military combatant who, prior to attack, changed into civilian clothing, and the case of military partisans, for instance, fighting in occupied territory while dressed in civilian clothing. The requirements specified in the amendments dealing with the second of those situations were justified and the sponsors of those amendments established a correlation between the article under consideration and article 42 of the ICRC draft. His delegation supported the provision of article 42 that organized resistance movements should distinguish themselves from the civilian population. It considered that the last phrase of the Norwegian amendment to paragraph 1 (CDDH/III/80), which avoided mention of civilian clothing, provided a good compromise.

34. It was doubtful, however, whether there was any need for the amendment proposed by Norway (CDDH/III/81), which would add a new paragraph 3 on attacks from ambush.

35. The ICRC text of paragraph 2, which gave specific examples of acts of perfidy, was quite straightforward and the amendment proposed by Belgium (CDDH/III/223) served to make the provisions of that paragraph even more precise.

36. In conclusion, he expressed the view that there were no divergences on substance. The Committee should devise a clear formula covering the essence of the matter.

37. Sir David HUGHES-MORGAN (United Kingdom) said that what had struck him in the ICRC text of article 35 was the use, in the English version, of the word "confidence", which was not an abstract concept in English. The amendment proposed by Poland (CDDH/III/93), which introduced the element of international law, was inadequate; the amendment submitted jointly by his country, Canada and Ireland (CDDH/III/233) was more comprehensive.

38. The amendment to paragraph 1 proposed by Norway (CDDH/III/80) had the same defect as the ICRC text in that it merely referred to the concept of "confidence"; it was, however, akin to the joint proposal (CDDH/III/233) in its reference to "the feigning of surrender".

39. The proposal for the addition of a new paragraph 3 (CDDH/III/81), as also the proposals by Indonesia (CDDH/III/232) and the Democratic Republic of Viet-Nam (CDDH/III/236) for the deletion of paragraph 1 (c), raised the issue of the extent to which non-combatant status could be used by combatants during an attack. The object was to protect the civilian population, but there would be no protection if combatants could claim that the text allowed them to act against the enemy in that way.

40. The question of "ambushes" had been discussed in 1949; despite the assertions of the representative of the Democratic Republic of Viet-Nam, methods of war had not changed since the Second World War, during which resistance groups had fought in occupied territory. The distinction previously made between combatant and non-combatant should be retained, for it would be dangerous to blur it.

41. The question of perfidy could not be settled within the ambit of article 35 alone: not until a decision had been reached on article 42, for example, could a final wording be devised for article 35. Nevertheless, the basic principle of prohibition of perfidy remained valid and his delegation hoped that a proper definition of the concept would be arrived at for inclusion in the article.

42. Mr. DIXIT (India) said that his delegation approved the principle in the ICRC text of article 35 but considered that the text needed improvement in both substance and form.

43. The ICRC text did not lay sufficient stress on outlawing the act of perfidy per se; the prohibition pertained more to the results of the act, so that combatants might be induced to carry out "such acts" if they could thereby gain an advantage. In other words, the principle should first be established that perfidy was unlawful, and that, consequently, "it is forbidden to kill, injure or capture an adversary by resort to perfidy".

44. Secondly, the definition of perfidy was ambiguous; it was dangerous, in a definition of that nature, to allow any room for guesswork. The definition must be precise and clear-cut. Under article 75, the perfidious use of the protective signs constituted a "grave breach of the Conventions or of the present Protocol"; that was an example of perfidy under the present definition.
45. It was also dangerous to introduce the idea of "intent", for the lack of intention could be used to give legality to certain acts of perfidy.
46. He found it difficult to understand the words "when carried out in order to commit or resume hostilities", for they seemed likely to limit the field of application of the definition.
47. Paragraph 2 was largely a question of drafting: what was required was a clear statement that ruses of war were not acts of perfidy.
48. Mr. HERNANDEZ (Uruguay) said that he had already commented on the proposals for the deletion of paragraph 1 (c) but, after hearing the various statements at the present meeting, he felt it his duty to appeal to the members of the Committee, as he had done in Committee IV on the subject of the use of certain categories of weapons, to shoulder their responsibilities towards future generations and to take the necessary steps to ensure that no individual of any country would be able to commit an illegal act which would endanger the security of the whole civilian population.
49. He was opposed to the deletion of paragraph 1 (c).
50. Mr. WOLFE (Canada) said that he was glad to note that the only difficulties to which paragraph 1 (c) gave rise were matters of drafting. He wished, however, to express his concern on the subject of the new paragraph 3 proposed by Norway (CDDH/III/81). It was true that paragraph 1 (c) and the new paragraph 3 were directly related to article 42, but he had been somewhat disturbed to hear the representative of the Union of Soviet Socialist Republics state that the new paragraph was not necessary because such action was already allowed. He hoped that the USSR representative agreed that resistance fighters would have to comply with article 42.
51. His delegation stressed that the establishment of rules that might lead to anarchy - by referring to the case of partisans, for example - was likely to be detrimental to humanitarian law.

52. Mr. CRETU (Romania) supported the amendments by the Democratic Republic of Viet-Nam (CDDH/III/236) and Indonesia (CDDH/III/232) proposing the deletion of paragraph 1 (c), since the act covered by the provision could not be regarded as a typical case of perfidy.

53. The CHAIRMAN said that he would refer the amendments, together with the comments made in the Committee, to the Working Group, on the understanding that the concern expressed by various delegations - Algeria, Norway, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland - regarding the link between articles 35 and 42 would be brought to the attention of the Working Group.

It was so agreed.

The meeting rose at 11.55 a.m.



SUMMARY RECORD OF THE TWENTY-NINTH MEETING

held on Friday, 7 March 1975, at 10.25 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

1. The CHAIRMAN called on the Committee to consider articles 36, 37 and 38.

Article 36 - Recognized signs (CDDH/1, CDDH/56; CDDH/III/75)

2. Mr. de PREUX (International Committee of the Red Cross), introducing article 36, said that the text was based on Article 23 f) of The Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land, which he read out. The content of that Article had been split into two to form articles 36 and 37 of draft Protocol I.
3. Draft Protocol I added to the prohibition of improper use of the protective sign of the Red Cross and of the flag of truce, as contained in The Hague Regulations, the prohibition of improper use of the protective emblem, of cultural property and of the distinctive sign of the United Nations.
4. The use of the words "protective sign", rather than "distinctive sign" as used in The Hague Regulations, had been preferred for draft Protocol I, and a clear distinction should in fact be made between the "indicative sign", in other words the peacetime sign of ownership by national Red Cross bodies or societies, and the "conventional sign" which afforded protection in time of war. The last sentence of both the first and the second paragraphs of Article 44 of the first Geneva Convention of 1949 were highly explicit on that point.
5. Moreover, in using the expression "improper use", The Hague Regulations had been speaking in terms of customary law, while the present text of article 36 of draft Protocol I referred to international agreements.
6. In paragraph 2, on the flag of truce, the ICRC had thought it unnecessary to refer to international agreements, which in turn meant referring back to Article 23 of The Hague Regulations. It had found it easier to formulate the prohibition directly as it was as much based on custom as was article 35.

7. Paragraph 3, on the distinctive sign of the United Nations, had been introduced at the suggestion of the United Nations itself. While the improper use of such signs could constitute perfidy within the meaning of article 35, paragraph 1 (a), the use of such signs by civilians in a moment of panic constituted an unlawful act, but not perfidy.

8. Mr. OCHOA TERAN (Venezuela) said he thought that article 36 as drafted by the ICRC was satisfactory, but that his delegation felt that the prohibition contained in paragraph 3 should be extended to the emblem of the United Nations. That emblem formed an integral part of the symbol designating the United Nations, and his delegation had therefore proposed (CDDH/III/75) that the words "emblem and" be inserted before the words "distinctive sign of the United Nations". His delegation's proposal had been based on the wording of resolution 22 (I) on "Privileges and immunities of the United Nations" adopted at the first session of the United Nations General Assembly. The amendment was intended to afford protection to humanitarian or relief operations carried out under the auspices of the United Nations and to help victims of international or non-international conflicts or of conflicts whose nature had not been precisely determined.

9. The CHAIRMAN suggested that article 36 and the amendments proposed to it be referred to the Working Group.

It was so agreed.

Article 37 - Emblems of nationality (CDDH/1, CDDH/45; CDDH/III/239, CDDH/III/240)

10. Mr. de PREUX (International Committee of the Red Cross) reminded the Committee that article 37 was also based on Article 23 f) of The Hague Regulations. On the contents of the article, he referred to article 46, paragraph 5, concerning the use for military purposes of the presence or movements of the civilian population, and he pointed out that uniforms and emblems of nationality served two purposes: distinguishing allies from enemies, and military personnel from civilians. The ICRC had thought of proposing an absolute ban, but it was too difficult to formulate. He cited various pertinent examples and stated, inter alia, that in occupied territory the presence of the occupied country's emblem was plausible; or, again, that under the second paragraph of Article 43 of the first Geneva Convention of 1949, medical units belonging to neutral countries might on all occasions fly their national flag. Finally, there was the well-known Skorzeny case of the Second World War, which had established that the firing of weapons while in the uniform of the adverse Party would not have been tolerated. The absolute limit was set out in article 35, and anyone firing while wearing the colours of a benevolent neutral or masquerading as a harmless civilian invariably committed an illegal act.

11. Mr. GRIESZLER (Austria) introduced the joint amendment (CDDH/45) which proposed that in article 37 "... or neutral ..." should be replaced by "or of neutral or other States not parties to the conflict". The latter expression occurred in articles 2, 5, 15, 32 and 57, which were being discussed by Committees I, II and III. He therefore felt that the two formulas should appear in article 37, especially since that terminology had already been adopted for articles 5 and 15 of draft Protocol I by Committee II. His delegation considered, however, that the joint proposal was a matter of form rather than of substance.
12. Mr. MENA PORTILLO (Venezuela), referring to his delegation's amendment (CDDH/III/239), said he would prefer the title of article 37 - "Signes de nationalité", "Signos de nacionalidad" - to be replaced in the French and Spanish texts by "symboles de nationalité", "Símbolos de nacionalidad". The national flag was truly the emblem of the country and of its sovereignty, and should be recognized and respected by all the States of the international community, as was in any case laid down in Article 50 of the Venezuelan Constitution, which he then read out.
13. Regarding the text of article 37, for the sake of clarity, and in view of its importance and scope, it should have two paragraphs: one pertaining to the emblems of neutral or non-belligerent States, and the other to those of the armed forces Parties to the conflict.
14. Mr. REED (United States of America) introduced his delegation's amendment to article 37 (CDDH/III/240). As he saw it, the object of the article, as drafted by the ICRC, was to clarify and expand Article 23 f) of The Hague Regulations of 1907, which merely banned improper use of the national flag and of the military insignia and uniform of the enemy.
15. The ICRC text had two weaknesses. First, it apparently sought to regulate, under the same criterion, the use of the national flag, and of military insignia and uniforms, whether of the enemy or a State not party to the conflict. That was inappropriate to the situation. Moreover, he preferred "States that are not parties to the conflict" to "neutral States". Secondly, he would like to know to what extent international law should seek to regulate the manner in which combatants of the opposing forces inflicted injury or violence on each other.
16. The object should be to avoid unnecessary harm, injury or destruction and to afford the widest possible protection for civilians and the civilian population; but it was extremely difficult to regulate the conditions under which the combatants belonging to adverse forces might legitimately kill or wound each other. Attempting to regulate activities beyond the infliction

of violence, namely an attack, was unnecessary regulation and went beyond the provisions of existing law. His delegation would prefer to retain the existing law. That was the reason for the second sentence proposed by his delegation (CDDH/III/240).

17. Sir David HUGHES-MORGAN (United Kingdom), speaking as a sponsor of amendment CDDH/45, said he agreed with the United States representative that it was highly desirable that no reference should be made to the notion of neutrality, and that it was preferable to refer to a State not party to the conflict. He also thought it desirable to forbid altogether and at all times making use of the national flags, military insignia and uniforms of States not parties to the conflict.

18. Furthermore, he would like to ask the Working Group to insert the words "on land" after the word "use". He said he readily accepted, and would support, the second sentence proposed by the United States delegation (CDDH/III/240). The decision taken in the Skorzeny affair was important; it had been the subject of prolonged discussion, and the question had been raised whether international law should continue to apply the rule thus laid down.

19. Mr. GILL (Ireland) said he would support the joint amendment introduced by the representative of Austria (CDDH/45) and also the amendment submitted by the United States delegation (CDDH/III/240). He was anxious that making use of the flags, military insignia and uniforms of neutral States should be expressly forbidden. Although he considered the expression "States that are not Parties to the conflict" acceptable, he hoped that neutral Powers would also be mentioned.

20. Mr. AGUDO (Spain) said that his view was the same as that of the representative of Venezuela. The national flag was something more than a "Signo de nacionalidad"; it was a symbol of the mother country. There should be a reference both to "States not parties to the conflict" and to "neutral States" and he would support the amendments which made that distinction clear.

21. Mr. CALDERON-PUIG (Mexico) said he whole-heartedly supported the Venezuelan amendment (CDDH/III/239).

22. Mr. CAMERON (Australia) said he found the wording proposed by the United States delegation (CDDH/III/240) more satisfactory than that proposed by the ICRC. Nevertheless, though he accepted the United States proposal in substance he might propose minor drafting amendments to the Working Group which, he hoped, would make the article widely acceptable and truly effective.

23. Mr. FISCHER (German Democratic Republic) said that the prohibition in article 37 appeared to be applicable only during military operations. He wondered whether making use of the uniforms of an adversary or of States that were not parties to the conflict ought not to be altogether forbidden. He would accordingly prefer the closing words of the ICRC text "in order to shield, favour or impede military operations", to be deleted.
24. Mr. HERNANDEZ (Uruguay) said he fully supported the views expressed by the Venezuelan and Spanish representatives.
25. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said he noted that there seemed to be general support for the ICRC proposal that it should be illegal to make use of the national flag of the enemy or of other States not parties to the conflict. It seemed, therefore, that all the Committee had to do was to decide on the wording to be used in article 37. It would be necessary to find a form of words that was clear, short, and readily intelligible to combatants. He thought that the suggestions put forward by the representative of the German Democratic Republic and by the delegations of Venezuela, the United States of America and the ICRC, would make it possible to evolve an acceptable text.
26. Mr. WULFF (Sweden), commenting on the United States amendment (CDDH/III/240), said that the wording used appeared to forbid making use of the national flag, military insignia and uniforms of the adversary solely "while engaging in attacks". Such methods had been used during the Second World War, notably in the Skorzeny affair, which had already been mentioned by the United Kingdom representative. In order to avoid a repetition of similar episodes, the use of enemy uniforms "in order to shield, favour or impede military operations", to use the wording of article 37, must be forbidden.
27. Mr. LINARES-SILVA (Colombia) supported the Venezuelan representative's amendments.
28. Mr. WOLFE (Canada) said that, in his view, the oral amendment proposed by the representative of the German Democratic Republic was covered by the United States amendment (CDDH/III/240). He therefore supported the latter amendment.
29. The CHAIRMAN suggested that the amendments to article 37 and the comments thereon should be referred to the Working Group.

It was so agreed.

Article 38 - Safeguard of an enemy hors de combat and giving quarter (CDDH/1, CDDH/56, CDDH/210; CDDH/III/7, CDDH/III/214, CDDH/III/242, CDDH/III/243)

30. Mr. de PREUX (International Committee of the Red Cross) said that article 38, which was based on Article 23 c) of The Hague Regulations of 1907, was concerned with the safeguard of an enemy hors de combat, whether or not he was actually a prisoner. Paragraph 1 defined the meaning of the expression hors de combat in a general clause and provided a number of specific examples. The general clause derived from Article 23 c) of The Hague Regulations, but differed from it to some extent, since that article obviously could not be applied to aerial warfare. The determining factor was abstention from hostile acts of any kind, either because the means of combat were lacking or because the person in question had laid down his arms. It was therefore necessary that there should be an objective cause, the destruction of means of combat, or a subjective cause, surrender. Paragraph 1 (a) dealt with the destruction of means of combat; paragraph 1 (b) did not necessarily refer to troops already disarmed; it also referred to troops who wished to lay down their arms or who had voluntarily done so. Paragraph 1 (c) defined what was meant by hors de combat; an attempt to escape was regarded as a hostile act.

31. Paragraph 2 was new and had no equivalent in The Hague Regulations. Article 2, paragraph 4 of the Convention of Geneva for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, signed at Geneva on 6 July 1906, provided for the release of wounded who represented a burden for their captors. The provision had been rearranged so that it would apply to able-bodied prisoners.

32. Paragraph 3 was drawn from Article 23 d) of The Hague Regulations. The statement that "to declare that no quarter will be given" was prohibited, seemed rather inexplicit, and it had been replaced by a different wording which prohibited not only the threat but also any attack that was intended to leave no survivors.

33. Mr. HERNANDEZ (Uruguay), introducing amendment CDDH/III/7, said that his delegation always endeavoured to draw lessons from examples which had arisen in the past. In view of recent events, it was clear that if an enemy was hors de combat, it was because he had laid down his arms and had thereby lost his status as a combatant. He should therefore be regarded from that moment as a non-combatant and be treated as such. None of the measures provided for in paragraph 1 could be taken against him. That line of reasoning was supported by the provisions of paragraphs 1 (a), (b) and (c).

34. Mr. STARLING (Brazil) explained why his delegation had submitted its amendment to article 38, paragraph 1 (CDDH/III/214). An enemy was hors de combat when he no longer had any possibility of defending himself or when he had surrendered. The former situation might arise in a variety of situations which it would be very difficult to describe. Only combatants facing such an enemy could decide whether or not he had any possibility of defending himself.

35. The second case was rather different. It was necessary to stipulate the conditions that an enemy had to fulfil in order to be deemed to have surrendered. Those conditions were laid down in the Brazilian amendment. They were: the enemy must have laid down his arms, must have clearly expressed the intention to surrender, must abstain from any hostile act, and must not attempt to escape.

36. The effect of the Brazilian amendment would be to improve paragraph 1 of article 38, by making it more precise and easier to understand and apply.

37. Mr. AKRAM (Afghanistan) welcomed the fact that the ICRC had based itself on certain provisions of The Hague Regulations and of the 1906 Geneva Convention in submitting a draft article on the safeguard of an enemy hors de combat. His delegation could accept that draft article, but it considered that the amendment submitted by the Belgian, Irish and United Kingdom delegations (CDDH/III/242) was clearer and better balanced. In paragraph 1 of that text, however, the words "ill-treat or torture" had been omitted, and it would seem preferable to insert those words in the first line of the paragraph, after the word "injure".

38. Paragraph 3 of article 38 was of such importance that his delegation had considered it desirable to submit an amendment (CDDH/III/241) whereby paragraph 3 would become article 38 bis. The delegations to the Conference, who were seeking means to lessen the injuries and reduce unnecessary suffering in armed conflicts could not tolerate the idea that combatants who went on defending themselves to the limit of their strength and finally surrendered and laid down their arms, should be exterminated. It was to give more force to the prohibition in paragraph 3 that the Afghan delegation had submitted its amendment.

39. Sir David HUGHES-MORGAN (United Kingdom), introducing amendment CDDH/III/242, pointed out that the ICRC text, which attempted a precise and comprehensive definition of an enemy who was hors de combat, was not without an element of risk. What for instance would be the position of a soldier on leave or of a prisoner held in a camp who attempted to escape? The sponsors of amendment CDDH/III/242 thought that the ICRC text might lead to some confusion.

40. Two possibilities could arise: either the combatant was not yet in enemy hands, or else he was in enemy hands. In the second case he was immediately protected by the provisions of the Geneva Conventions applicable to the wounded or to prisoners of war. It seemed dangerous therefore to lay stress on certain aspects of the protection already granted by other instruments. In paragraph 1 of the amendment in question reference was made solely to combatants "not yet in the power of the adversary party". That explained the omission of the words "ill-treat or torture", since those combatants could not be ill-treated or tortured before being in enemy hands. The sponsors of amendment CDDH/III/242 had no intention of removing the prohibition on ill-treatment or torture, but those words were out of place in an article dealing with combatants not yet in the power of the adversary party.

41. The words "who ... has surrendered", which were taken from Article 23 c) of The Hague Regulations, should not appear in article 38 since a combatant could surrender without having laid down his arms. If taken by surprise he could put his hands up as a sign of surrender while he was still bearing arms.

42. The sponsors of the amendment had not repeated the expression "is unable to express himself" since it was not clear whether the person concerned was one speaking a different language or whether he was wounded or unconscious. It was better to specify that the definition applied to a combatant who was unconscious, wounded or sick.

43. Paragraph 2 of the ICRC draft had been replaced by a new text which stated that where for operational reasons a commander in the field could not hold prisoners as required by the third Geneva Convention of 1949, he was obliged not only to release them but to take all reasonable precautions to ensure their safety.

44. Paragraph 3 was in line with the initial text, but the word "and" in the second line had been replaced by "or" so as to express more clearly the sense intended by ICRC.

45. Mr. WOLFE (Canada) observed that amendment CDDH/III/243 was substantially the same as paragraph 2 of the amendment just submitted by the United Kingdom representative. The sponsors of amendment CDDH/III/243 generally were in agreement with the ideas set out in the United Kingdom amendment but feared that the terms used might lead to misinterpretation. He agreed with the United Kingdom representative that, for operational reasons, a commander in the field might be unable to hold prisoners "under humane conditions" in accordance with the provisions of the third Geneva



Convention of 1949. However, that was not the problem their amendment sought to resolve. The problem was to provide for the release of prisoners captured under conditions of combat which prevented the evacuation of such prisoners as required by the third Convention of Geneva of 1949.

46. Mr. GILL (Ireland) agreed with the United Kingdom representative that the words "ill-treat or torture" were inappropriate in the text of amendment CDDH/III/242, although there should be no doubt that the use of ill-treatment or torture against anyone was absolutely prohibited.

47. Mr. AKRAM (Afghanistan) thanked the United Kingdom representative for his explanation concerning the deletion of the words "ill-treat or torture" and withdrew his proposal to re-insert them in paragraph 1 of amendment CDDH/III/242.

48. Mr. BOULAGHLEM (Algeria) said that article 38 as proposed by the ICRC offered a satisfactory working basis; with a few changes, it would seem, the problems could be better circumscribed. For instance, the text of amendment CDDH/III/214 might usefully replace paragraph 1, since it was more logical, more concise and clearer.

49. His delegation could not, on the other hand, agree with the United Kingdom representative's observations concerning the deletion of the words "ill-treat or torture": it considered that no distinction must be drawn between combatants who were not yet in the hands of the adverse Party and those who were already prisoners, and that the words in question should remain in paragraph 1.

50. The amendment submitted by Canada, New Zealand and the United States of America (CDDH/III/243) was an attractive one and the ideas contained in it might be worth adopting, provided the word "reasonable" was deleted: it implied a subjective appraisal which might lead to abuses.

51. Paragraph 3 could, as the Afghan representative had suggested, become a separate article, but that was perhaps unnecessary. Although it fell within the field of application of article 38, paragraph 3 was peculiar in that it related not so much to the safeguarding of combatants as to the conduct of military operations.

52. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) said that the ICRC draft of article 38 offered an excellent basis for discussion. Moreover, the various amendments submitted in connexion with it - and it was one of the most important articles of draft Protocol I - were in line with the ICRC text and could be moulded without too much difficulty into a single text, even though, on some points, they differed.

53. Two schools of thought had made their appearance on the subject of the advisability or inadvisability of including a prohibition on the ill-treatment or torture of an enemy, in paragraph 1 of the ICRC draft. He himself considered, for reasons which had been most ably set forth by the Algerian representative, that such a prohibition should be retained. He understood that the Irish delegation would raise no objection to its retention. With reference to paragraph 1 (a) of the ICRC draft, according to which "an enemy hors de combat" was an enemy who was "unable to express himself", he pointed out that the amendment submitted by the Belgian, Irish and the United Kingdom delegations (CDDH/III/242) specified that an enemy was considered "hors de combat" if he was "unconscious" or "wounded or sick". An enemy's inability to express himself, as referred to in the ICRC text, should perhaps be related to his being unconscious, wounded or sick. It could also be due, however, to lack of knowledge of the adversary's tongue. Such a possibility, should be taken into account.

54. The amendment submitted by Canada, New Zealand and the United States of America (CDDH/III/243) was clear, and its form was satisfactory. His delegation endorsed the Afghan amendment (CDDH/III/241) for it was logical that a provision of a general character such as that contained in the paragraph in question should constitute a separate article.

55. Mrs. RUESTA de FURTER (Venezuela) said that she endorsed the Uruguayan amendment (CDDH/III/7), and subscribed to the remarks of the Afghan representative, whose amendment (CDDH/III/241) would strengthen and clarify ICRC draft article 38.

56. Mr. SCHUTTE (Netherlands) said he recognized that article 38 was full of subtle nuances, as Mr. de Preux of the ICRC, among others, had noted when introducing the ICRC draft, and that it raised questions not only of form but of substance.

57. With regard to the order of the paragraphs, he said that the article's basic principle was set forth in paragraph 3, from which the first two paragraphs derived. That fundamental principle established that an enemy hors de combat must not be killed but taken prisoner, and that enemies who could not be held as prisoners, must be released. Logically, therefore, paragraph 3 should become paragraph 1.

58. With regard to the existing paragraph 1, two trends of thought had become apparent during the debate. According to some representatives, the prohibition of "ill-treatment or torture" should appear in article 38; according to others, it did not belong there. That difference of opinion seemed to correspond to a divergence of views regarding the exact moment at which the

legal status of "combatant hors de combat" changed into "prisoner-of-war" status, as defined in Article 4 of the third Geneva Convention of 1949. Those who were in favour of a reference to that prohibition in article 38 considered that a combatant hors de combat could be in the hands of an adversary without being a prisoner of war. Those who wanted the reference to that prohibition deleted did not accept such a possibility. In their view, as soon as a combatant hors de combat was in the hands of an adversary, he was entitled to prisoner-of-war status, and consequently his ill-treatment or torture was already prohibited under Articles 13 and 17 of the third Geneva Convention.

59. The question might be of some importance in connexion with paragraph 2, where it was stated that, in certain circumstances, a Party to the conflict might release prisoners to the opposing party. That might raise a delicate problem in relation to Articles 7, 12 and 109 of the third Geneva Convention. In his opinion a combatant was entitled to prisoner-of-war status and treatment from the moment he was in the hands of the adversary. But the Convention should not be interpreted in such a way as to prevent a release of captives as provided in paragraph 2. That might lead to hostilities being conducted on the basis of no quarter, which was expressly prohibited by paragraph 3. The Netherlands delegation therefore considered that the words "ill-treat or torture" should not appear in article 38. Furthermore, according to that delegation the term "enemy" should have the broadest possible interpretation, namely anyone taking part in hostilities, whether lawful combatant or not.

60. Another point concerned the second sentence of paragraph 1 of the ICRC draft article. Its wording was clearly derived from Article 23 c) of The Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land, and from Article 13 c) of the 1874 Brussels Project of an International Declaration concerning the Laws and Customs of War. The amendment submitted by the Belgian, Irish and United Kingdom delegations (CDDH/III/242) seemed to provide the best approach. The Drafting Committee might perhaps improve the text, for instance, by using the expression "unable to defend himself" instead of "... is unconscious or (a) is wounded or sick ..." in paragraph 1.

61. As to paragraph 2 of the ICRC draft, amendments CDDH/III/242 and CDDH/III/243 included proposals which seemed to improve the original text. Amendment CDDH/III/242 had the advantage of presupposing an existing obligation to release prisoners who could not be held, whereas amendment CDDH/III/243 gave the impression that that was a new obligation under international law.

Amendment CDDH/III/243, laid emphasis on the fact that responsibility for releasing the prisoner lay with the party holding him and not with the commander in the field. Perhaps the best way would be to ask the Working Group to try to merge the two texts into a single proposal stating that a Party to the conflict should issue instructions to the armed forces under its control that when captured combatants who could not be held or evacuated were released, such precautions as might be reasonable in the circumstances must be taken to ensure their safety.

62. He then turned to the question of the consequences of violations of the provisions of the third Geneva Convention of 1949, and of Protocol I, the study of which was essentially a matter for Committee I. He wished nevertheless to refer to document CDDH/210, which contained new proposals by the ICRC with regard to article 74. On page 2 of annex 2 to that document, the ICRC gave a list of acts which would constitute grave breaches of Protocol I. After examining that list the Netherlands delegation wished to state there and then that the new ICRC proposals must be examined with great circumspection. The part with which the Committee was concerned was paragraph 2 (b) of article 38 which described as a grave breach of the Protocol refusal to spare the life of an enemy who, having laid down his arms, no longer had any means of defence or had surrendered. That proposal, of all those in the ICRC list, came closest to the régime of repression of grave breaches under the Geneva Conventions. His delegation was prepared to consider the extension of the definition of grave breaches given in the third Geneva Convention of 1949 relative to the treatment of prisoners of war to cover situations in which combatants were hors de combat, in other words the situation in which they found themselves just prior to being captured and becoming prisoners of war. But it would be necessary to adopt a prudent approach and to define those grave breaches in terms of wilful killing and wilfully causing serious unnecessary injury to an adversary hors de combat.

63. Mr. GENOT (Belgium) said that he had nothing to add to the statement in which the United Kingdom representative had explained the reasons that had prompted the submission of amendment CDDH/III/242, of which Belgium was a sponsor.

64. As far as the discussion of article 38 was concerned, he agreed with the Netherlands representative that the idea expressed in paragraph 3 of the ICRC text of article 38 should precede the provisions set out in paragraphs 1 and 2. He would nevertheless prefer paragraph 3 to form a separate article, as had been proposed by the Afghan delegation in amendment CDDH/III/241, but he thought that the new article should be article 37 bis and not article 38 bis.

65. With regard to paragraph 1 of the ICRC text of article 38, he considered that the two trends which the discussions had revealed were not incompatible, inasmuch as it would be sufficient to agree on the aims which the Committee intended to achieve. Referring to the amendments proposed to paragraph 2, he pointed out that according to amendment CDDH/III/242 the responsibility for releasing prisoners who could not be held was incumbent upon a commander in the field, whereas in amendment CDDH/III/243 it devolved upon a Party to a conflict, and only by implication upon a commander in the field. That was a question of substance to which the Working Group should give all due attention.

66. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that, in view of the extreme importance of article 38 for humanizing the means and methods of combat, it was necessary to exercise the greatest wisdom in framing the article. The texts before the Committee, which included the ICRC draft and the various amendments that had been submitted, provided an excellent basis for discussion. His delegation considered that the provisions of the ICRC text of paragraph 3 were of a general nature which justified its constituting a separate article. His delegation accordingly supported the amendment submitted by the Afghan delegation (CDDH/III/241).

67. With regard to paragraph 1 of the ICRC text of article 38, his delegation considered that, even if it had the effect of recapitulating the provisions of the Geneva Conventions, it was essential to retain the phrase: "It is forbidden to kill, injure, ill-treat or torture an enemy hors de combat" if it was really the intention to prevent such acts, which regrettably occurred all too frequently in armed conflicts.

68. His delegation had no objection to paragraph 1 of the ICRC text, sub-paragraph (a) of which appeared to him to be of wider scope than sub-paragraph (a) of amendment CDDH/III/242. The text proposed in document CDDH/III/243 for paragraph 2 seemed to him an improvement on the text proposed by the ICRC, in the sense that it aptly supplemented the provisions of the third Geneva Convention of 1949.

69. Mr. CASTREN (Finland) said that, while he recognized the merits of the ICRC text of article 38, he thought that the text proposed for paragraphs 1 and 3 in amendment CDDH/III/242 could be adopted if it incorporated some of the points in the Brazilian amendment (CDDH/III/214), which the Netherlands representative had implicitly supported.

70. The text of paragraph 2 proposed in amendment CDDH/III/243 was an improvement on the ICRC text, but he would suggest that the opening words of the paragraph "A Party to a conflict" should be replaced by the words "A commander in the field", as in amendment CDDH/III/242. He supported the Netherlands proposal that the order of the paragraphs should be changed so that paragraph 3 of the ICRC text would become paragraph 1 - a logical arrangement which might satisfy the representative of Afghanistan.

71. Mr. TODORIĆ (Yugoslavia) emphasized the vital importance of protecting human beings in the event of armed conflict and said that in that respect all the amendments submitted were of undeniable value. He particularly supported the Afghan amendment (CDDH/III/241), which seemed to him to be of great value from the humanitarian point of view; his delegation would like to co-sponsor that amendment.

72. Mr. AGUDO (Spain) supported the delegations which would like paragraph 3 of the ICRC text of article 38 to become either paragraph 1 of that article or else a separate article. He would like the present paragraph 1 to reproduce the wording of Article 23 c) of The Hague Regulations of 1907 and the words "no longer has any means of defence" to be replaced by the words "or having no longer means of defence," the comma implying a condition. Otherwise he would rather the phrase was deleted.

73. Sir David HUGHES-MORGAN (United Kingdom) associated his delegation with those which had supported the Afghan delegation's suggestion that paragraph 3 should become a separate article. Such an article could perhaps mention the absolute prohibition of ill-treatment or torture of an enemy, which would give it greater humanitarian significance.

74. Mr. MENCER (Czechoslovakia) said that on the whole he supported the ICRC text of article 38. He noted that the amendments submitted were not in contradiction with that text. Some of them improved it and others suggested a new structure, of which his delegation approved, making a separate article of paragraph 3. At all events, the terminology of the article should be made uniform: the word "enemy" was used in paragraph 1, "adverse Party" in paragraph 2 and "adversary" in paragraph 3.

75. Mr. WULFF (Sweden) said that he was convinced that the ICRC text of article 38 could be improved. Amendment CDDH/III/242, introduced in detail by the United Kingdom representative, provided for a special situation in which a soldier was no longer a combatant and not yet a prisoner of war. He noticed that

paragraph 1 made no mention of the combatant laying down his arms. There were, of course, situations in which the soldier could not lay down his arms, but it was the customary sign of surrender, although it was not necessary in all circumstances.

The meeting rose at 12.30 p.m.





SUMMARY RECORD OF THE THIRTIETH MEETING

held on Thursday, 13 March 1975 at 10.25 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 39 - Aircraft occupants (CDDH/1, CDDH/56;  
CDDH/III/69, CDDH/III/244)

1. Mr. de PREUX (International Committee of the Red Cross) reminded participants that, as opposed to the preceding articles, article 39 had no equivalent in The Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land, since air warfare had been unknown when the latter had been drawn up. An airman in distress could, strictly speaking, be covered by paragraph 1 (a) of article 38, but the importance of aviation in modern conflicts warranted the adoption of a special provision to ensure the normal functioning of air operations and the protection of airmen. Certain States had already published military manuals, prohibiting attacks on disabled aircraft and on their crew in distress; that prohibition obviously excluded airborne troops. But since it was not always easy to make a distinction between the two situations, one expert had already suggested that an orange parachute be used in cases of distress.

2. Article 39 applied only to airmen in distress and to disabled aircraft. Once they had reached the ground, all airmen should be afforded the same safeguards as during their descent by parachute, whether they landed in a zone held by the military or among an enemy population. In the latter case, the authorities should ensure that the provisions of the relevant article were observed.

3. Paragraph 2 referred back to article 35 and would be more effective if the Protocol provided for the use of an orange parachute or some other signal.

4. Mr. SABEL (Israel), introducing his delegation's amendment (CDDH/III/69) said that it should be clearly stressed that an airman who jumped by parachute to abandon his aircraft in distress was indeed hors de combat and should not be attacked. That provision already appeared in Article 20 of The Hague Rules of Air Warfare (1922/1923) and in the ICRC proposal made in 1972 to the second session of The Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts.

5. Normally, it could be presumed that an airman parachuting from an aircraft in distress was hors de combat, but that presumption could be proved false by the behaviour of the airman in question. The ICRC text was somewhat ambiguous on that point and left it to the enemy troops to decide whether that airman was hors de combat or not, although he would obviously be unable to lay down any small arms which he might be carrying. Since the protection that he should be afforded obviously could not be given to airborne troops, the Israeli delegation had proposed the qualifying phrase: "... and whose attitude in the course of his descent is not manifestly hostile". Finally, his delegation proposed that a concluding sentence be added, stipulating that all airmen should be given a reasonable opportunity to surrender upon reaching the ground, since their attitude did not necessarily become hostile simply because they had reached the ground.

6. In any case, his delegation was prepared to co-operate with other delegations in the Working Group in order to draft a definitive text of that article.

7. Mr. EL GHONEMY (Arab Republic of Egypt), speaking on behalf of the sponsors of amendment CDDH/III/244, said that the ICRC text was perhaps over-ambitious. The adversary's freedom to manoeuvre should be restricted without, however, ignoring military realities.

8. Article 39 should be seen as a specific application of articles 33 and 38, but each article afforded a different measure of protection. Article 38 provided that it was "forbidden to kill, injure, ill-treat or torture an enemy hors de combat", while draft article 39 contained the phrase "the occupants of aircraft in distress shall never be attacked". The latter provision was open to question, since an airman hors de combat was still a combatant and could not be protected in all circumstances. The only way of capturing such an airman was often to attack him. The ICRC text therefore went too far, no doubt unwittingly. Since the occupants of an aircraft in distress might have hostile intentions, article 39 should not go beyond the provisions of article 38.

9. With regard to the second point of the amendment proposed by the Arab countries, it should be borne in mind that the use of misleading signals was covered by article 35; his delegation considered that it would be more realistic to introduce the concept of perfidy at the end of paragraph 2 of the ICRC text.

10. The CHAIRMAN declared open the debate on article 39.

11. Mr. CASTREN (Finland) said he thought that the ICRC draft was too succinct and added nothing new to articles 35 and 38. Its application would, moreover, give rise to practical difficulties. In particular, it would be difficult to determine whether the occupants of an aircraft in flight were in distress and whether the aircraft had exhausted all means of combat. It would therefore be better to restrict the provisions of that article to descent by parachute and to what happened after the parachutist reached the ground. His delegation therefore proposed that the ICRC text be replaced by the first sentence of the amendment proposed by the Arab countries (CDDH/III/244) and by the last paragraph of the Israeli amendment (CDDH/III/69).

12. Mr. BOULAGHEM (Algeria) said that the ICRC text merely constituted the application of articles 35 and 38 to the specific case of aircraft occupants.

13. Paragraph 1 was rather ambiguous. The fact that an aircraft was in distress did not necessarily mean that its occupants were hors de combat. The aircraft was of little importance: what mattered was the fate of its occupants. Any airman who parachuted from an aircraft was likely to be hors de combat, unless he failed to comply with paragraph 1 of article 38. The Working Group should take into consideration amendment CDDH/III/244, which reflected the Algerian delegation's concern about those matters.

14. With regard to paragraph 2, it was advisable to avoid providing any loop-hole for acts of perfidy and to add to the final text the clarification proposed in the amendment submitted by the Arab countries. Finally, he considered that article 39 should be brought into line with the provisions of articles 35 and 38.

15. Mr. NGUYEN VAN HUONG (Democratic Republic of Viet-Nam) said that he supported the principles embodied in the ICRC text, but would like it to be made more precise, in order to facilitate its uniform application.

16. During the war waged in Viet-Nam by aggressive imperialist Powers, enemy airmen had been found to carry two revolvers and two radio transmitters, which proved that they had no intention of surrendering when they reached the ground and that the adversary was prepared to use any means to ensure their rescue, without the least regard for the civilian population. Machine guns, dive bombing, pellet bombs and other means had been used during rescue operations. Even CS smoke had been used, particularly in the province of Thanh Hoa, as a screen between the civilian population and the airman. The suffering inflicted on civilian populations and the damage caused to civilian objects were particularly serious when the airman landed near a village or town.

17. The conditions in which peoples struggling against colonial domination, foreign occupation or racist régimes had to fight were identical with those of peoples who had to struggle against imperialism. Accordingly, the occupants of an aircraft in distress, whether or not they had left the aircraft, should not be considered as being hors de combat in the following four cases: if they did not fulfil the conditions stated in paragraph 1 of article 38; if they sent signals of distress to their armed forces; if a rescue operation was undertaken on their behalf; and if they moved off in the direction of the lines occupied by their own troops.

18. The CHAIRMAN, replying to a question by the representative of the Democratic Republic of Viet-Nam, assured him that his delegation's amendment submitted to the Working Group would be taken into consideration by the Group, despite the fact that it had been submitted late.

19. Mr. HERNANDEZ (Uruguay) said that, in his opinion, the ICRC text, the Israeli amendment (CDDH/III/69) and the amendment of the Arab countries (CDDH/III/244) together provided an excellent basis for discussion. Despite the value of those documents and of the earlier statements, it might be asked whether the criteria already established for the shipwrecked should not be applied to air crews, excluding airborne troops. The Committee should take care that crews in distress were not left to their fate because, as he knew from his own experience, they were exposed to serious and perhaps mortal dangers.

20. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that the definite connexion between article 39 and article 38 should be kept in mind. The aim was to ensure the safety of a person who had withdrawn from the combat, protection being granted under articles 38 and 39. The essential principle in the rules under discussion was the obligation for the combatant to prove that he had withdrawn from the combat: that principle was the source of the concept of being "obviously hors de combat", introduced in amendment CDDH/III/244; any feigning would entail the notion of an "act of perfidy" which the sponsors of that amendment proposed to introduce at the end of paragraph 2.

21. The USSR delegation supported amendment CDDH/III/244. It was, of course, difficult to judge when a person was "obviously hors de combat", but that difficulty should not prevent the adoption of the principle on which the rules under discussion were based.

22. Mrs. SILVERA (Cuba) said that paragraph 1 of article 39 established a privilege for aircraft which might also be accorded in principle to any other kind of military transport. With regard to paragraph 2, reference might usefully be made to article 35, which stated the principle of the prohibition of perfidy.

23. Mr. EATON (United Kingdom) said that his delegation was puzzled that the new text which the ICRC had prepared differed quite substantially from those generally favoured by the Government Experts at their meetings in 1971 and 1972. The people to be protected no longer seemed to be the same. In the earlier text the emphasis had been on protecting aircrew and passengers who had baled out from an aircraft in distress as distinct, of course, from paratroopers. In the new text such persons were still covered, but so also were those who remained in an aircraft in distress, and, for example, made a forced landing, and the emphasis of protection was placed on the latter. That change had created problems. It was very difficult to determine when an aircraft was in distress, especially from the ground. The second sentence attempted to provide a text for such a determination, but in his view failed. Perhaps the solution might be to return to the initial concept of protecting only persons who had abandoned an aircraft in distress (and who refrained from committing hostile acts) but not those who remained in such an aircraft.

24. Accordingly, in his opinion, paragraph 1 of the ICRC text could not be kept as it stood. He welcomed amendment CDDH/III/244 submitted by the Arab Republic of Egypt and other Arab States and the Israeli amendment (CDDH/III/69), both of which went a long way towards meeting the criticisms he had expressed concerning the present text. A judicious combination of the two amendments should make it possible to arrive at an acceptable text. The Israeli amendment had the merit of introducing the notion of "a reasonable opportunity to surrender". He also agreed with the Egyptian amendment that paragraph 2 was an example of perfidy and that that could be explicitly stated. Alternatively, it might not be necessary to include paragraph 2 at all, since the point appeared to be wholly covered by article 35, paragraph 1 (a) "the feigning of a situation of distress".

25. Mr. PASCHE (Switzerland) pointed out that the problem dealt with in article 39 had not yet been solved in any of the many existing international instruments. All military pilots naturally tried to avoid capture and waited until the last moment before deciding whether to surrender or to continue to fight. The article under discussion had a considerable bearing on military interests and on the fate of the pilot who was a particularly valuable combatant in all armies. The ICRC text

seemed to provide a good compromise between humanitarian requirements and military necessities. He thought it might be supplemented by the provision in amendment CDDH/III/69 for "reasonable opportunity to surrender". Amendment CDDH/III/244 was useful because it introduced the notion of "acts of perfidy".

26. Mr. AJAYI (Nigeria) said that the ICRC text was excellent. Nevertheless, after hearing the statements of the sponsors of the two amendments (CDDH/III/69 and CDDH/III/244), he thought that it should be possible to reach a compromise by redrafting paragraph 1 in such a way as to stress the need to retain the notion of "acts of perfidy". He could support amendment CDDH/III/244, subject to a drafting change in the English version of paragraph 1.

27. The CHAIRMAN suggested that article 39 should be sent back to the Working Group, together with the amendments submitted and the observations made during the meeting.

It was so agreed.

Article 40 - Independent missions (CDDH/1; CDDH/III/213, CDDH/III/217, CDDH/III/245)

28. Mr. de PREUX (International Committee of the Red Cross) said that that article was partly based on Article 29 of The Hague Regulations, which dealt with persons who could be regarded as spies and those who were not spies. On the one hand, the troops referred to in that provision belonged among the categories listed in Article 4 of the third Geneva Convention of 1949, namely, members of regular armed forces in uniform, militia and partisans acting in co-ordination with the regular forces and mass uprisings in which arms were carried openly and distinctive emblems were worn. On the other hand, the provisions concerned the combatants mentioned in article 42, who were required to distinguish themselves from the civilian population. The words "shall be prisoners of war" in article 40, paragraph 3, categorically excluded any action being taken on the grounds of espionage and sabotage of military objectives.

29. Mr. AGUDO (Spain), introducing his delegation's amendment (CDDH/III/213), said that the words "armed forces" should be written with initial capital letters in order to emphasize the fact that those forces were part of the State machinery. After requesting a change in the Spanish text, he drew attention to the wording of the paragraph relating to combatants who "distinguish themselves from the civilian population by means of fixed badges, permanent and clearly visible", and expressed the hope that article 40 would establish, with respect to combatants, the distinction appearing in article 42.

30. Mr. STARLING (Brazil), introducing his delegation's amendment (CDDH/III/217), said that the word "combatants", used by the ICRC, was not sufficiently clear. His delegation accordingly suggested that specific reference should be made to the "other persons belonging to the categories referred to in Article 4A (1) (2) (3) and (6) of the third Geneva Convention of 1949", since that would eliminate any risk of confusion.

31. Mr. NGUYEN VAN HUONG (Democratic Republic of Viet-Nam), introducing his delegation's amendment (CDDH/III/245), drew attention to the statement in the ICRC Commentary on article 40 that "what distinguishes espionage from the legitimate quest for military information is its clandestine nature" (see CDDH/3, p. 46). The wearing of a uniform could be required in the war situations referred to in The Hague Regulations, annexed to The Hague Convention No. IV of 1907 concerning the Law and Customs of War on Land, namely, when the two parties at war were industrialized European countries at approximately the same level of economic and military development and when the activity of the armies was entirely distinct from the life of the civilian population. Yet in modern wars waged for self-determination, armies often did not have enough uniforms. Furthermore, the activities of liberation armies were closely linked to the life of the civilian population. Those facts had to be taken into account if the new provisions on humanitarian law were to be applied in practice, and his delegation appealed to participants to accept the deletion of the words "in uniform". Since the question was one of distinguishing between civilians and armed forces - a distinction which the wearing of uniforms made possible in conventional warfare - it would be advisable, in the new context of neo-colonial wars, to establish other criteria for non-clandestine activities, such as belonging to a military organization or being under responsible command. His delegation was prepared to collaborate with others in drawing up a satisfactory text.

32. Mr. CASTREN (Finland) said that he considered paragraph 1 of the ICRC text, based on Article 29 of The Hague Regulations of 1907, to be acceptable. It could easily be combined with paragraph 2, since saboteurs and spies had nearly always received similar treatment from various States. He endorsed the Brazilian amendment (CDDH/III/217), but regretted that he could not support the Spanish amendment (CDDH/III/213), or the amendment submitted by the Democratic Republic of Viet-Nam (CDDH/III/245), since the former did not take into account organized resistance movements and mass uprisings and the latter departed from the corresponding provisions of The Hague Regulations. In conclusion, he drew attention to article 42, which in some degree was closely related to article 40.

33. Mr. BOULAGHLEM (Algeria) said he wished to draw attention to the position adopted by his delegation with regard to article 35 (Prohibition of perfidy) and to reaffirm that position in relation to article 40. The Algerian delegation had, like others, recommended the deletion of paragraph 1 (c) of article 35 specifying the act of perfidy as "the disguising of combatants in civilian clothing". Such a provision no longer covered situations currently arising in wars of decolonization. For the same reason, he hoped that the reference to wearing uniform would be deleted from article 40. The millions of combatants in liberation organizations were not just so many spies. He therefore supported amendment CDDH/III/245.

34. Mr. CRETU (Romania) said he had already expressed his views on the wearing of uniform, which was not indispensable for combatants. He therefore supported amendment CDDH/III/245.

Article 40, with the amendments thereto and the comments of representatives, was referred to the Working Group.

Article 41 - Organization and discipline (CDDH/1, CDDH/56; CDDH/III/28, CDDH/III/210)

35. Mr. de PREUX (International Committee of the Red Cross) explained that article 41 was based, not on The Hague Regulations but on Article 1 of The Hague Convention No. IV of 1907, which was worded as follows: "The contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention".

36. According to the terms of draft Protocol I, the organization which was indispensable for any armed force should be directed towards respect for the rules laid down in that instrument and should provide for the dissemination not only of rules but also of instructions, as it was stated in The Hague Convention. That requirement was expressed in terms of an internal disciplinary system giving official recognition to the rules of the Protocol, the law laid down at The Hague, the Geneva Conventions, The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, and customary law. In other words, armed forces should provide themselves with the necessary machinery to ensure that their own members observed international law. That requirement had seemed so fundamental to those who drafted The Hague Regulations that they had made it the subject of the Convention itself, to which the rules of application were annexed.



37. Mr. AGUDO (Spain), referring to the Spanish amendment (CDDH/III/210), said that as his delegation did not know what the final text of article 42 would be, it had preferred not to include special categories of armed forces, such as liberation or resistance movements, in order not to restrict the scope of the article. That was why it had used the words "combatants referred to in Article 4 of the third Geneva Convention of 1949 and article 42 of the present Protocol". The amendment also contained certain drafting changes to the original Spanish text.

38. Mr. SCHUTTE (Netherlands) drew attention to the interpretation of the term "internal disciplinary system". In some countries, including his own, a clear distinction was made between military disciplinary law and military penal law. The former was enforced by the military commanders who had the power to inflict certain penalties, whereas military penal law was enforced by the judicial authorities which were, in principle, independent of the military organization. The modern trend, however, was to confine disciplinary law to matters of purely internal administration, i.e. rules of conduct intended to ensure the proper functioning of the military organization. Everything which lay outside the area of application of disciplinary law was considered as falling within the sphere of military penal law. According to that concept, the enforcement, or more accurately, the violation of the rules of the Protocol or of other rules of international law, was primarily a matter of penal procedure. That was not in contradiction with article 41; on the contrary, such a system of enforcement of the rules of humanitarian law was a fortiori covered by that provision.

39. Mr. SORIANO (Philippines) said he thought that article 41 as drafted by the ICRC met the concern of several delegations which wanted the provisions of Protocol I to be understandable by the ordinary soldier. Discipline was a characteristic of the soldier, and if the internal disciplinary system included the order to apply the rules of international humanitarian law in armed conflicts, soldiers would carry out that order. The Philippine delegation therefore supported the ICRC text of article 41. In drawing up the regulations concerning internal discipline, the Philippine military judicial authorities had stressed the importance of observing the rules of international law applicable in armed conflicts.

40. Mr. NAMON (Ghana) referring to his delegation's amendment (CDDH/III/20) said that the words "and liberation movements" should be inserted after the words "resistance movements". Like resistance movements, liberation movements should be organized and disciplined. The existence of such movements and the legitimacy of their aims and aspirations had been recognized by the international community. Moreover, such

organizations had already expressed their intention of complying with the standards of international law, and that was the reason why the cause they defended deserved respect. It was therefore necessary to mention such organizations in article 41.

41. Mr. PASCHE (Switzerland) said he could endorse the ICRC text of article 41, the basic idea of which had appeared in the law in force for nearly a hundred years. That article reaffirmed the notion that, to be recognized as belligerents, regular armed forces, militia organizations and volunteer corps had to be organized and must be subject to an appropriate internal disciplinary system. On the other hand, the wording of the article should be brought into line with that of the relevant articles of the Geneva Conventions. It should therefore be specified which armed forces were meant and to mention, for example, militias and members of volunteer corps. Article 41 did not apply in the case of mass uprisings, which were spontaneous and unorganized movements.

42. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that article 41 was extremely important since, without discipline, officers would find it difficult to carry out the obligations of international humanitarian law applicable in armed conflicts stipulated in draft Protocol I and in the Geneva Conventions. The ICRC text provided an excellent basis for discussion. The question of discipline affected all the armed forces, regular or irregular, referred to in Article 4 A of the third Geneva Convention of 1949 and in article 42 of draft Protocol I. The provisions of article 41 should be applicable by all regular armed forces and by such irregular armed forces as liberation movements, militias and volunteer corps taking part in armed conflicts, and even forces formed spontaneously after an uprising. He therefore supported the amendment proposed by Ghana: in his view, liberation movements should be mentioned explicitly, in order to emphasize the equality of rights accorded to those movements. Moreover, in their struggle against colonial domination, liberation movements should respect the rules of international humanitarian law.

43. Sir David HUGHES-MORGAN (United Kingdom) said that he could support unreservedly the principle set out in the ICRC text of article 41. In all armed conflicts discipline was of the utmost importance and should be imposed on all armed groups and on all combatants. It was the lack of discipline which led to violations of international humanitarian law.

44. His delegation found it rather difficult however, to accept the term "armed forces" used by the ICRC. Article 4 of the third Geneva Convention of 1949 distinguished between armed

forces and the various other armed groups. Article 45 of draft Protocol I, which had already been approved by the Committee, expressly mentioned the categories of combatants referred to in Article 4 of the third Geneva Convention of 1949. It would be useful to mention resistance movements and liberation movements in article 41, in order to make it quite clear that all combatants must be subject to a disciplinary system and must respect the rules of international humanitarian law. The Committee could perhaps adopt some such expression as that proposed by Spain (CDDH/III/210) and base the wording of article 41 on that text.

45. Mr. AJAYI (Nigeria) supported the amendment proposed by Ghana. He did not consider that the phrase "resistance movements" necessarily included the national liberation movements struggling for the right of the African peoples to self-determination. Those movements were organized and disciplined and reference to them should be made in article 41.

46. Mr. DIXIT (India) supported the principle laid down in the ICRC text of article 41 that armed forces should be organized and should at all times respect the rules of international humanitarian law. He also supported the Ghanaian amendment for the insertion of a reference to national liberation movements in article 41, since it was essential that such movements should respect the provisions of Protocol I and of the Geneva Conventions.

47. Miss BOA (Ivory Coast) accepted the text proposed by the ICRC and wholeheartedly supported the Ghanaian amendment for the inclusion of a reference to national liberation movements in article 41. She pointed out that the Conference had already placed the action of resistance movements and liberation movements on the same footing as international armed conflicts.

48. Mr. EIDE (Norway) said that, while his delegation endorsed the principles laid down in article 41, it had some doubts about the wording. His delegation had already drawn attention to the relationship between articles 35, 40, 41 and 42 and had pointed out that it was difficult to consider those articles separately. His delegation proposed that part of the text of article 42 should be transferred to article 41 and it had drawn up a working paper on the subject. Articles 35, 40, 41 and 42 should be considered together and final decisions could be taken in the Working Group.

49. Mr. GILL (Ireland) said that his delegation endorsed the views expressed by the representative of the United Kingdom and thought that the text proposed by Spain (CDDH/III/210) might serve as a basis for the final text of article 41.

50. Mr. FISSENKO (Byelorussian Soviet Socialist Republic) endorsed the principle laid down in article 41 and supported the Ghanaian amendment, which improved the ICRC text considerably.

51. Mr TODORIĆ (Yugoslavia) emphasized the importance of article 41. He supported the Ghanaian amendment, which conformed with the principles already adopted by the Conference regarding article 1 of draft Protocol I.

52. The CHAIRMAN said that article 41, the amendments thereto and the comments of representatives would be sent to the Working Group.

The meeting rose at 12.15 p.m.

SUMMARY RECORD OF THE THIRTY-FIRST MEETING

held on Friday, 14 March 1975, at 10.50 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 46 - Protection of the civilian population

Paragraph 3 (CDDH/1; CDDH/III/246, CDDH/III/264)  
(concluded)

Article 48 - Objects indispensable to the survival of the civilian population (CDDH/1; CDDH/III/247, CDDH/III/264)  
(concluded)

Article 49 - Works and installations containing dangerous forces (CDDH/1; CDDH/III/248, CDDH/III/264) (concluded)

Article 50 - Precautions in attack (CDDH/1; CDDH/III/249, CDDH/III/264) (concluded)

Article 51 - Precautions against the effects of attacks (CDDH/1; CDDH/III/250, CDDH/III/264) (concluded)

Article 52 - Non-defended localities (CDDH/1; CDDH/III/251, CDDH/III/264) (concluded)

Article 53 - Neutralized localities (CDDH/1; CDDH/III/252, CDDH/III/264) (concluded)

1. The CHAIRMAN drew attention to the report by the Rapporteur (CDDH/III/264) and to the Working Group's proposals in documents CDDH/III/246 to CDDH/III/252 concerning article 46, paragraph 3, and articles 48 to 53. After the Rapporteur had introduced his report, the articles would be put to the vote one by one. Subsequently, delegations would be given the opportunity to explain their vote or to make any other comments which they wished to be placed on record.

2. Mr. ALDRICH (United States of America), Rapporteur, said that document CDDH/III/264 contained a number of his comments on the problems which had arisen during the Working Group's attempts to produce agreed texts for the articles in question. The report did

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\* Incorporating document CDDH/III/SR.31/Corr.1

not claim to be a complete account of the Working Group's deliberations; it did, however, deal in some detail with the articles which had proved to be the most difficult, in particular articles 48 and 49. There were some mistakes in the document; a revised version would be issued which would also take into account the points that had been settled at the Working Group's previous meeting.

3. The CHAIRMAN, referring to article 46, paragraph 3, observed that all the other paragraphs had already been approved by the Committee.

4. Mr. ALDRICH (United States of America), Rapporteur, said that article 46 had been discussed by the Committee at the first session of the Conference and earlier in the current session. The Working Group had now succeeded in reaching agreement on a text for paragraph 3 which the Committee should be able to adopt by consensus. Referring to paragraph 3 (b), he said that the question of whether a cross-reference to article 50, paragraph 2 (a) (iii) would suffice or whether that text should be reproduced in full in the subparagraph would have to be left to the Drafting Committee.

5. Mr. FRIEDRICH (Legal Secretary) said that the equivalent of the words "among others" in the last sentence of paragraph 3 (CDDH/III/246) did not appear in the Russian version; that omission would be made good.

Article 46, paragraph 3 (CDDH/III/246) was adopted by consensus.

Article 46 as a whole was adopted by consensus.<sup>1/</sup>

6. Mr. LOPEZ IMIZCOZ (Argentina), supported by other Spanish-speaking delegations, asked that due attention should be paid to questions of style, so that the Spanish texts not only corresponded fully with the original language version but were elegantly drafted.

7. The CHAIRMAN requested the Spanish-, French-, and Russian-speaking delegations to co-operate with the Rapporteur and the Secretariat in order to ensure that the different language versions were fully satisfactory to all.

8. Mr. ALDRICH (United States of America), Rapporteur, referring to article 48 (CDDH/III/247), said that the proposed text might need refinement by a Drafting Committee, as he had stated in his report (CDDH/III/264). In substance, however, it reflected the almost unanimous view of the Working Group, which considered it one of the most important articles of humanitarian law relating to protection of the civilian population.

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<sup>1/</sup> For the text of article 46 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)

9. Mr. FRIEDRICH (Legal Secretary) said that the words "y recursos" should be deleted from the Spanish version of paragraph 2 and that the words "y las zonas agrícolas" should be inserted after "alimenticios" in that paragraph.

10. Mr. FRICAUD-CHAGNAUD (France) said that, in spite of the objections raised by his delegation, the word "déplacer" still appeared in the French version of paragraph 2. That word was not acceptable to his delegation and he would be unable to participate in the consensus unless he received the assurance that it would be replaced by "enlever".

11. The CHAIRMAN assured the French representative that the correction would be made.

Article 48 (CDDH/III/247) was adopted by consensus.<sup>2/</sup>

12. Mr. ALDRICH (United States of America), Rapporteur, referring to article 49 (CDDH/III/248), said that the Working Group had been unable to solve all the problems which had arisen concerning that article. Two decisions would need to be taken with regard to the text of paragraph 1, namely, whether or not the phrase in double square brackets should be retained and which of the two phrases "would be likely to" or "may", should be retained.

13. Turning to paragraph 7 of article 49, he said that the Working Group had not considered itself competent to take a decision on the special sign. That question would have to be considered by another body, which might be either Committee II or a Working Group.

14. Mr. FRIEDRICH (Legal Secretary), said that the square bracket which appeared after the word "attaques" in the fifth and tenth lines of the French version of paragraph 1 should be reversed.

15. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) proposed that the Committee should first decide between "may" or "would be likely to", and then take up the phrase in double square brackets as a whole.

It was so agreed.

16. The CHAIRMAN invited the Committee to choose between "would be likely to" and "may".

In favour of "would be likely to": 18

In favour of "may": 47

Abstentions: 3

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<sup>2/</sup> For the text of article 48 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)

17. The CHAIRMAN stated that the word "may" in paragraph 1 would consequently be retained.

18. He invited the Committee to vote on the deletion or retention of the phrase in double square brackets in paragraph 1.

In favour of deletion: 7

In favour of retention: 54

Abstentions: 5

19. The CHAIRMAN stated that the phrase would consequently be retained, with the word "may".

Article 49 (CDDH/III/248) as a whole was adopted by consensus.<sup>3/</sup>

20. Mr. ALDRICH (United States of America), Rapporteur, referring to article 50, said that the Working Group had been able to reach general agreement on that article (CDDH/III/249). Only two issues remained outstanding, namely, the choice between "cause" and "create a risk of" in paragraph 2 (a) (iii) and 2 (b), and the closing phrase of paragraph 2 (c), for which two alternatives were given in square brackets. With regard to the second issue, some members of the Working Group had been of the opinion that neither phrase should be included, but most members had considered that either one or the other should be retained.

21. The CHAIRMAN invited the Committee to choose between "cause" and "create a risk of" in paragraphs 2 (a) (iii) and 2 (b).

In favour of "cause": 47

In favour of "create a risk of": 15

Abstentions: 2

22. The CHAIRMAN stated that the word "cause" would consequently be retained.

23. He drew attention to paragraph 2 (c) and the two phrases which appeared in square brackets.

24. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that the Russian translation of the phrases in square brackets was inaccurate. At an earlier meeting his delegation had asked the Secretariat to correct the error, but that had not been done.

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<sup>3/</sup> For the text of article 49 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)



25. The CHAIRMAN said that the Legal Secretary would see that the necessary correction was made.

26. Mr. ALDRICH (United States of America), Rapporteur, observed that it was desirable for Spanish and Russian translators to be present at meetings where such questions arose. The necessary arrangements had unfortunately not been made for the Committee's thirtieth meeting, but steps would be taken to make good that omission in the future.

27. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said he noted that that would be done in the future. In the present case, however, he would be obliged to vote on the basis of the English language text, and that was an irregular procedure. He requested that the Russian version of future texts should be brought into line with the original version in good time.

28. The CHAIRMAN said that he would give instructions to that effect.

29. He invited the Committee to vote on the two alternatives in paragraph 2 (c) of article 50.

In favour of "whenever circumstances permit": 20

In favour of "unless circumstances do not permit": 37

In favour of including neither phrase: 8

Abstentions: 2

30. The CHAIRMAN stated that the phrase "unless circumstances do not permit" had consequently been adopted.

31. Mr. CRISTESCU (Romania) said that a number of delegations had objected to the inclusion of the phrase "which would be excessive in relation to the concrete and direct military advantage anticipated" in paragraphs 2 (a) (iii) and 2 (b) of article 50. Consequently, he asked for a separate vote to be taken on that phrase.

The Committee decided, by 56 votes to 6, with 3 abstentions, to retain the phrase.

32. The CHAIRMAN put article 50 as a whole to the vote.

Article 50 (CDDH/III/249) as a whole was adopted by 66 votes to none, with 3 abstentions.<sup>4/</sup>

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<sup>4/</sup> For the text of article 50 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)

33. Mr. ALDRICH (United States of America), Rapporteur, referring to article 51, said that the wording had been considerably changed in the Working Group and the resultant text (CDDH/III/250) had been generally acceptable to the Working Group.

34. Sir David HUGHES-MORGAN (United Kingdom) drew attention to a small typing error in the English text: paragraph 1 should begin with the words "Without prejudice to Article 49 ...".

Article 51 (CDDH/III/250) was adopted by consensus.<sup>5/</sup>

35. Mr. ALDRICH (United States of America), Rapporteur, referring to article 52, said that the text in document CDDH/III/251 was the result of a compromise among five tendencies: those who wished to see non-defended localities established by unilateral declaration; those who wished to see them established only by agreement; those who wished to limit them to an area in or near the contact zone; those who wished to permit them also in the hinterland; and those who wished to provide a mechanism for creating non-defended localities even where it would take some further time to remove all combatants from the locality. The result was an article which permitted unilateral declaration of non-defended localities near or in a contact zone which were open for occupation by an adverse Party and met the other prescribed conditions and which required agreement for the establishment of zones not meeting the geographical or other requirements. He drew attention to the foot-note to paragraph 2 of the text.

36. Mr. FRIEDRICH (Legal Secretary) said that in the Spanish text of paragraph 2 the words "y que está abierto a la ocupación por una Parte contraria" should be added after the words "o dentro de ella".

Article 52 was adopted by consensus.<sup>6/</sup>

37. Mr. ALDRICH (United States of America), Rapporteur, referring to article 53, said that there had been differences of opinion about the title of article 53 in the Working Group. The terms "neutralized zones", "demilitarized zones" and "non-militarized zones" had all been considered. The term "demilitarized zones", though admittedly not ideal, had been the most generally acceptable. There had been no disagreement on the substance of the article.

Article 53 (CDDH/III/252) was adopted by consensus.<sup>7/</sup>

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<sup>5/</sup> For the text of article 51 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)

<sup>6/</sup> For the text of article 52 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)

<sup>7/</sup> For the text of article 53 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)

38. The CHAIRMAN congratulated the Working Group on the spirit of co-operation that prevailed in its discussions and expressed his sincere thanks to Mr. Aldrich, Rapporteur, for his most valuable help.

The Committee adopted by acclamation a vote of thanks to the Rapporteur.

Explanations of votes.

39. The CHAIRMAN invited representatives who so wished to explain their votes.

40. Mr. CRISTESCU (Romania), explaining his vote on article 49, said that his delegation had voted against the insertion of the expression "where such attack /\_would be likely to\_/ /\_may\_/ cause the release of dangerous forces and consequent severe losses among the civilian population" in paragraph 1 (CDDH/III/248), because it considered that those phrases would result in a reduction of the protection of works and installations containing dangerous forces.

41. His delegation had voted against the word "cause" and in favour of the phrase "create a risk of" in paragraph 2 (a) (iii) of article 50 (CDDH/III/249).

42. It had voted against the two phrases in square brackets in paragraph 2 (c) of that article, because it considered that those expressions would restrict protection of the civilian population. His delegation had abstained in the vote on article 50 and had voted against paragraph 2 (a) (iii) and 2 (b), which embodied the "rule of proportionality" that his delegation had always opposed. Article 50 introduced into humanitarian law a concept which was contrary not only to humanitarian principles but to the general principles of international law. It amounted to legal acceptance of the fact that one part of the civilian population was to be deliberately sacrificed to real or assumed military advantages and it gave military commanders the power to weigh their military advantage against the probable losses among the civilian population during an attack against the enemy. Military leaders would tend to consider military advantage to be more important than the incidental losses. The principle of proportionality was therefore a subjective principle which could give rise to serious violations. Accidental losses among civilians must be reduced to a minimum through scrupulous application of the Geneva Conventions. All precautionary measures must be taken to protect the civilian population before embarking on an attack. In no circumstances should legal provisions give parties the right to dispose of human lives among the civilian population of the adversary. Modern international law prohibited aggression and only wars of defence against aggression were permitted. The rule of proportionality was therefore against the principles of international law. That position was also valid for article 46, paragraph 3 (b) (CDDH/III/246).

43. Mr. FRANKE (Federal Republic of Germany), referring to article 46, paragraph 3, said that only with great reluctance had his delegation not opposed the consensus. It would have preferred the ICRC text of article 46, paragraph 3. That applied particularly to paragraph 3 (b), in which the cross-reference to article 50 did not correspond to the importance of that provision.

44. His delegation had not opposed the consensus on article 48 (CDDH/III/247) because it supported the aim and substance of the article, but it agreed with the Rapporteur that the wording required considerable polishing if the article was to be clear and workable. His delegation would therefore have abstained had there been a formal vote on the text in document CDDH/III/247.

45. With reference to article 49 (CDDH/III/248), he said that his delegation had been reluctant to accept the consensus, for it considered the text too complicated. The ICRC text covered the main issues and the attempt to solve every possible problem connected with dangerous forces had produced an almost unworkable text.

46. Mr. SCHUTTE (Netherlands) said that during the discussion on article 49 in the Working Group, his delegation had been eager to obtain as high a standard as possible for the protection of the particular objects covered by that article. The points of major concern to it had been taken into account: namely, the circumstances in which attacks might lead to the destruction of dams, dykes and nuclear generating stations, with catastrophic consequences for the civilian population and civilian objects in the vicinity. Nevertheless there were still some ambiguities in paragraph 2 of article 49, which should be read in connexion with the generally accepted explanation attached to it.

47. His delegation fully supported the statement by the Rapporteur on page 4 of his report (CDDH/III/264) that in cases where a great many people would be killed and much damage done by the destruction of a dam or dyke, immunity would exist unless the military reasons for destruction in a particular case were of an extraordinarily vital sort.

48. His delegation considered the interpretation of paragraph 2 of article 49 given by the Rapporteur (CDDH/III/264, pp. 4 and 5) to be the correct one. Its support of the consensus on article 49 had been based on that assumption.

49. Mr. STARLING (Brazil) said that his delegation had voted in favour of the text of article 50 (CDDH/III/249) as adopted by the Committee. With a view to the translation into Portuguese of paragraph 2 (b) of that article, however, his delegation wished it to be noted that, in accordance with the clarifications given in the discussions in the Working Group, particularly by the Rapporteur and the representative of the Union of Soviet Socialist Republics, on the identity of the words "apparent" and "evident", and considering

the English, French and Spanish texts of that paragraph, his delegation understood that the expressions "becomes apparent", "il apparaitra" and "si se advierte" meant "becoming aware" or "realizing", which in Portuguese would be translated by the appropriate tense of the verb "constatar".

50. Mr. REED (United States of America) said that his delegation had supported the adoption of article 46, paragraph 3 (CDDH/III/246). The term "clearly separated and distinct military objectives" was used in paragraph 3 (a); his delegation took the words "clearly separated" to refer not only to a separation of two or more military objectives, which could be observed or which were usually separated, but to include the element of a significant distance. Moreover, that distance should be at least sufficiently large to permit the individual military objectives to be attacked separately.

51. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that Committee III had accomplished important work in the adoption of article 46, paragraph 3, and articles 48 to 53. While those articles obviously could not reflect every shade of view, they were a good compromise and demonstrated the good will that prevailed on all sides. The new rules and provisions in those articles would help to increase the protection afforded to civilian populations and objects. It was encouraging that such progress had been made.

52. Mr. GENOT (Belgium) said that the Belgian delegation had never lost sight of the fact that rules applicable to war were inevitably a compromise between humanitarian imperatives and ruthless military requirements. To ignore that fact would be unrealistic and would result in rules that would lack credibility. The Working Group had achieved the best possible balance between the two.

53. Article 48 prohibited attacks on objects essential to the survival of the civilian population. On the other hand, the exceptions made to that principle were defined in a restrictive manner, mainly because such objects could be used in direct support of a military action. The article made it clear, however, that even military necessity could not take precedence over a minimum guarantee of protection to the civilian population. It was hard to see how the text of article 48 (CDDH/III/247) could be improved. It certainly marked a step forward in the development of humanitarian law.

54. The same applied to article 49 (CDDH/III/248), although the text needed some refinement by the Drafting Committee. His delegation understood the words "shall cease" in paragraph 2 to mean that the provision in question applied only in cases of inescapable military need. That was made quite clear by the words that followed, namely, "if such attack is the only feasible way to terminate such support". The Belgian delegation also welcomed paragraph 3 of article 49, which represented an important measure of protection for the civilian population. Paragraph 4, prohibiting reprisals was worthy of emphasis. Paragraph 5 reflected the

balance that had been achieved in article 49, inasmuch it was a reminder to the Parties to a conflict to avoid locating military objectives in the vicinity of the works or installations mentioned in paragraph 1 of the article.

55. The Belgian delegation noted that the question of the rights and duties of the High Contracting Parties in their own territories was still open for the whole of that section and would be discussed in the Working Group.

56. Mr. EL GHONEMY (Arab Republic of Egypt) said that his delegation fully supported article 46, paragraph 3 (CDDH/III/246), and agreed with the remarks made by the United States representative in connexion with that article. It also supported the comments made by the Netherlands representative concerning article 49 (CDDH/III/248), bearing in mind the fact that questions concerning petroleum refineries and related installations would be covered in a separate article.

57. Miss BOA (Ivory Coast) said that her delegation was entirely in favour of article 46, paragraph 3. It had abstained from voting on article 50 (CDDH/III/249) because the rule of proportionality implied in that article hardly seemed valid in international law. It had not voted against that article, however, because it met most of the desired requirements. It was evident that article 46, paragraph 3, and articles 48 to 53 would add considerably to the protection of civilian populations.

58. Mr. WOLFE (Canada) supported the comments by the United States and Egyptian representatives on article 46, paragraph 3, but said that he would have preferred to see paragraph 3 (b) state the specific rule rather than merely incorporating it by reference to the precautionary measures of article 50. It was to be hoped that the Drafting Committee would redraft the provision accordingly.

59. In article 48, paragraph 3 (b), the movement of the population should have been more directly associated with the concept of starvation.

60. His delegation had voted in favour of article 50 (CDDH/III/249) on the understanding that paragraph 4 was in no way incompatible with article 44, paragraph 1, which had already been approved by the Committee.

61. Mr. MUKHTAR (United Arab Emirates) expressed his full agreement with the remarks made by the Egyptian representative.

The meeting rose at 12.10 p.m.

SUMMARY RECORD OF THE THIRTY-SECOND MEETING

held on Monday, 17 March 1975, at 10.30 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

OTHER BUSINESS

1. Mr. FRIEDRICH (Legal Secretary) drew the Committee's attention to the note by the Secretary-General on page 2 of the Conference Journal (CDDH/JC/216), dealing with criticisms made by some delegations concerning the quality of the summary records.
2. Mr. GILL (Ireland), speaking on a point of order, said that his country was celebrating its national day, St. Patrick's Day, and he would like to take the opportunity of extending sincere wishes for the success of the Conference and wish good luck to all members of the Committee.
3. The CHAIRMAN thanked the representative of Ireland for his kind thoughts and extended the Committee's best wishes to him and his country.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol II

Article 20 - Prohibition of unnecessary injury (CDDH/1, CDDH/56; CDDH/III/87, CDDH/III/104, CDDH/III/215)

4. Mr. de PREUX (International Committee of the Red Cross) observed that the rules set out in article 20 of draft Protocol II were identical to those of draft Protocol I, article 33. There might, of course, be differing views on the wisdom of introducing in Protocol II rules relating to methods and means of combat. The ICRC considered, however, that if those rules were to be introduced in Protocol II, they could not, on fundamental issues, differ from those of Protocol I. Moreover, owing to the often very bitter nature of non-international conflicts, there was sometimes a danger that the adversaries might become involved in an open-ended escalation or in a situation of unnecessary suffering among both combatants and civilians. That was why the present article 20 of draft Protocol II contained rules identical to those of draft Protocol I, article 33.
5. Mr. FISCHER (German Democratic Republic) observed that his delegation's amendment (CDDH/III/87) to draft Protocol II, article 20, was identical to its amendment (CDDH/III/108) to draft Protocol I, article 33. Without reverting to the reasons underlying those amendments, he would like to point out that paragraph 4

prohibited the use of means and methods which destroyed natural human environmental conditions. Although draft Protocol II dealt with non-international armed conflicts, his delegation's view was that such a prohibition was necessary to protect the civilian population and for the security of neighbouring countries. He would like the Committee to consider the text of the paragraph in question in conjunction with the report of the Chairman of the Biotope Group contained in document CDDH/III/GT/35. In conformity with that report, paragraph 4 of his delegation's amendment should read as follows: "It is forbidden to employ methods and means of warfare which damage the environment in such a way that the stability of the ecosystem is disturbed."

6. Mr. CASTREN (Finland) said that, in submitting his delegation's amendment (CDDH/III/104), he would merely recall what he had said in presenting his country's amendment (CDDH/III/91) to article 33 of draft Protocol I. The proposed changes in the text and title of draft Protocol II, article 20, and the reasons invoked, were the same in both cases. As had already been said, the purpose was not to alter the substance of the ICRC draft article, but merely to modernize, simplify and define the wording of the texts setting forth the fundamental principles and rules applicable to the conduct of armed conflicts.

7. Mr. STARLING (Brazil) explained that the aim of amendment CDDH/III/215 submitted by his delegation to article 20 of draft Protocol II was to make it quite clear that paragraph 1 of the article applied to members of the armed forces as well as to members of organized armed groups. That clarification would avoid misunderstandings and, thus improve the ICRC version of paragraph 1.

8. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said he thought the Committee was beginning its consideration of draft Protocol II in favourable circumstances, since an agreement had been reached in Committee I on the definition of armed conflicts which was of interest to the Committee. Consideration of the substance of draft Protocol II, article 20, could therefore be begun at once, bearing in mind the definition worked out in Committee I which had received support of the overwhelming majority of the Committee's members. The task of Committee III was to formulate the rules of non-international armed conflicts with a view to safeguarding the rights and freedoms of persons who were not involved in such conflicts. As the representative of the ICRC had pointed out, conflicts of that kind were often more cruel than the others, and every effort should be made to mitigate and, if possible, eliminate such cruelty. From that point of view, it would be well to start out from the principle that it was the Governments'



responsibility, when they could not succeed in avoiding an armed conflict, to ensure that human rights and freedoms were respected and to protect persons not involved in the conflict, so as to reduce the number of victims to a minimum.

9. The purpose of contemporary international law and international agreements on human rights was to ensure strict respect for the principle of non-interference in the affairs of a sovereign State, and to prohibit any violation of territorial integrity, so as to promote the development of countries devoting themselves first and foremost to an ideal of social progress, peace and democracy.

10. He thought, therefore, that the Committee should approach the consideration of article 20 with that in mind. He considered that the text proposed by the ICRC met the demands of humanitarian law and could give rise to no objections. He felt, however, that it would be expedient to mention in paragraph 2 the prohibition of the use of weapons that had indiscriminate effects, in order to provide better protection for civilian objects and for the civilian population who were not involved in such conflicts. That would, moreover, be along the lines of the amendment submitted by the German Democratic Republic (CDDH/III/87), and in particular of paragraph 4, which forbade the use of means and methods of combat which destroyed natural human environmental conditions, since such destruction could have tragic consequences. He thought that the idea underlying the amendment submitted by Finland (CDDH/III/104), which was designed to ensure that article 20 should be considered to constitute a "basic rule", was entirely justified.

11. The CHAIRMAN proposed that the Committee should refer the text of article 20 of draft Protocol II, together with the amendments submitted and the comments made, to the Working Group.

It was so agreed.

Article 21 - Prohibition of perfidy (CDDH/1, CDDH/56;  
CDDH/III/105, CDDH/III/221)

12. Mr. de PREUX (International Committee of the Red Cross) pointed out that in substance the rule set forth in article 21 of draft Protocol II was the same as that stated in article 35 of draft Protocol I. In fact, the experts had taken the view that the problem of perfidy, which was already difficult to resolve in the case of draft Protocol I, was still more so in that of draft Protocol II. They had also, however, considered that for such a fundamental issue there could be only one single definition, since there were no two ways of conceiving perfidy. In article 21, the ICRC was setting forth a basic rule identical with that stated in

draft Protocol I and it gave a list of examples that were to some extent different. The actual difference was to be found in paragraph 1 (c) of the two articles. Paragraph 1 (c) of article 35 prohibited military personnel whose combat dress was a uniform or the equivalent in the case of militia formations - from disguising themselves in civilian clothing. Paragraph 1 (c) of article 21 prohibited the feigning, before an attack, of non-combatant status. It was the same idea but expressed in a different form - in other words, the prohibition of sheltering behind civilian status in combat and in warfare. Paragraph 1 (d) followed, in condensed form, the terms of article 37 of draft Protocol I.

13. He pointed out that paragraph 2 of article 21 of draft Protocol II, which referred to ruses of war, was identical with paragraph 2 of article 35 of draft Protocol I.

14. Mr. BIERZANEK (Poland) said that he would not go into the reasons which had led the Polish delegation to submit amendment CDDH/III/105 to article 21 of draft Protocol II. The reasons were, in fact, the same as those which his delegation had already stated in submitting amendment CDDH/III/93 to article 35 of draft Protocol I. He shared the view of the ICRC representative that the definition of perfidy must be the same in both the Protocols. Referring to the discussion that had taken place in Committee III on article 35 of draft Protocol I, he said that the Polish delegation would gladly co-operate with the delegations which were prepared to provide a more precise definition of perfidy, and in particular with the Norwegian delegation, as the sponsor of amendment CDDH/III/80, and with the Canadian, Irish and United Kingdom delegations as the sponsors of amendment CDDH/III/233. In his opinion those texts and that of the delegation of Poland provided material on the basis of which a new and more satisfactory definition of perfidy could be drafted.

15. Mr. WOLFE (Canada), referring to his delegation's amendment (CDDH/III/221), said that he thought it was dangerous to try to introduce in draft Protocol II a notion of perfidy which was only valid in international conflicts and very difficult to apply in internal conflicts. In cases of rebel movements, States might, at least initially, call upon their ordinary police, either alone, or in conjunction with their armed forces. To try to apply the notion of perfidy to police forces who naturally wore civilian clothes or uniforms other than those of the armed forces would be to introduce an element of confusion which would inevitably lead to an intensification of the conflict.

16. Mr. REED (United States of America) said that he had already expressed his opinion on the need to provide a Protocol II applicable to non-international armed conflicts. One of the principal reasons for that requirement lay in the non-observation of Article 3 common to the Geneva Conventions of 1949, which was an almost universal phenomenon. That attitude appeared to him to be due mainly to the fact that, in all probability, it was difficult for a State to admit that a rebel group should be in a position to impose an international obligation on a State. If States had so far shown a certain reluctance to apply Article 3 common to the Conventions, it was hard to see what kind of agreement the present Conference could hope to reach that could be widely respected in the future. His delegation considered that the text most likely to be accepted should refer only to humanitarian treatment and the protection of innocent victims and should not require any form of recognition of revolutionary or rebel forces. That was all the more true now that the provisions of Protocol I were likely to cover liberation movements against colonialist and racist régimes and foreign domination, and that Protocol II concerning non-international conflicts was not likely to cover that kind of conflict.

17. His delegation would support in particular the articles of draft Protocol II which offered the most likelihood of increasing protection of innocent victims. He was convinced that any provision tending to give States directives on the manner in which they should treat rebel movements would only make those States more reluctant to apply the Protocol as a whole. Indeed, in most non-international conflicts a State would probably maintain that all acts of hostility by rebel or revolutionary groups were illegal and that their members should be brought to justice and punished if found guilty. He was also in doubt about the exact meaning of the article and wondered, in particular, whether a rebel who observed the provisions of paragraph 2 of the article could escape punishment.

18. The CHAIRMAN suggested that article 21 should be referred to the Working Group, together with the relevant amendments and comments.

It was so agreed.

Article 22 - Quarter (CDDH/1; CDDH/III/221)

19. Mr. de PREUX (International Committee of the Red Cross) pointed out that article 22 repeated word for word paragraph 3 of article 38 of draft Protocol I. The idea of "combat" and rules of combat implied that the conflict ceased when the military objective had been achieved and the adversary disarmed. It therefore excluded the outlawing of the adversary or acts of desperadoes.

20. Mr. WOLFE (Canada) explained the reasons for his amendment (CDDH/III/221) for the deletion of article 22. His delegation had already proposed (CDDH/I/37) that article 22 should become paragraph 1 of a new article 7 of draft Protocol II. The aim of that amendment was to draw the attention of the Conference to the question of "quarter", which was treated in another part of draft Protocol II.

21. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that article 22 was of great importance. Not only did it contribute to humanitarian protection, but it required Parties to conflicts to act in such a way as to minimize the injuries resulting from those conflicts. The text in fact was designed to humanize armed conflicts as much as possible. If it was accepted, it would impose an obligation not only on Governments but on those who, for various reasons, were engaged in movements against Governments.

22. Once adopted, the text would become a national law imposing an obligation on all persons within the territory of the State in question. Any international instrument signed by a Government was binding on all those within its territory. Thus any person, whether partisan or adversary of the Government, who might violate that instrument would be liable to punishment. In other words, he would thereby be deprived of the protection of draft Protocol II.

23. There must therefore be a clear understanding of the nature of the legal document which would be adopted and would become national law, imposing an obligation on both the Government concerned and the institutions and citizens within its territory; otherwise difficulties were likely to arise.

24. Some delegations had thought that the text in question would impose an obligation on Governments only. That would be a serious mistake. The obligation was in fact valid for all citizens, and if it was not respected the person concerned would not be able to call upon the protection of Protocol II.

25. That was a normal situation when a Government accepted a legal instrument. It was therefore particularly important to keep article 22 in Protocol II, the more so as by its nature it tended to humanize armed conflicts radically.

26. The CHAIRMAN suggested that the Committee should refer article 22 to the Working Group, together with the relevant amendments and comments.

It was so agreed.

Article 23 - Recognized signs (CDDH/1, CDDH/56; CDDH/III/75, CDDH/III/216, CDDH/III/221)

27. Mr. de PREUX (International Committee of the Red Cross) said that article 23 was mainly based on paragraphs 1 and 2 of article 36 of draft Protocol I; the wording of paragraph 1 was slightly different. Article 36 prohibited the use of protective signs in cases other than those provided for by the international agreements concerned, whereas article 23 prohibited their use for purposes other than those provided for in the Conventions in question. The reason for the difference was that the agreements were concerned with international conflicts, and thus with different situations. The purpose would therefore have to be the same, for instance the protection of wounded or of a valid cultural object, if there was to be application by analogy.

28. Mr. PINEDA (Venezuela) said that his delegation's amendment (CDDH/III/75) to article 36 of draft Protocol I had proposed the addition of the words "emblem and" before the words "distinctive sign of the United Nations". To improve the text of article 23 of Protocol II and extend its scope, it had seemed logical to submit a second amendment (CDDH/III/75) proposing in a new paragraph 3 that the use of the emblem and distinctive sign of the United Nations in cases other than those authorized by that Organization should be forbidden.

29. Mr. STARLING (Brazil) said that the purpose of his delegation's amendment (CDDH/III/216) was to extend the scope of article 23 so as to prevent the improper use not only of the protective sign of the Red Cross (Red Crescent, Red Lion and Sun), but also of the other protective signs or emblems provided for in the Geneva Conventions, in the additional Protocols to the Conventions, and in other similar international instruments. There was no danger that a reference in article 23 to all the signs and emblems provided for in international instruments would weaken the protection afforded by the signs and emblems of the Red Cross (Red Crescent, Red Lion and Sun). His delegation considered that it was very important to state that prohibition very clearly in the case of non-international conflicts, because otherwise it might happen that only one of the Parties to the conflict, namely the one bound by the international instruments specifically mentioning those signs and emblems, would be legally obliged to respect them. The adoption of his delegation's amendment would have the advantage not only of ensuring respect for all protective signs provided for in international instruments, but also of introducing a provision that would be fair to all parties.

30. Mr. WOLFE (Canada) said that his delegation had submitted an amendment (CDDH/III/221) proposing the deletion of article 23 because it considered that the question of the use of the protective sign of the Red Cross (Red Crescent, Red Lion and Sun) had already been dealt with in the provisions of draft Protocol II relating to the protection of medical personnel, units and means of transport. Furthermore, an attempt to enumerate all the protective signs and emblems would be likely to weaken the protection afforded by the Protocol. The effect of the rule should be to bind all parties. But forces which had risen in revolt against their government had already committed, vis-à-vis their national law, the crime of treason and rebellion. It was therefore very unlikely that such rebels would be concerned about respecting internationally recognized symbols even if they knew what such symbols meant. It was better to keep to the humanitarian aspects of the question and not to formulate rules that were too complicated.

31. The CHAIRMAN suggested that article 23 should be passed to the Working Group, together with the amendments submitted and the comments made by delegations.

It was so agreed.

The meeting rose at 11.20 a.m.

SUMMARY RECORD OF THE THIRTY-THIRD MEETING

held on Wednesday, 19 March 1975, at 10.30 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

ORGANIZATION OF WORK

1. The CHAIRMAN said that at a meeting of the Chairmen, Rapporteurs and Secretaries of the four Main Committees, held on Monday, 17 March, the Chairman of Committee I had asked that Committee III should undertake the consideration of articles 63 to 69. Although he himself had understood those articles to be on the agenda of Committee I, in a spirit of co-operation he had agreed to submit the request to Committee III and had promised that it would do its best to comply with the request if it were possible to do so without interfering with the rest of its work. He would ask the Committee to give its views on the matter at a later meeting.
2. Mr. FRICAUD-CHAGNAUD (France) supported by Mr. BLISHCHENKO (Union of Soviet Socialist Republics) requested that, in order to facilitate the work of smaller delegations, meetings of the Working Group should not be arranged for the same time as those of Committee IV.
3. Mr. BAXTER (United States of America), Rapporteur, said he would be glad to comply with that request.
4. Mr. LOPEZ IMIZCOZ (Argentina) said that the Argentine and Spanish delegations had prepared a definitive Spanish version of the articles recently adopted by the Committee. He suggested that the same procedure might be followed for the other articles already adopted and those adopted in the future, in order to ensure uniformity of style and presentation. It would be useful if the texts of articles could be issued as addenda to the summary records of the meetings at which they had been adopted in order to facilitate consultation.
5. Mr. FRIEDRICH (Legal Secretary) said that a revised version of all the texts already adopted by the Committee was being prepared and would be circulated in the four official languages before the end of the week.

MESSAGE OF CONDOLENCE ON THE DEATH OF MME PAUL GRABER

6. At the request of the CHAIRMAN, Mr. FRIEDRICH (Legal Secretary) read out a letter he had received from Mr. Pierre Graber, President of the Swiss Confederation and President of the Conference, thanking the Committee for its message of condolence on the death of his mother, Mme Paul Graber.

## CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 42 - New category of prisoners of war (CDDH/1, CDDH/56; CDDH/III/5/Rev.1, CDDH/III/11, CDDH/III/28, CDDH/III/73, CDDH/III/94, CDDH/III/95, CDDH/III/209, CDDH/III/253, CDDH/III/256, CDDH/III/257, CDDH/III/258, CDDH/III/259)

Article 42 bis - Protection of prisoners of war (CDDH/III/77, CDDH/III/254 and Corr.1, CDDH/III/260)

Article 42 ter - Persons not entitled to prisoner-of-war status (CDDH/III/254)

7. The CHAIRMAN invited the Committee to consider articles 42, 42 bis and 42 ter of draft Protocol I.

8. Mr. VEUTHEY (International Committee of the Red Cross) said that, since Article 4. A(2) of the third Geneva Convention of 1949 no longer appeared to protect effectively a large number of present-day combatants, the ICRC had considered it necessary to include in draft Protocol I a provision extending the categories of combatants entitled to prisoner-of-war status, if captured. The title and wording of article 42 had resulted from the sessions of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts held at Geneva in 1971 and 1972.

9. Paragraph 1 of article 42 of draft Protocol I stated the conditions to be fulfilled by a combatant in order to be granted the status of prisoner of war, based in general on Article 1 of The Hague Regulations of 1907<sup>1/</sup> and Article 4. A(2) of the third Geneva Convention. In order to make those conditions more flexible, an effort had been made to reach a compromise between two tendencies, one opposed to any change in the existing conditions and the other wishing to simplify them to the extreme. The difficulty of reaching such a compromise was shown by the number of amendments submitted to article 42 and by the fact that, after 25 years, it had been necessary to include the famous Martens clause contained in The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land, adopted at the International Peace Conference of The Hague in 1907.

10. Apart from its organized character, the first condition to be fulfilled by the resistance movement as a group was its relationship with a Party to the conflict (article 42, para. 1) which guaranteed that the conflict was an international armed conflict

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<sup>1/</sup> Regulations respecting the Laws and Customs of War on Land annexed to The Hague Convention No. IV of 1907.



and that the movement was subject to certain discipline. On the basis of Article 4. A(3) of the third Convention of 1949, it had also been agreed that the Party might be represented by a government or an authority not recognized by the Detaining Power.

11. With regard to the second condition, that the movements should distinguish themselves from the civilian population, it had been agreed that the conditions laid down in paragraphs 2 and 3 of Article 1 of The Hague Regulations had the same ratio legis, so that no specific provisions had been made concerning either the distinctive sign or the open carrying of arms and the need to distinguish themselves had been limited to military operations. The third condition included in The Hague Regulations (Article 1, para. 4) had been clarified by reference to the four Geneva Conventions of 1949 and draft Protocol I.

12. Paragraph 2 of article 42 limited the consequences that non-fulfilment of the conditions by individual members might have on other members of the movement, as in the case of regular armed forces. It also extended the application of Article 85 of the third Geneva Convention of 1949 to the new category of prisoners-of-war.

13. Paragraph 3, which had been introduced as a note by the ICRC in 1973, was no longer necessary in view of the adoption at the first session of the Conference of draft Protocol I, article 1, paragraph 2.

14. The ICRC hoped that the wording of article 42 as eventually adopted by the Committee would ensure that the greatest possible number of combatants captured might benefit from the fundamental humanitarian guarantees of the third Geneva Convention of 1949.

15. Mr. QUACH TONG DUC (Republic of Viet-Nam), introducing the revised version (CDDH/III/5/Rev.1) of his delegation's amendment to article 42, said that it was designed to prevent any difficulties of interpretation which might impede the application of humanitarian law.

16. With regard to the conditions to be fulfilled by the members of resistance movements, his delegation considered it preferable to include in article 42, paragraph 1 (b) the reference to the fixed distinctive sign recognizable at a distance and the carrying of arms openly mentioned in Article 4. A(2) (b) and (c) of the third Geneva Convention of 1949. That condition was necessary for the protection of the civilian population and should be the basis of the application of humanitarian law.

17. If his delegation's amendment was adopted, it would no longer be necessary to add paragraph 3 to article 42 proposed in the note to that article in the ICRC text.

18. Mr. HAMID (Pakistan) said that his delegation considered article 42 to be one of the most important in draft Protocol I because it dealt with a situation that had so far been regarded as an internal conflict. Since article 1 of Protocol I had included within the scope of the Protocol armed conflicts where peoples were fighting for self-determination against colonial and alien domination and racist régimes, members of national liberation movements should be specifically mentioned in article 42. There was a clear distinction between freedom fighters struggling in the exercise of their right to self-determination against alien occupation and racist régimes, and minority movements rebelling against a lawful authority and threatening the territorial integrity of a State. His country supported the granting of prisoner-of-war status to the former but considered that the latter should be subject to the internal law of the State and could be tried for crimes against it. His delegation's amendment (CDDH/III/11) clearly specified that the resistance movements so covered belonged to the former category.

19. His delegation supported the conditions mentioned in paragraphs 1 (a), (b) and (c) of article 42 of the ICRC draft but considered that a fourth condition should be added, namely, that the movements were organized and subject to an appropriate internal disciplinary system.

20. His delegation was ready to co-operate with other delegations in order to find a mutually acceptable wording.

21. Mr. NAMON (Ghana) said that the paragraph 3 proposed in the note to the ICRC draft of article 42 was clearly a compromise solution and as such should be dealt with in a spirit of compromise. Although the position of liberation movements could not be equated with that of the armed forces of a State, they too were engaged in armed struggle. Article 4 of the third Geneva Convention of 1949 included no provision for those engaged in a liberation struggle, but experience had shown the need for such a provision in the draft Protocol, since they, like the members of regular forces, were fighting for what they considered right.

22. Paragraphs 1 and 2 of article 42 were acceptable to his delegation, which also supported the inclusion of the proposed paragraph 3. In view, however, of the conditions under which liberation movements operated, it might not be practicable for them to comply with all the conditions with which resistance movements could comply. His delegation had therefore proposed the insertion in that paragraph of the words "so far as is practicable" (CDDH/III/28).

It had drawn attention to the need for organization and discipline for liberation movements when it had made its oral amendment to article 41 at the thirtieth meeting (CDDH/III/SR.30). Once the liberation movements were organized and subject to an appropriate internal disciplinary system, they should be able to comply with the conditions laid down in paragraphs 1 and 2 as far as possible.

23. His delegation wished to join the sponsors of amendment CDDH/III/260.

24. Mr. ZAFERA (Madagascar) said that at the first session of the Conference his delegation had maintained that the struggle for self-determination against colonial and racist régimes should be regarded as international conflicts subject to the Geneva Conventions of 1949 and that the members of national liberation movements captured by the enemy should be entitled to prisoner-of-war status. Since that principle had been accepted by Committee I when it had adopted article 1 of draft Protocol I, his delegation had submitted amendment CDDH/III/73 restating the same principle. As the representative of the ICRC had pointed out, the adoption of article 1 of draft Protocol I had rendered the additional paragraph 3 proposed in the note to the ICRC text of article 42 superfluous. His delegation's amendment was similar to the ICRC text except that paragraph 2 of the ICRC text became paragraph 3 and paragraph 1(b) of the ICRC text was omitted.

25. The inclusion of members of national liberation movements engaged in armed struggle for self-determination in the new category of prisoners of war had been suggested by several delegations at the first session of the Conference and his delegation hoped that its amendment would present no particular difficulty.

26. Mr. BIERZANEK (Poland) said that the purpose of his delegation's amendment (CDDH/III/94) was to clarify the legal status of members of organized resistance movements and to harmonize it with the fundamental distinctions upon which the law of armed conflicts was based, in particular the distinction between combatants and non-combatants. The Geneva Conventions of 1949 had given members of organized resistance movements the same status as that of regular combatants in one important respect: namely, the right to be treated as prisoners of war if captured by the adversary. Article 4 of the third Geneva Convention stated that members of other militias and of other volunteer corps were also entitled to that status but neither that Article nor the text of article 42 proposed by the ICRC stated clearly the rights and obligations of members of resistance movements and their legal status in circumstances other than armed conflict. That question arose, for instance, if the members of a resistance movement were nationals of the adverse Party - for example, in cases where overseas territories were claimed by the occupying Power as provinces

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19. His delegation supported the conditions mentioned in paragraphs 1 (a), (b) and (c) of article 42 of the ICRC draft but considered that a fourth condition should be added, namely, that the movements were organized and subject to an appropriate internal disciplinary system.

20. His delegation was ready to co-operate with other delegations in order to find a mutually acceptable wording.

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which were an integral part of the State. Although members of resistance movements from such territories would enjoy the status of prisoners of war during the armed conflict, they might be regarded merely as nationals of the country, and therefore traitors, after their insurrection had been put down.

27. The members of organized resistance movements should have the same status as other legitimate combatants, especially when, in accordance with article 41 of draft Protocol I, they were organized and subject to an internal disciplinary system.

28. It was understandable that when the Conventions had been drafted in 1949 many delegations had been opposed to the idea of recognizing resistance movements as legitimate combatants. Consequently, the Conventions had merely stated the entitlement of such movements to the most important right from the humanitarian point of view: that of being treated as a prisoner of war when captured by the enemy. As many Governments' position on that matter had changed, particularly in the light of the new wording of article 1 of draft Protocol I, the time seemed ripe to grant the members of resistance movements all the rights of legitimate combatants.

29. Mr. ROSAS (Finland) said that the experience of past and present conflicts had shown the need to widen the category of persons entitled to the status of legal combatant and of prisoner of war. The four conditions to be fulfilled by irregular forces laid down in Article 4. A(2) of the third Geneva Convention of 1949 dated back to the unratified Brussels Declaration of 1874.<sup>2/</sup> An important step forward had been taken in the 1949 Convention by including resistance movements, even those operating in occupied territory, in the category of privileged combatants. There now seemed to be general agreement that some modification of the law was needed. The ICRC text of article 42 went some way in that direction by amalgamating the second and third conditions of Article 4. A(2) and formulating them as the general condition that resistance movements should distinguish themselves from the civilian population in military operations.

30. The Finnish amendment (CDDH/III/95) did not affect the three conditions proposed in article 42, paragraph 1, but related only to the article's field of application. It sought to include not only the "resistance movements" referred to in the ICRC text and the "militias" and "volunteer corps" mentioned in Article 4. A(2) of the third Geneva Convention, but all organized armed units not forming part of regular armed forces. The term "irregular forces" had been avoided in view of its possible negative connotations. In

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<sup>2/</sup> International Declaration concerning the Laws and Customs of War.

order to remove any possible doubts, the Finnish amendment had taken over the wording of Article 4. A(2), stating expressly that the armed forces covered by article 42 might operate in or outside their own territory, even if that territory was occupied.

31. Mr. AGUDO (Spain) said that there were three basic differences between the Spanish amendment (CDDH/III/209) and the ICRC text of article 42.

32. The first was that the resistance movement in question should exercise effective territorial jurisdiction. His delegation regarded that condition as indispensable because the scope of the Protocol was no longer that envisaged by the ICRC when it had prepared the draft: namely, the situations referred to in Article 2 common to the 1949 Geneva Conventions. In the new version of draft Protocol I, article 1, paragraph 2, adopted by the Conference, the scope of the Protocol was extended to cover armed conflicts where peoples fought against colonial and alien domination and against racist régimes in the exercise of their right to self-determination. But the criterion for deciding when a people had acquired sufficient international recognition for the armed conflict in which it was engaged to fall within the scope of Protocol I rather than Protocol II must surely be the ability to demonstrate that it exercised effective territorial jurisdiction.

33. The second difference was the requirement that the members of resistance movements must distinguish themselves from the civilian population by means of fixed, permanent and clearly visible emblems. The intention of the ICRC was to widen the category of persons who, without being members of the armed forces, were entitled to prisoner-of-war status. Article 4. A(2) of the third Geneva Convention already accorded that status to members of such resistance movements on condition that they had a fixed distinctive sign and carried arms openly. In the ICRC text of article 42, those conditions were modified in order to take account of the type of combatant who took part in national liberation movements; the requirement that arms should be carried openly had been deleted and the need for combatants to distinguish themselves from the civilian population was limited to military operations. That would lead to a situation of confusion between combatants and the civilian population which would have serious consequences for the latter, not only on account of the doubts that would arise but because of the increased risk of perfidy. The argument that members of the armed forces also put on civilian clothes when they were demobilized or on leave overlooked the fact that members of resistance movements were permanently in action even when they were not specifically engaged in military operations. Since the main purposes of the Protocol were the protection of the civilian population and the prohibition of perfidy, it was essential to state clearly, as did the Spanish amendment, that the distinguishing emblems of resistance movement combatants should be fixed, permanent and clearly visible.

34. The third difference was that the words "such movements" in the last phrase of paragraph 1 were replaced by the words "their members". That change made it possible to distinguish clearly between the characteristics of the movement as Party to a conflict and those of the combatants as members of the movement. The only characteristic that was common to them both was that of being under a responsible command. The conditions in sub-paragraphs (b) and (c) applied only to the legal status of combatants.

35. Mr. NGUYEN VAN HUONG (Democratic Republic of Viet-Nam) said that, having studied the amendments submitted by other delegations, his delegation wished to withdraw its amendment in document CDDH/III/253 and to propose a new paragraph 3, to read:

"All combatants in liberation movements in the armed conflicts referred to in the new article 1, paragraph 2, provided that such movements fulfil the conditions in sub-paragraphs (a) and (c) of paragraph 1, shall, if captured, have the status of prisoners-of-war throughout the period of their detention. Individual members of such movements shall also be subject to the provisions of paragraph 2."

36. Thus the new category of prisoners of war would include, firstly, members of organized resistance movements as defined in the ICRC text of article 42, and, secondly, all members of movements of peoples fighting for their right to self-determination, as referred to in the new article 1, paragraph 2, of draft Protocol I.

37. The only difference between the members of the two groups was that the first must fulfil the condition of visibility, i.e., they must distinguish themselves from the civilian population in military operations in accordance with paragraph 1 (b), whereas the second would be exempt from that requirement. That distinction was justified by the evolution that had taken place in typical war situations since the adoption of The Hague Regulations and the Geneva Conventions. The war situations envisaged in those instruments had been conflicts between industrialized European countries of approximately the same level of economic and military development in which each party had the possibility of retaliating on the enemy's territory and in which there was a clear separation between the activities of armies and the life of the civilian population. At the present day, however, in the neo-colonial wars waged by imperialist aggressors against poor and ill-armed peoples fighting for their right to self-determination, the conditions were completely different. Characteristic of such wars was the great inequality between the armaments of the two sides and the fact that the heavily armed imperialist Powers were immune from any retaliation on their own territory. In such conditions, to impose the rule of visibility on the guerrilla fighters would simply mean



exposing them to the enormously superior fire-power of their adversaries, thus serving the counter-guerrilla tactics of the imperialist aggressors. In all the neo-colonial wars in Asia, Africa and Latin America, the condition that the freedom-fighters must be "visible" had always served as a pretext for reprisals against the civilian population. The need to distinguish between the combatants of the national liberation army and the civilian population was a basic principle of humanitarian law as applied to such conflicts. In view of the material and practical conditions prevailing, however, such differentiation could be based only on membership of a military organization or subordination to a responsible command. His delegation would be glad if other delegations could find other distinguishing criteria applicable in the special conditions of contemporary wars of national liberation.

38. His delegation's proposal for the addition of a new article 42 bis (CDDH/III/254 and Corr.1) was based on the tragic experiences of his people in their fight against aggressive imperialism and its puppets. The new article referred to four types of reprisals which had been used against the combatants of the Provisional Revolutionary Government. The first was detention in penal establishments, such as the notorious "tiger cages" whose existence had been revealed in July 1970 when two members of the United States Congress had returned from a visit to the island of Poulo Condor, South Viet-Nam. Thousands of prisoners of war and political prisoners were kept in such cages in the camps of Poulo Condor, Phu Quoc and Can Tho, the normal practice being to keep five prisoners in a cage measuring 3 metres by one-and-a-half and only two metres high. The second type of reprisal was repression by force of arms, the most typical instance being the incident at the prison of Cay Dua (Phu Quoc) in 1972, when several hundred prisoners of war had been killed or seriously injured by their guards. Thirdly, there was the falsification of records so as to represent prisoners of war as prisoners under ordinary law, a common practice in the area controlled by the puppet Government of South Viet-Nam, since it enabled the provisions of the third Geneva Convention to be circumvented. Fourthly, there was physical and moral compulsion to attend so-called "anti-Communist re-education courses", designed to force prisoners of war to renounce their political convictions and their love for their country. Those four types of reprisal, designed to break prisoners of war physically and morally, should be the subject of explicit prohibitions. The amendment in document CDDH/III/254 and Corr.1 was intended to fill that gap.

39. His delegation also proposed a new article 42 ter (CDDH/III/254) referring to persons not entitled to prisoner-of-war status. While it was just that there should be equality of treatment between the war criminals belonging to either side and between the war victims belonging to either side, justice did not demand that there should be equality of treatment between war criminals and their victims. The proposal was in accordance with the principles laid down by the Nürnberg International Military Tribunal, which his Government, like many others, had adopted when it had entered a reservation to article 85 of the third Geneva Convention. Nevertheless, war criminals would be treated humanely during their detention. The distinction between the maximum of humane treatment to be accorded to prisoners of war and the minimum to be accorded to those who were not entitled to that status could be regarded as a matter of positive law since the adoption of the 1949 Geneva Conventions, common Article 3 of which laid down a sort of irreducible minimum of humanitarian treatment. The humanitarian provisions of the four Conventions put war criminals and their victims on an equal footing; in certain cases, they even provided more privileged treatment for the guilty than for their victims. That inconsistency had impaired the scrupulous application of the Conventions and it was time that it was remedied.

40. Mr. SCHUTTE (Netherlands) said that articles 41, 42, 42 bis and 65 were closely connected. The structure of the body of law contained in those articles was clear and sound; it set out the circumstances in which irregular fighters should, when captured, have prisoner-of-war status and, if not, to what humanitarian protection they were entitled.

41. The wording of amendment CDDH/III/256 submitted by his delegation was based on the assumption that an article such as 42 bis proposed in amendment CDDH/III/260 would ultimately be included, providing that in case of doubt the final status of a captive would be determined by a competent tribunal, and indicating the circumstances in which individual infringements of the rule of international law applicable in armed conflicts would not result in forfeiture of prisoner-of-war status. The Netherlands amendment had much in common with other amendments, particularly those in documents CDDH/III/95 and CDDH/III/257.

42. As in amendment CDDH/III/257, the term "irregular forces" was used instead of "organized resistance movements". That term, which might need formal definition in article 2, was broader than the term used by the ICRC and was absolutely neutral. His delegation understood it to mean organized armed units not belonging to the regular forces of a Party to a conflict. His delegation did not exclude the fact that in warfare of a guerrilla type, for instance in a war of national liberation, the liberation movement might have both

regular and irregular forces. Members of the regular forces of such movements were covered by Article 4. A(1) of the third Geneva Convention of 1949, while members of the irregular forces would be covered by the articles at present under consideration.

43. The main question with regard to article 42 was what the constitutive elements were for entitlement to prisoner-of-war status by irregular fighters. In his delegation's view, there were three such elements: first, the fact of belonging to an organization, for an individual fighting his own private war could not be taken into consideration; second, the fact that such an organization had an internal disciplinary system capable of enforcing respect for the rules and principles of international law applicable in armed conflicts - a requirement that was set out in article 41; third, that the persons in question distinguished themselves from the civilian population in military operations. That last requirement related both to the general policy of an irregular force and to the actual conduct of individual members.

44. The next question was how to prove that one or more of those criteria had or had not been met. The ICRC text and many of the amendments submitted were not sufficiently explicit. The Netherlands amendment was designed to improve the text in that respect. It would be unwise to try to set up rules of evidence with regard to proof of membership of an organization. There were several possibilities, ranging from assertion to showing identity cards or a distinctive sign adopted by the irregular force. The captive should always have the benefit of the doubt, as was provided in paragraph 1 of proposed article 42 bis (CDDH/III/260), until his status had finally been fixed by a competent tribunal. Such a tribunal should be able to develop certain standards even if those were primarily related to the actual circumstances of the armed conflict in question. It was, of course, conceivable that members of irregular forces who were captured might simply refuse to admit their membership in order not to betray the organization. Such persons, however, would thereby be making the choice not to claim prisoner-of-war status.

45. The second constitutive element raised the question of how to prove that a given irregular force was organized with an internal disciplinary system and that the rules of the law of armed conflict were generally respected. The contrary might all too easily be concluded by inductive reasoning that, since some members of the force had violated one or more of the rules of international law applicable in armed conflicts, that violation could be attributed to the whole irregular force. The Netherlands amendment was designed to exclude reasoning of that kind. The group as a whole should have the benefit of the doubt. If it was not altogether beyond doubt that an irregular force as such had violated the rules and principles of international humanitarian law applicable in

armed conflicts, there would have to be certain presumptions. The only such presumption which in the view of his delegation was valid in such a case was set out in paragraph 2 of its amendment: namely, that it had become clear from declarations or instructions emanating from the responsible command of the irregular force or from declarations by its members that the force was not willing or able to respect, in their operations, the rules and principles of international law applicable in armed conflicts. The actual behaviour of some of its members could thus never serve as a presumption to that effect.

46. The question of how to prove the absence of the last constitutive element, namely whether a member of an irregular force had distinguished himself from the civilian population during the military operations, was fairly easy to answer. It was a matter of physically observable fact. The only doubt might lie in whether the distinction was sufficiently effective. The standard might vary from conflict to conflict.

47. His delegation considered that the requirement that a distinction between civilians and combatants should always be made was absolutely essential. Individual infringement of that principle must lead to the forfeiture of any claim to prisoner-of-war status. All other individual infringements were dealt with in paragraph 2 of proposed article 42 bis. The fundamental issue was whether by distinguishing himself from the civilian population a person was prepared to take the risk of being recognized as a legitimate objective, or whether he was not prepared to take that risk and wished to reserve the opportunity to be the first to shoot under cover of the protection accorded to a civilian under article 45, in particular paragraph 4. Preparedness to take that risk meant that prisoner-of-war status was deserved.

48. That did not mean that irregular fighters who had not distinguished themselves and were captured should be deprived of humanitarian treatment. On the contrary, they had the right to recognition of their inalienable human rights as provided in Part III, Section III of the fourth Geneva Convention of 1949 and in articles 42 bis and 65. They too could not be subjected to violence, torture, degrading treatment or medical experiments, nor should they be tried without due process.

49. It was true that civilians, in contra-distinction to prisoners of war, could be tried because they had taken up arms and taken part in hostilities even without having committed any war crime. Those who, for that reason, wished to give prisoner-of-war status to as many people as possible seemed to forget that irregulars, even if they did not commit any war crimes, would probably be tried for belonging to an irregular subversive organization. That, at least, might be the case with members of resistance movements in occupied territory.

50. It was not the Committee's task to encourage mass trials of prisoners of war, although that might be implicit in the proposals to grant prisoner-of-war status to irregular fighters who had not distinguished themselves. Mass trials of prisoners of war were dangerous, since they could hardly fail to have repercussions on the treatment of prisoners of war, even captured members of the regular armed forces, in the hands of the adverse Party. Such a result would be completely counterproductive.

51. Mr. REED (United States of America), introducing amendment CDDH/III/257, said that it was the intention of the sponsors, and indeed of the ICRC, to recognize the realities of modern warfare and to take into account the various categories of people who had fought in recent conflicts. The proposed text for article 42 extended prisoner-of-war status to a much larger group, which might properly be referred to as "irregular forces". It followed the same order and format as the ICRC text but was simpler and clearer.

52. In the introductory part of paragraph 1 the sponsors had replaced the term "organized resistance movements" by "irregular forces". They considered that the forces of a Party to the conflict were made up of its regular military establishment, which included established reserve forces and militia and irregular forces. They felt that "irregular forces" was a more representative term, since it included all types of combatants or lawful belligerents not included in the regular armed forces of a Party to the conflict. In referring to a Party to the conflict, the sponsors had taken account of the revision of draft Protocol I, article 1 by Committee I at the first session of the Conference and had included liberation movements fighting for self-determination as Parties to the conflict.

53. The conditions to be fulfilled by the irregular forces mentioned in paragraph 1 - considered as a collective or corporate body and not as individuals - if its individual members were to be entitled to prisoner-of-war status on their capture, were essentially the same as those in the ICRC text, but the changes suggested by the sponsors were worthy of mention.

54. The use of the broader term "irregular forces" required the addition in paragraph 1 (a) of the condition that the forces should be "organized". If the narrower term "organized resistance movements" used by the ICRC was retained, the separate requirement of organization would be unnecessary. The condition that such a force must be commanded by a person responsible for his subordinates' conduct to a Party to the conflict had also been included. The sponsors realized that irregular forces might not always be organized in the same way as regular forces but they were sure that there would always be a commander responsible for the conduct of the irregular forces and they preferred to mention the responsibility of the commander rather than to use the more imprecise term "command".

55. With respect to paragraph 1 (b), the sponsors fully concurred with the ICRC and could support its text, but they felt that it was appropriate to include some of the illustrative examples mentioned in the ICRC Commentary (CDDH/3), such as carrying arms openly or a distinctive sign or any other effective means. That was a justifiable relaxation of the conditions required for lawful belligerent status in Article I of The Hague Regulations of 1907 and Article 4. A(2), (b) and (c), of the third Geneva Convention of 1949. The single important issue was that combatants should be distinguished from civilians: how it was done was not so important.

56. Paragraph 1 (c) of the ICRC text required the irregular forces to comply only with the 1949 Geneva Conventions and draft Protocol I. The sponsors felt that there was no need for such limitation, although they hoped that much of the existing law of war would be included in Protocol I. They did not consider it too burdensome a requirement that Parties to a conflict should inform all their forces, including irregular forces, of their obligation to abide by all international law applicable in armed conflicts, and indeed should require such compliance. To do otherwise would invite disregard of certain laws and something less than an attitude of respect for other laws. Accordingly, the sponsors had re-phrased the ICRC text of paragraph 1 (c).

57. The sponsors considered the first sentence of paragraph 2 of the ICRC text of article 42 to be quite clear and had virtually adopted it as paragraph 2 of their amendment, merely repeating the requirement for the force as a group to comply with the conditions laid down in paragraph 1. The second sentence of paragraph 2 of the ICRC text was not so clear, however, on the crucial point of whether an individual member of an irregular force was entitled to be a prisoner of war upon capture if he individually violated either paragraph 1 (b) or paragraph 1 (c). The sponsors felt that that issue must be squarely faced, and they had done so in paragraph 3 of their proposal, which provided that an individual member of an irregular force listed in paragraph 1 or in Article 4 of the third Geneva Convention of 1949, who committed a war crime or other violation of international law applicable in armed conflicts should not forfeit his entitlement to be a prisoner of war, on the single condition that individuals should distinguish themselves from civilians in their military operations. That requirement was fundamental to the purposes of the Protocol, essential if the protected status of civilians was to have any meaning, and basic in lending credibility to article 45, paragraph 4 and article 46.

58. For all those reasons it was vital that the Protocol should deny a privileged status to combatants who violated the requirements to distinguish themselves in some way from civilians in their military operations. The sponsors were not, however, suggesting that combatants who did not comply with article 42, paragraph 1 (b) should be treated summarily or denied any essential judicial safeguards. Lawful combatants could not be punished for acts of violence against the adversary's military objectives. Unlawful combatants did not enjoy such immunity. In the sponsors' view, a combatant who deliberately failed to distinguish himself from other civilians while engaging in combat operations would commit such an extraordinary violation of the laws of war as to prejudice the protection for civilians. He would lose his entitlement to be a prisoner of war, together with any immunity from punishment he might have had for acts of violence against the adversary.

59. The sponsors had originally intended to include an additional paragraph in article 42 providing that in case of doubt the status of the prisoner of war would be determined by a tribunal, pending whose decision the captive should receive prisoner-of-war treatment. If it were determined that the captive was not entitled to such treatment he would in any case receive the safeguards of the fourth Convention and of article 65 of Protocol I. They had withdrawn that proposal, however, in favour of a new article 42 bis, which was more comprehensive and which would be introduced later. That new article was fully compatible with their proposed article 42 and provided it with the proper balance. Moreover, it ensured increased safeguards for persons who were entitled to be prisoners of war.

60. The sponsors considered that their proposal provided rights, obligations and protection for individual members of **irregular** forces on essentially the same basis and to the same extent as those available to individual members of the regular forces.

61. Miss ORTIGOZA (Argentina) said that her delegation's amendment (CDDH/III/258) was designed to adapt the text of article 42 to the new article 1 of draft Protocol I. Article 42 as at present drafted would be compatible with the other provisions of draft Protocol I and the 1949 Geneva Conventions, particularly the third Convention, if the previous text of article 1 had been retained in the framework of international conflicts which did not include wars of liberation, the struggle against foreign occupation and racial conflicts.

62. It was difficult to conceive the possibility of other international conflicts in which a Party did not recognize implicitly or explicitly that the other Party had the necessary legal capacity to be a participant in an international conflict.

63. Her delegation's proposal would supplement the provisions of Article 4. A(3) of the third Geneva Convention, which dealt only with regular armed forces, since in 1949, when the four Geneva Conventions had been drawn up, liberation movements had not yet taken part in such conflicts.

64. In the present state of international affairs, only in the case of wars of colonial liberation, foreign occupation and racial segregation could it be supposed that the adverse Party, namely, the colonial or occupying Power, or the Power practising a policy of racial discrimination, would not recognize the Government or authority responsible for the organized movements taking part in such conflicts.

65. Her delegation considered that the requirements for such movements should be those laid down for resistance movements in Article 4. A(2) of the third Convention.

66. Mr. LONGVA (Norway) stressed that his Government attached the utmost importance to the question under discussion.

67. The question of "irregular forces" had led to the failure of the Brussels Conference of 1874.<sup>3/</sup> The Hague International Peace Conferences of 1899 and 1907 had produced results as far as the laws and customs of war were concerned mainly because those Conferences had decided, as a compromise, to leave open the question of the status of the so-called "irregular forces". The price humanity had had to pay for that compromise had been to go through two world wars and numerous limited conflicts without any adequate legal regulation of guerrilla combat situations.

68. Unfortunately, no satisfactory solution to the problem had been found at the 1949 Diplomatic Conference. The present Diplomatic Conference would fail in its task if it did not find an adequate basis for legal regulation of guerrilla combat situations. In that respect, attention should be concentrated on articles 33, 35, 40, 41 and 42 of the ICRC text and on the provisions for the protection of the civilian population.

69. In introducing the redraft of article 42 proposed by his delegation, (CDDH/III/259), he would use as a point of departure paragraphs 1 (a), (b) and (c) of the ICRC text of article 42.

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Conference concerning the draft of an international agreement respecting the laws and customs of war.



70. His Government shared the view that compliance with the criterion of being under a command responsible to a Party to the conflict for its subordinates, as laid down in paragraph 1 (a) of the ICRC text, should be a constitutive condition for prisoner-of-war status in case of capture. It felt, however, that since that was a condition relating to organization and discipline, it should be placed in article 41, rather than in article 42. Consequently, in its amendment that condition was moved from article 42 to article 41.

71. His Government felt that the principle laid down in paragraph 1 (b) of the ICRC text of article 42, namely that combatants should distinguish themselves from the civilian population in military operations, reflected a basic rule of positive international law which should be reaffirmed in the new Protocol. It considered, however, that it would be much more appropriate to reaffirm that principle in article 33 as a basic rule of international law applicable to all armed forces, rather than as a constitutive condition for prisoner-of-war status in case of capture as far as a limited category of combatants was concerned. Paragraph 1 (b) of the ICRC text would deprive a certain category of combatants of the basic guarantees relating to penal regulations, judicial proceedings and execution of penalties, as provided in the third Geneva Convention of 1949, in case of capture, if charges of group violations of the principle in question were brought against them. His Government saw no legitimate justification for such a deprivation of basic guarantees. Moreover, as the deprivation proposed in the ICRC text did not apply to all groups of combatants, it retained an element of discrimination which in practice might easily contradict the principle of equality of belligerents under the international law of armed conflicts, and hence amount to a return to the mediaeval doctrine of "just war". For those reasons his Government proposed that the principle in sub-paragraph (b) should be stated in article 33 as a basic rule, and that it should be deleted from article 42 as a constitutive condition for prisoner-of-war status for certain combatants.

72. In his Government's view, the significance of paragraph 1 (c) of the ICRC text was to deprive the same group of combatants of the same basic guarantees in cases where charges were brought against them that as a group they had not conducted their military operations in accordance with the Conventions and the Protocol. For the reasons he had already given, his Government did not consider such a deprivation to be justified and it was therefore proposing the deletion of paragraph 1 (c).

73. According to the ICRC text, the distinction between group violations and individual infringements constituted the decisive criterion of which members of guerrilla units would be entitled to prisoner-of-war status in case of capture. While in theory it might be easy to make such a distinction, in practice it might prove impossible. A group consisted of its individual members: how many individual infringements must take place before it could be concluded that a group violation had taken place? The answer would always depend on a subjective assessment, which in practice would be that of the enemy. The Norwegian Government, however, could not admit that the question of whether or not a captured combatant would be entitled to prisoner-of-war status should be left to the subjective assessment of the enemy.

74. Since his observations regarding the ICRC text applied equally to some of the other proposals relating to article 42, he would not comment upon those proposals in detail.

75. There were three essential conditions which must be fulfilled if the system of international humanitarian law applicable in armed conflicts was to function in practice. First, the legal rules in question must place the Parties to the conflict on an equal footing; second, they must represent a well-balanced compromise between humanitarian considerations and considerations of military necessity; third, they must be drafted in such a manner as to ensure that all the Parties to the conflict have an equal interest in their application.

76. In the view of his Government, the ICRC text of article 42 did not fully satisfy those three basic principles as far as articles 35, 40, 41 and 42 were concerned. The main purpose of the Norwegian proposals relating to articles 33, 35, 41, 42 and 42 bis was to provide a basis for a legal regulation of guerrilla combat situations, imposing restraints on both Parties to the conflict and taking those three basic principles fully into account. Since the programme of work of the Committee had not permitted a comprehensive discussion of those vital questions, his delegation hoped that such a discussion would take place in the Working Group. The success or failure of the entire Conference might hinge on the ability to find acceptable solutions to those problems.

The meeting rose at 12.35 p.m.

SUMMARY RECORD OF THE THIRTY-FOURTH MEETING

held on Thursday, 20 March 1975, at 10 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)  
Draft Protocol I

Article 42 - New category of prisoners of war (CDDH/1, CDDH/56; CDDH/III/5/Rev.1, CDDH/III/11, CDDH/III/28, CDDH/III/73, CDDH/III/94, CDDH/III/95, CDDH/III/209, CDDH/III/253, CDDH/III/256, CDDH/III/257, CDDH/III/258, CDDH/III/259) (continued)

Article 42 bis - Protection of prisoners of war (CDDH/III/77, CDDH/III/254 and Corr.1, CDDH/III/260) (continued)

Article 42 ter - Prisoners not entitled to prisoner-of-war status (CDDH/III/254) (continued)

1. Mr. SABEL (Israel) introduced amendment CDDH/III/77 proposing a new article provisionally numbered 42 bis, and said that the text was related to the most essential provisions of the third Geneva Convention of 1949, namely, the protection and privileges of prisoners of war. Since the rules had been set out clearly for the first time in the early twentieth century, their implementation had been a matter of concern to the parties in practically every conflict. It was of vital importance to reaffirm them at the present Conference. It would seem strange indeed if soldiers or lawyers were to find out in future that, out of some 90 provisions in Protocol I, there was no reference whatsoever to the protection and privileges of prisoners of war. Paragraphs 1 and 2 of his delegation's draft article succinctly summarized the relevant provisions of the third Geneva Convention, notably Article 13.

2. Paragraphs 3 and 4 of the proposed article sought to expand the 1949 Geneva Conventions by stating expressly what was already binding in international law, namely that the ICRC must be informed immediately of the capture of a prisoner of war. Further, the fulfilment of the obligations and duties of the Detaining Power must under no circumstances be made conditional upon political and other considerations. Those principles were self-evident and in conformity with existing international law.

3. The two draft Protocols currently under study were the first reaffirmation of international humanitarian law since the end of the Second World War; to ignore the principles governing the treatment of prisoners of war would be a serious matter that might be grievously misinterpreted.

4. The CHAIRMAN said that the delegation of Ghana had asked to be included among the co-sponsors of document CDDH/III/260.
5. Mr. de BREUCKER (Belgium), introducing proposed new article 42 bis (CDDH/III/260), said that the text was based on a concern for the protection of human beings, in whatever capacity they played a part in the conflict and whatever the military situation (hostilities in progress or occupation). The sole conditions laid down in paragraph 1 were those of taking part in hostilities and falling into the hands of the adverse Party. The person concerned could then enjoy the benefits of the third Geneva Convention of 1949 and Protocol I whether he claimed prisoner-of-war status or whether it was clear that he was entitled to such status or, yet again, whether any doubts arose about such status. Such protection would cease only if a competent tribunal determined that he was not entitled to the status of ~~prisoner of war~~. Consequently, there would be a presumption in his favour. Article 5 of the third Geneva Convention of 1949 and Article 6 of the fourth Convention contained precedents.
6. An important question arose, however: that of the status of the competent tribunal, its composition and the procedural guarantees it offered. Through its judgement, the tribunal in fact carried out a radical act of selection within the framework of the 1949 Geneva Conventions.
7. If a person killed a certain number of members of the enemy armed forces, either in combat or under occupation, there were two hypotheses under the terms of paragraph 1. First, the selective judgement might recognize him as a "regular" combatant: and he would therefore, save in cases of particular offences such as use of poison or perfidy, incur no condemnation. Alternatively, the tribunal might classify the person as a civilian; he would then come under the melancholy provisions of article 68 of the fourth Geneva Convention of 1949.
8. In other words, the competent tribunal's selection judgement would be the finger of destiny.
9. Consequently, the sponsors of proposed new article 42 bis (CDDH/III/260) would associate themselves with any proposal specifying in precise terms the guarantees of protection that a tribunal could and should offer. Article 66 on enemy occupation, of the fourth Geneva Convention of 1949, mentioned "properly constituted, non-political military courts". That was a minimum guarantee of the utmost value. Thought might also be given to guarantees based on the third Geneva Convention. Thus, under Article 99, second paragraph, no moral or physical coercion might be exerted on a prisoner of war in order to induce him to admit that he belonged to the civilian

rather than to the combatant category. Under Article 105, of the same Convention, that person could call witnesses, have recourse to the services of a competent interpreter if required, and receive particulars of the charge in a language which he understood, in good time before the opening of the trial.

10. Paragraph 2 of amendment CDDH/III/260 contained a measure of public safeguard; individual regular combatants, enjoying statutory protection under existing law and the provisions currently under study, could not be deprived of that right and of its conditions of exercise without causing disturbing retrograde effects on humanitarian law.

11. Paragraph 3 confirmed the fundamental guarantees laid down in article 65 of draft Protocol I for persons not recognized, by virtue of the selection judgement, as entitled to the status of prisoner of war, and was likewise satisfactory.

12. In the particular case of enemy occupation, the unqualified right to communicate with, and be visited by, a representative of the Protecting Power or of ICRC was a great improvement on the authoritarian muzzling prescribed in Article 5 of the fourth Geneva Convention, the least humanitarian article in all the four Geneva Conventions.

13. Finally, paragraph 4 of amendment CDDH/III/260 provided that, in the event that there was no Protecting Power, ICRC would act as a substitute in respect of judicial proceedings of which notification should have been given to the Protecting Power under Articles 104 of the third Geneva Convention and 71 of the fourth Convention.

14. The CHAIRMAN opened the general debate on draft articles 42, 42 bis and 42 ter of draft Protocol I.

15. Mrs. MANTZOULINOS (Greece) expressed her approval of the wording of article 42 submitted by ICRC, as a key provision which took account of present-day realities.

16. Her delegation nevertheless supported certain proposed amendments which could improve and develop the text of the draft.

17. The new term "irregular forces" proposed by the Netherlands delegation (CDDH/III/256) and by the United States and the United Kingdom delegations (CDDH/III/257) appeared useful, for it took account of the possible or provisional situation of those forces vis-à-vis the regular armed forces of a Party. The amendment proposed by Finland (CDDH/III/95) amplified the scope of the term "irregular forces" by specifying organized armed units, including those of organized resistance movements.

18. The proposal that those irregular forces should be organized in accordance with article 41 of draft Protocol I (oral amendment proposed by Ghana and supported by Norway and the Netherlands) likewise appeared to be opportune.

19. Regarding the conditions to be fulfilled in order to obtain the status of prisoner of war, her delegation would have preferred the wording proposed for paragraph 1 (b) by the United States and the United Kingdom delegations (CDDH/III/257), the Netherlands delegation (CDDH/III/256) and Spain (CDDH/III/209). As for article 42, paragraph 1, (a) and (c), she was pleased that agreement had been virtually unanimous.

20. Political resistance movements had existed in Greece, a small country which had undergone a lengthy period of occupation during the Second World War, but their leaders had been well known. But such was not always the case, and members of irregular forces might be unable or unwilling to divulge the name of their commander, if their organization had instructed them not to do so. Adventurers and mercenaries might also be involved: it would therefore be dangerous to widen the concept of combatants entitled to the status of prisoner of war, through laying down conditions of greater flexibility.

21. For persons not entitled to the status of prisoner of war under the terms of article 42 of draft Protocol I, the twelve co-sponsors of amendment CDDH/III/260, including Greece, had proposed in paragraph 3 the application of article 65 of draft Protocol I, on fundamental guarantees for persons who would not receive more favourable treatment under the Geneva Conventions or Protocol I.

22. Still on the draft of the new article 42 bis in the same document, she expressed her appreciation of the assumption in paragraph 1 in favour of a person falling into the hands of the adverse Party. That amendment ruled out any possibility that a captor belonging to the Detaining Power might take it upon himself to decide whether or not the combatant was entitled to the status of prisoner of war. Only a competent tribunal could do so.

23. Finally, regarding paragraph 2 of article 42 of the ICRC draft, which related to two different situations, the wording of paragraphs 2 and 3 of the amendment submitted by the United States and the United Kingdom delegations (CDDH/III/257) was clearer and more precise.

24. Mr. GENOT (Belgium) pointed out that modern warfare had seen a startling development in weapons and even more in tactics. The methods of intervention used were no longer the exclusive preserve of "irregular forces". On the contrary, conventional armed forces, even if over-equipped as a whole, might find themselves locally in an inferior tactical position which would then make them avoid a direct confrontation. In such instances they would use guerrilla combat methods. In different circumstances, such forces would seek what was considered to be a more "profitable" military advantage by means of commando operations sometimes carried out quite far behind the theoretical battle front. That front then became more of a demarcation line between territories controlled predominantly by each of the adversaries, rather than an absolute, linear contact zone.

25. Such considerations had necessarily led to the drafting of article 40. It was interesting to note that the same considerations had more or less consciously influenced both the placing and the wording of article 42. He wondered whether that might not have the effect of creating confusion between methods of combat on the one hand and circumstances leading to an extension of prisoner-of-war status to other categories of individuals on the other.

26. Article 42, indeed, envisaged situations which were not necessarily connected with methods of combat. A different way must be found to take account of the more salient differences between conventional and irregular armed forces.

27. In the case of regular armed forces, the groups which made up commandos usually had their point of departure in an area controlled by their own side, and very often sought to return to that point after an operation.

28. In extreme cases combatants of an irregular force emerged as if were from the civilian population and returned to it immediately after the operation, since they were acting in enemy-controlled territory and must by definition remain there.

29. Any number of nuances and possibilities existed between those two extremes, and consequently a great variety of types of conduct, based entirely on the circumstances.

30. Faced with that range of reactions, whom did they seek to protect? And to protect to what extent and in what way? None of those questions was easy to answer.

31. The Hague legislation expressly protected members of the regular armed forces and members of militias differing in fact only on minor points from the regulars. Members of all such forces benefited from prisoner-of-war status if captured. That

legislation also took into account the case of mass levies in the case of an enemy advance. Subject to certain conditions, those who took part in mass levies and were subsequently captured also became prisoners of war. In the event of occupation, mass levies and resistance activities would be penalized and put down by the adversary, subject to the so-called Martens clause.

32. In 1949, progress had been made at Geneva in the shape of recognition both of resistance movements - even those operating in occupied territory, provided they respected the Hague legislation - and of the regular troops of non-recognized governments. But mass levies in occupied territories were still not contemplated. Men who did not belong to any category were not entitled to commit acts of hostility and were therefore civilians. If they behaved otherwise, their fate would be that laid down by Article 68 of the fourth Geneva Convention of 1949.

33. Article 42 as proposed by the ICRC was intended to confer prisoner-of-war status on captured members of certain organized resistance movements. Two kinds of condition had to be fulfilled: the first applied to the movements themselves, and those were The Hague conditions, worded in somewhat less rigid terms; the second applied to members of such movements.

34. Apart from the fact that the condition that the person concerned should distinguish himself from the civilian population in military operations was a determining rule in so far as prisoner-of-war status was concerned rather a basic provision - essential without any doubt - of the law of war, which was questionable in certain respects, the fundamental problem was that of the proof that the individual was a member of a movement belonging to a Party to the conflict, a proof which was almost impossible to provide in many cases of urban resistance in particular. So far as the movement itself was concerned, such proof was linked to the fact that the Detaining Power was judged according to the criteria it finally chose concerning the behaviour of that movement.

35. Article 42 did not substantially alter the 1949 situation. Only vast liberation movements could provide concrete instances of the application of such a text. At all events, it was vital to avoid going to the other extreme by encouraging banditry or by removing all distinction between combatants and civilians.

36. The amendments submitted by Pakistan (CDDH/III/11), Ghana (CDDH/III/28) and Madagascar (CDDH/III/73) dealt with a question which warranted careful consideration. The question should be answered most judiciously bearing in mind all types of conflict.



37. The amendment submitted by the Polish representative (CDDH/III/94) should be considered by the Working Group, since the treatment of captured resistance fighters might raise problems when a conflict came to an end in the circumstances described by the author of the amendment.

38. The Netherlands amendment (CDDH/III/256) offered three important features: it was clearer, it transformed the condition of respect for the rules of war into an implementing provision promulgated by a responsible command, and it established the presumed existence of such a provision in balanced, realistic and practical terms.

39. The Norwegian amendment (CDDH/III/259) also warranted close consideration by the Working Group, because the ideas behind it were an attempt to pose the question of article 42 according to new premises. In fact, they replaced the conditions traditionally brought together under the same heading in various articles of Part III, thus significantly modifying its scope.

40. He assured the Committee that his delegation would not neglect any aspect of the problem in the Working Group.

41. Mr. GILL (Ireland) supported the United States and United Kingdom amendment (CDDH/III/257); he would have co-sponsored it had he not had a number of minor comments to make, which could well be handled by the Working Group of the Drafting Committee.

42. With reference to article 42 of draft Protocol I, he hoped that a better definition than "irregular forces" might be found and suggested the words "armed organizations not forming part of the armed forces regularly constituted in conformity with the national legislation of the government in power".

43. He would prefer to use the words "into the power of" rather than "into the hands of" in paragraph 1 of article 42. His delegation fully supported the wording of paragraph 1 (a), (b) and (c), but believed that in paragraph 1 (b) it would be sufficient to require irregular forces to be distinct from the civilian population, without being more specific. The expression "in their military operations" in paragraph 1 (b) might be considered too loose. In that case, he would suggest the words "in their military operations intended or carried out to kill, injure or capture an adversary or to damage or destroy a military objective or the military property of the adversary". In paragraph 2 the word "Other" should be inserted before the word "members" in the third line. Wherever the word "forces" was used, it should be qualified by the word "irregular" rather than by the word "such".

44. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) said that the main purpose of article 42 was to confer the status of combatant on persons fighting against colonial and racist régimes and alien domination. The USSR and the allied Soviet countries wished to see the abolition of such régimes and his country was therefore opposed to imperialism, banditry and any form of exploitation. It would give all the necessary assistance to nations that were thus struggling to achieve one of the aims of the United Nations Charter - that of abolishing colonial régimes. International humanitarian law and the Geneva Conventions already extended legal protection to those who fought against imperialism and colonialism. The new article 1 of draft Protocol I extended the scope of draft Protocol I to persons struggling against colonial domination in order to obtain the right to self-determination in accordance with the United Nations Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)).

45. That action by the first session of the Conference was fully in accordance with the later development of the anti-colonialist struggle of peoples which was the dominating feature of the present era.

46. The Secretary-General of the Communist Party of the Union of Soviet Socialist Republics, Mr. Leonid Brezhev, had recently stated that the overthrow of the Portuguese colonial system represented a major advance towards the abolition once and for all, of the colonial enslavement of the African continent. The day was near when the whole of Africa would be free, from the Cape of Good Hope to the Western Sahara.

47. That did not mean that those colonialist régimes would not try to reintroduce such régimes in those countries which had recently gained their independence. World opinion was fully aware that the extremists in Mozambique and Angola had the support of the colonialists. In its fight against national liberation movements, colonialism had resorted to the use of mercenaries: that had been the case in the Congo, Nigeria and the Arabian peninsula. According to recent information, a mercenary force of 500 to 700 men, equipped with highly-sophisticated weapons, had been set up in the territories of southern Africa, South Africa and Rhodesia, to carry out operations in the territories of Angola and Mozambique.

48. Although most governments were against such a practice, mercenaries were recruited in Western Europe, the United States of America and Canada with the promise of cash rewards for each combatant against colonialism killed. Skilful publicity sought to give the impression that such recruitment was not punishable.

A whole range of films and literature glorified the activities of the recruiters. World opinion should be made to declare such recruitment illegal, so that those who might be tempted to offer their services would think twice before doing so.

49. The Organization of African Unity, which had considered the problem, had called for the prohibition of such recruitment, and that prohibition was reflected in United Nations General Assembly resolutions 2465 (XXIII) and 2548 (XXIV) which stated that the practice of using mercenaries against national liberation movements and independence movements constituted an act punishable under the penal code. General Assembly resolution 2548 (XXIV) had been endorsed in resolution 2708 (XXV). In that text, the General Assembly requested the Governments of all countries to adopt laws which made the recruitment of mercenaries in their territory a punishable offence and to prohibit their nationals from serving as mercenaries.

50. Lastly, General Assembly resolution 3103 (XXVIII), which had been quoted at both sessions of the current Diplomatic Conference, confirmed the basic principles of the legal status of combatants struggling against colonial and alien domination and racist régimes. That resolution stressed that the use of mercenaries by colonial and racist régimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism was considered to be a criminal act, and that mercenaries should accordingly be punished as criminals under the penal Code.

51. The Ukrainian delegation to the United Nations had sponsored several initiatives on that subject. The Diplomatic Conference had recognized the rights of the national liberation movements and could not ignore world opinion, the Organisation of African Unity and the decisions of the United Nations General Assembly. The two draft Protocols ought to indicate that mercenaries did not benefit from the status of combatant and should be regarded as criminals, with all that that entailed. It was vital that such a measure be taken if the struggle against colonialism was to gain ground. The Committee and the Working Group should give close attention to the amendments and new articles submitted by numerous delegations.

52. It was now established in the draft Protocols that there were three main categories of combatant, namely regular armed forces, national liberation movements and mercenaries. To accord mercenaries the safeguards offered to the other categories would be contrary to the rules of existing international law and also to the resolutions of the United Nations General Assembly and the Security Council.

53. The new article 42 bis, submitted by the Belgian delegation and several co-sponsors (CDDH/III/260), stated that any person who took part in hostilities would be entitled to protection under the Conventions. That text made a judicious addition to the draft article prepared by the ICRC. But he would ask the sponsors of the amendment whether their text would apply to mercenaries struggling against national liberation movements and, if so, what legal status such persons would enjoy.

54. Mr. MOKHOTHU (Lesotho) said that he considered article 42 of draft Protocol I to be of vital importance. The greatest possible protection must be given to members of national liberation movements fighting against colonialism, foreign domination and racism. That was the purpose of article 42 of the ICRC text and in particular of the new paragraph 3 proposed for addition to the article. His delegation had difficulty, however, in accepting article 42 in its present form.

55. The term "members of organized resistance movements" used in paragraph 1 was vague and might create confusion rather than maintain order in international relations. His Government had no intention of encouraging organized resistance movements which might be composed of common law criminals and his delegation could therefore not accept the wording of article 42.

56. He had studied closely the various amendments submitted to the Committee. He did not think it desirable to replace the words "organized resistance movements" by the words "irregular forces" as suggested by some of the amendments. It might be asked what exactly was meant by the word "irregular". Was it for instance the opposite of "regular", in which case mercenaries were "irregular forces"? Did the Conference intend to protect mercenaries? His Government, which had experience of atrocities committed by mercenaries in Africa, could not support any provision of the Protocol which protected them.

57. To avoid the ambiguity introduced by the words "organized resistance movements" he suggested their deletion and replacement by a provision which might read "combatants belonging to a national liberation movement, fighting against colonial domination, foreign occupation or racist régimes, who fall into the hands of the enemy shall be treated as prisoners of war". It would then be unnecessary to include the paragraph mentioned in the Note on article 42 of the ICRC text.

58. It should be pointed out that members of liberation movements defending the right of their people to self-determination could not openly carry distinctive emblems or arms, in view of their financial situation and military inferiority. Experience had shown, moreover,

that it was not difficult for an enemy régime to identify the members of liberation movements. For those reasons paragraphs 1 (b) and (c) were not acceptable to his delegation.

59. He emphasized in conclusion that a provision must be adopted which would stipulate clearly and explicitly that members of national liberation movements engaged in armed conflict were entitled to the status of prisoners of war.

60. Mr. FISCHER (German Democratic Republic) said that great importance must be attached to article 42. A number of amendments had been submitted and his delegation had examined them closely.

61. The text of article 42 as proposed by the ICRC provided a sound working basis. He had, however, some doubts on the subject of paragraph 2, which stated that "members of a resistance movement ... shall ... even if sentenced retain the status of prisoners of war". In connexion with Article 85 of the third Geneva Convention of 1949, his Government had indicated that it would not grant the benefit of the provisions under consideration to prisoners of war sentenced in accordance with the principles of the Nurnberg Tribunal for war crimes and crimes against humanity. He would therefore prefer the deletion of the words "... and shall ... even if sentenced retain the status of prisoners of war".

62. His delegation supported proposals such as those of the Democratic Republic of Viet-Nam (CDDH/III/254), Madagascar (CDDH/III/73), Poland (CDDH/III/94) and Pakistan (CDDH/III/11), which helped to clarify the ICRC text in the interests of those fighting for the right of self-determination of their peoples, against colonial rule, foreign occupation and racism.

63. In view of the adoption of draft Protocol I, article 1, at the first session it seemed necessary to change the structure of article 42. The principle should be adopted at the outset that armed forces of national liberation movements had the same status as other Parties to the conflict. It was not enough to treat them as members of "irregular forces", and he hoped that the Working Group would attach weight to that fact.

64. Mr. QUACH TONG DUC (Republic of Viet-Nam) said that he had studied with the greatest interest all the amendments proposed for article 42. He would like to draw the attention of the Committee to the following points.

65. First, several amendments (Netherlands (CDDH/III/256), the United States of America and the United Kingdom (CDDH/III/257)) stipulated that organized resistance movements should be commanded by a "responsible person" rather than be placed under a "responsible command".

66. Second, those amendments, as also that of Spain (CDDH/III/209), required that members of resistance forces should distinguish themselves from the civilian population by a fixed, permanent and visible emblem or by carrying arms openly. The Norwegian amendment (CDDH/III/259) even suggested that that distinguishing feature should be made the subject of a new basic rule. His own delegation had already made known its views on the subject: the distinguishing of combatants was essential for the effective protection of the civilian population.

67. Third, the amendment of Belgium and eleven other countries (CDDH/III/260), proposing to add a new article 42 bis entitled "Protection of persons taking part in hostilities", called for very careful study. The idea of a competent tribunal deciding whether a person was entitled or not to the status of prisoner of war was an interesting one.

68. With reference to the amendment proposed by the Democratic Republic of Viet-Nam (CDDH/III/254), he wished to exercise his right of reply.

69. Since the beginning of the session his delegation had always maintained an attitude of dignity and courtesy, in the desire to make an effective contribution to the drafting of the two Protocols. It had been grieved, therefore, to find that once again the Hanoi delegation had taken every opportunity to make grave and unfounded accusations against the Republic of Viet-Nam. Those controversial charges were inspired by a hostile feeling. If his delegation had been of the same mind it would have revealed the innumerable atrocities committed by North Vietnamese troops against the civilian population and civilian objects in South Viet-Nam; an opportunity had arisen in the course of the discussion on articles of draft Protocol I relating to the protection of the civilian population and civilian objects and to the prohibition of acts intended to spread terror among the civilian population - in which connexion it could have spoken of the summary executions, in public, of military personnel and civilians, and the collective burials in common graves like those discovered at Hue - on the prohibition of the use of projectiles to bombard populated areas, or schools during working hours, on the obligation to give quarter and on the prohibition of the liquidation of combatants who surrendered, and so forth. It could have referred to the exodus of nearly a million and a half South Vietnamese fleeing before the North Vietnamese troops, the present attacks on the town of Ban Me Theot, etc. It had, however, kept silence in a spirit of reconciliation and concord, believing, moreover, that it was not the place or the time to launch into that problem.

70. The charge of falsifying the files of prisoners of war in order to turn them into common law prisoners was a pure invention, as were the charges of repression of prisoners of war by force of arms, their detention in penal establishments, and moral and physical compulsion to force prisoners of war to renounce their political convictions. Immediately after their capture, combatants of the North Vietnamese armed forces were questioned and evacuated to internment camps. It often happened that they asked, of their own free will, to correct their first statements in order to enjoy better treatment. For example, able-bodied soldiers who were prisoners of war could be used as workers, whereas officers could not be forced to work. Such corrections to their statements could lead to a change of internment camp and consequently of registration number; apart from that, there could be no falsification of records so as to represent prisoners of war as prisoners under ordinary law. In the matter of the treatment of prisoners of war and the organization of internment camps, his Government had applied the provisions of the third Geneva Convention of 1949, as stated in the report submitted by his delegation to the XXIInd Conference of the International Red Cross held at Teheran in November 1973. Representatives of the International Red Cross could visit, and had indeed often visited, the prisoner-of-war internment camps in South Viet-Nam. Had the Government of North Viet-Nam taken similar action to apply the Geneva Convention? It seemed not. It was all very well to take part in the work concerning the development of humanitarian law, but it was certainly much better to make a point of applying the existing humanitarian law, in particular the Geneva Conventions of 1949.

71. In addition, his Government had implemented the Paris Agreements of 27 January 1973 by returning all military detainees belonging to the North Vietnamese armed forces and captured before that date; the adverse Party, on the other hand, had only returned a small number of soldiers of the Vietnamese armed forces captured by them.

72. The offensive remarks of the North Vietnamese representative did not serve the purpose they sought to achieve. The successive mass exoduses of the civil population were creating heavy burdens and responsibilities for the Government of the Republic of Viet-Nam, which had to feed the refugees, resettle them on new land and help them to form new centres of population. It was those new centres of population, often built with the financial assistance of international relief organizations, that the Hanoi delegation had called "concentration camps". If the remarks of the North Vietnamese representative were to be believed, the Government of the Republic of Viet-Nam had set out deliberately to destroy the civilian population, and that was unthinkable on the part of any government. Did that representative think that in that way he

could divert the attention of the representatives of the various countries of the world from the war of aggression that the expeditionary corps of North Viet-Nam was still waging against South Viet-Nam, from the general offensive that had just been launched against the positions, towns and centres of population of South Viet-Nam, that bleeding, torn and devastated country?

73. Mr. MENCER (Czechoslovakia) observed that the experience gained in armed conflicts was at the root of many United Nations General Assembly resolutions and of the text which had been adopted at the first session of the current Conference for the article 1 of draft Protocol I. It was obvious that the provisions of Article 1 of The Hague Regulations on combatants, and those of Article 4 of the third Geneva Convention on prisoners of war, were no longer sufficient: it was essential to reaffirm and extend them in more positive terms. The fact that twenty-two countries had participated in drawing up sixteen amendments, and the large number of speakers on article 42, bore witness to the capital importance of the problem it dealt with. The final text of article 42 would reflect the efforts of the Conference to adapt the law more fully to the realities of the situation.

74. The text proposed by the ICRC for article 42 was the outcome of the Conferences of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts which had preceded the current Conference. It constituted a sound basis for discussion, and his delegation supported it in its main lines.

75. The draft of article 42 was intended to cover resistance movements and the movements of armed struggle for self-determination of peoples fighting against racist régimes or foreign domination and battling for the right to decide their own future. According to that article, only members of such movements should be treated as combatants and placed on the same footing as other prisoners of war. He agreed with the representatives of the Ukrainian Soviet Socialist Republic, Lesotho and the Democratic Republic of Viet-Nam, that mercenaries and war criminals should in no case enjoy such protection.

76. It was to be hoped that the members of the Working Group would succeed in reaching agreement on the important problem of the conditions which members of resistance movements should fulfil and on the various amendments, many of which might be combined to improve the ICRC text.

77. Sir David HUGHES-MORGAN (United Kingdom) pointed out that the text to be adopted for article 42 perhaps held the key which might solve the problems raised by certain other articles.



78. Article 42 was concerned not merely with prisoner-of-war status, but also with lawful combatant status as well. The Hague Regulations respecting the Laws and Customs of War on Land<sup>1/</sup> defined the categories of persons who should be treated as lawful combatants and stated that such persons should be considered as prisoners of war. A new pattern had been adopted in the third Geneva Convention of 1949; in Article 4 of that Convention, the first three and the last categories of persons to be given prisoner-of-war status also included persons considered as lawful combatants and, as such, not liable to punishment for having taken part in hostilities. The Polish proposal (CDDH/III/94) was logical in so far as it went back to the form of words suggested in The Hague Regulations and, although it might be difficult thus to revert to a formulation adopted in 1907, the Working Group would perhaps succeed in reaching a compromise on that point.

79. As to the scope of application of article 42, the law in relation to the position of regular forces was clear. A reformulation merely extending it to irregular forces might involve the danger of being given a more restrictive interpretation. His delegation could not therefore support the Norwegian proposal (CDDH/III/259). Article 42 should be applicable to "irregular forces" and not only to resistance or liberation movements. The expression "irregular forces" was a good one; it included those movements if they were irregular forces, and it would permit article 42 to be applied to any other irregular forces which might appear in future conflicts and which ought to receive the same degree of protection.

80. It had been maintained that it was unjust to impose conditions for granting prisoner-of-war status to the members of irregular forces. Yet such limitations were indispensable for three reasons: first, irregular forces were not so disciplined as regular forces; second, they engaged in different kinds of operations; lastly, and above all, they very often operated among the civilian population and even as part of that population. The civilian population received immunity only on the condition that it did not take part in hostilities. It was thus vital, in the interests of that population - which should be the overriding concern of the Conference - to maintain the distinction between civilians and combatants and to continue using the traditional method of imposing sanctions on groups which placed civilians at risk. To be entitled to benefit from the provisions under discussion, irregular forces must be organized, must distinguish themselves from the

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<sup>1/</sup> Annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land.

civilian population - and in that respect the open carrying of weapons was not sufficient - and must comply with all the rules of international humanitarian law applicable in armed conflicts. With regard to the latter condition, the Ghanaian amendment contained a risk in so far as, if literally applied, it would permit liberation movements not to make the distinction between civilian objects and persons and military objectives. Moreover, even if the members of irregular forces who did not fulfil the above-mentioned conditions were deprived of prisoner-of-war status, that in no way meant that they would lose all humanitarian protection.

81. The text of article 42 bis (CDDH/III/260), of which the United Kingdom was one of the sponsors, was intended to ensure maximum protection to all persons taking part in hostilities, whether they belonged to regular or to irregular forces.

82. Paragraph 1 was designed to ensure that any person taking part in hostilities should obtain prisoner-of-war status if he claimed it or appeared to be entitled to it, or even if any doubt arose as to his entitlement. The application of Article 5 of the third Geneva Convention should be extended to irregular forces. Paragraph 1 of proposed article 42 bis applied only to persons taking part in hostilities, but without prejudice to the other provisions for granting prisoner-of-war status - for example, Article 4 of the third Geneva Convention. The tribunal referred to by the representative of Belgium must present every guarantee of impartiality, but such safeguards might perhaps be difficult to frame. The Working Group should study that important aspect. The Netherlands amendment (CDDH/III/256), and especially paragraph 2, was of interest but his delegation saw certain difficulties in it. Actions often spoke louder than words and it was on actions that judgements should be made.

83. The opening words of paragraph 2 of article 42 bis should accord with the text adopted for article 42. That paragraph reflected quite a different philosophy from that underlying the amendment submitted by the Democratic Republic of Viet-Nam (CDDH/III/254 and Corr.1). If justice demanded unequal treatment for the criminal and the victim, it had to be decided who was to determine justice, and that was as difficult as to determine what was a "just war". The Romans had been the first to introduce the concept of a just war, and it had continued in medieval Europe, but the difficulty had been that both sides had claimed they were just. A more humanitarian approach, and one more in conformity with the work of Henry Dunant, was called for.

84. Replying to the representative of the Ukrainian Soviet Socialist Republic, he said that, in the context of article 42 bis, the references to mercenaries were a spectre without substance, since nothing in that article deprived a Party to a conflict of the right to try war criminals. Indeed, its purpose was to ensure that such trials would be conducted with all the necessary judicial safeguards, with fairness and in public. Such fundamental guarantees should be extended to everyone.
85. Paragraph 3 of proposed article 42 bis (CDDH/III/260) applied to persons who did not obtain prisoner-of-war status. It was intended to extend to them the same protection as was granted to civilians under article 65 of draft Protocol I and, in occupied territory, to entitle them, notwithstanding Article 5 of the fourth Geneva Convention to benefit at all times from the safeguards and protection contained in Part III, Section III of that Convention.
86. Paragraph 4 was designed to ensure reasonable treatment for persons taking part in hostilities in the absence of any Protecting Power. He hoped that the ICRC would receive favourably the notification envisaged in the article.
87. Mr. EL GHONEMY (Arab Republic of Egypt) said he shared the point of view that the draft article 42 proposed by the ICRC called for improvement, particularly with regard to liberation movements which, as all were aware, had now become an established fact in daily life. The attitude of most countries towards the problem was usually influenced by their philosophical idea of freedom. Liberation movement combatants were people who had been deprived of their territories and placed, as a result, in difficult circumstances. Such an intolerable situation made it essential that there should be great flexibility in the application of humanitarian standards. Most of the amendments presented to the Committee clearly supported that concept and constituted, in consequence, an excellent basis for the drafting of article 42.
88. Concerning proposed article 42 bis, he recalled that his country was one of the co-sponsors of amendment CDDH/III/260, which had been ably presented and commented upon by the Belgian and United Kingdom representatives.
89. In conclusion, he pointed out to the United Kingdom representative that it had been Islam not Rome which had originally introduced the universal idea of justice in law applicable in armed conflicts.

90. Mr. STARLING (Brazil) pointed out that article 42, which established a new category of prisoners of war, involved three important issues to be settled: first, the persons considered should be members of an organized resistance movement belonging to a "Party to the conflict"; second, members of organized resistance movements should be distinguishable from the civilian population; third, they must respect all the rules of international law applicable in armed conflicts, including the Geneva Conventions and the draft Protocol I to the same Conventions.

91. In respect of the first question, he drew attention to article 1, paragraph 2 of draft Protocol I as adopted by Committee I at the first session of the Conference, in which a new type of party to an international armed conflict was envisaged. According to that paragraph, the new "Party to the conflict" must be considered and precisely defined, bearing in mind that until now the Conventions and other acts of international law applicable in armed conflicts had understood the expression "Party to the conflict" to mean a State. Further, in order to permit complete understanding of article 42 and consequently its full application and respect, there should be a clear statement of what was intended by "peoples fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination".

92. As far as the question of distinction between the members of organized resistance movements and the civilian population was concerned, the Brazilian delegation considered that the decision must be either to maintain the conditions prescribed in Article 4.A (2) of the third Geneva Convention of 1949, which had to be fulfilled by the members of all other organized resistance movements, or - if new conditions were adopted for members of a new type of organized resistance movements - to extend those new conditions to all other organized resistance movements considered in Article 4 of the third Convention. He considered that the members of organized resistance movements should respect not only the Geneva Conventions and the Protocols but also all the other rules of international law applicable in armed conflicts. However, as the question of providing prisoner-of-war treatment was one of those which offered unquestionable opportunities for reciprocity, he considered that in article 42, or in another appropriate article of the Protocol, it should be clearly stated that the Party to the conflict to which the organized resistance movement belonged had to be legally bound by the Geneva Conventions and the Protocols.

93. Article 42 bis should also deal with the protection of persons who fell into the hands of the adverse Party, but he considered that the reference to "combatants" should not appear in the article, since the status of combatant ceased to exist when a person fell into the hands of the adverse Party. Moreover, when dealing with

persons referred to in Chapter I of The Hague Regulations of 1907 and in Article 4 of the third Geneva Convention of 1949, it had to be borne in mind that as those specific provisions referred not only to combatants but also to persons who were non-combatants, any legal provision extending to all those persons the status of lawful combatants would raise a serious doubt as to the validity of those international rules.

The meeting rose at 12.30 p.m.



SUMMARY RECORD OF THE THIRTY-FIFTH MEETING

held on Friday, 21 March 1975, at 10.10 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 42 - New category of prisoners of war (CDDH/1, CDDH/56; CDDH/III/5/Rev.1, CDDH/III/11, CDDH/III/28, CDDH/III/73, CDDH/III/94, CDDH/III/95, CDDH/III/209, CDDH/III/253, CDDH/III/256, CDDH/III/257, CDDH/III/258, CDDH/III/259) (continued)

Article 42 bis - Protection of prisoners of war (CDDH/III/77, CDDH/III/254 and Corr.1, CDDH/III/260) (continued)

Article 42 ter - Persons not entitled to prisoner-of-war status (CDDH/III/254) (continued)

1. The CHAIRMAN invited the Committee to continue its general discussion of articles 42, 42 bis and 42 ter of draft Protocol I.
2. Mr. DENEREAZ (Switzerland) said that, after studying the proposed ICRC text of article 42, he had decided not to submit any amendments or to co-sponsor the amendments submitted, although he recognized their value. The ICRC draft offered much more than a mere basis for discussion: it was clear, sufficiently precise and, above all, confirmed the accepted and, to some extent, already legalized principles of respect for the laws and customs of war, and hence the will to comply with the Geneva Conventions and draft Protocol I, the obligation on all combatants to distinguish themselves from the civilian population, and the exercise of responsible command vis-à-vis a Party to the conflict. The Swiss delegation could not agree to the disappearance of those three requirements, or any one of them, from article 42, which had treaty force.
3. After surveying the various amendments to article 42, he wondered whether it would be possible, as the representative of Argentina had proposed, to define the new category of prisoners of war simply by reference to other articles. Personally, he preferred the ICRC text, which was more explicit. Nor was he convinced that it was necessary, as the representative of the Democratic Republic of Viet-Nam had proposed at the thirty-third meeting (CDDH/III/SR.33), that the status of combatant should be defined from a particular and exclusive point of view. He preferred the ICRC text, which referred to resistance movements without regard to their origins or objectives. In its amendment CDDH/III/259, the Norwegian delegation spoke of "legal combatants", an unusual expression to which he preferred the ICRC wording which made no allusion to any legality -

a concept that might easily give rise to controversy. The amendment submitted by the United States and the United Kingdom delegations (CDDH/III/257) contained obsolete terms such as "irregular forces" by contrast with regular forces. Such expressions, formerly applied to commandos, were now outmoded and had a distinctly pejorative connotation which should not be applied to resistance movements.

4. With regard to the ICRC text, he said that the Swiss delegation would like to see the principle expressed in paragraph 1 (c) become a universal one and suggested the deletion of the words "in military operations" which, in its opinion, implied an engagement on a scale unlikely to occur in the case of resistance movements. With regard to the principle set out in paragraph 1 (b), his delegation suggested that the Working Group should consider whether the text should read: "that they distinguish themselves from the civilian population in military operations", or, as a better alternative, "that they distinguish themselves from the civilian population in regions in which fighting takes place on land". His delegation would also favour the insertion of a paragraph 3 similar in terms to the paragraph 3 proposed by ICRC. It had no objection to an article 42 bis or 42 ter being considered, although it saw no real need for such provisions. Nor did it regard amendment CDDH/III/260 as being very realistic: could the protection provided under article 42 really be granted to any person who took part in hostilities and fell into the hands of the adverse Party? Although his delegation would find it hard to accept such an extension of that protection, it was nevertheless sympathetic to the presumption of innocence implied in paragraph 1 of the proposed text. It considered that paragraph 3 of the same text belonged in article 65, and suggested that paragraphs 2 and 4 should be deleted since they seemed merely to duplicate the basic rules which, however, were alien to article 42. His delegation wished, however, to affirm its preference for the ICRC text.

5. Mr. FISSENKO (Byelorussian Soviet Socialist Republic) stressed the importance his delegation attached, from the humanitarian point of view, to article 42 of draft Protocol I. The ICRC text for article 42 was the outcome of lengthy, painstaking work by experts and constituted an excellent basis for discussion. The principles set out in it would make for fuller protection of members of resistance movements and participants in national liberation movements, and met the requirements of modern times.

6. Commenting on paragraph 3 of the ICRC text, whose inclusion he regarded as fully justified and necessary, he said that the time had come to give to members of national liberation movements, who in the exercise of the right of self-determination were fighting to free their country from colonialism, racism and foreign occupation,



the same status as other combatants. For that reason, his delegation broadly approved the text proposed by the ICRC for article 42, although the form and - to some extent - the substance could be improved. For instance, the provisions in paragraph 2, under which criminals and captured persons would be treated as prisoners of war, should be deleted. In that connexion, he shared the views expressed at the thirty-fourth meeting (CDDH/III/SR.34) by the representative of the Ukrainian Soviet Socialist Republic, supported by certain other delegations, concerning the treatment of captured mercenaries, for which provision should be made in Protocol I.

7. He supported the amendments which supplemented in greater detail the ICRC draft for article 42, notably the amendment of the Democratic Republic of Viet-Nam (CDDH/III/254) which proposed two fresh articles 42 bis and 42 ter; Poland (CDDH/III/94); Madagascar (CDDH/III/73); and Pakistan (CDDH/III/11), all of which contained interesting ideas that should be reflected in the draft Protocol. He could not, however, support the amendments of Spain (CDDH/III/209); the Netherlands (CDDH/III/256); the United States of America and the United Kingdom (CDDH/III/257); or the joint amendment CDDH/III/260, either because they deviated too much from the original, or else, as in the case of CDDH/III/260, introduced an element of vagueness into draft Protocol I, for instance the idea of a tribunal competent to determine whether a person falling into the hands of the adverse Party was or was not entitled to the status of prisoner of war. Would that be an international or a national tribunal? Moreover, the special role assigned in the latter amendment to the ICRC in the matter of judicial proceedings against certain persons deviated from the principles of article 5 of draft Protocol I adopted by Committee I.

8. Mr. RONZITTI (Italy) said he was satisfied with the ICRC text of article 42, which was of crucial importance, and believed that the amendments should produce a generally acceptable compromise text.

9. His delegation agreed with those delegations which had suggested that in article 42 the words "resistance movements" should be replaced by "irregular forces" for the latter expression had a broader meaning and, in his delegation's opinion had no negative connotation. The irregular forces should fulfil the conditions set out in paragraph 1 (a), (b) and (c) of the ICRC draft for article 42.

10. His delegation attached special importance to the conditions laid down in paragraph 1 (b) of the ICRC text, namely, that the irregular forces must distinguish themselves from the civilian population. While regarding that principle as essential, his delegation agreed that it should apply to military operations only.

Besides, it would be very hard to find a realistic formula indicating in what way irregular forces should distinguish themselves from the civilian population.

11. His delegation realized that it would be extremely dangerous to leave it to the enemy to form a subjective assessment to determine whether the behaviour of the irregular forces, as a whole, conformed to the requirements of paragraph 1(a), (b) and (c) of article 42. The problem should be studied attentively, so that the enemy could not refuse to treat members of irregular forces as "lawful" combatants, claiming that they did not distinguish themselves from the civilian population or had no organization capable of enforcing the laws of war. That was why it had been proposed to consider the fact that combatants should distinguish themselves from the civilian population as an essential rule of the law of war, but not a "constitutive" condition with which both irregular forces as a whole and individual combatants would have to comply. His delegation could appreciate the reason for the proposal, but was unable to support it because there was a risk that too much relaxation might endanger the civilian population. On the contrary, it was to be hoped that the Committee would work out a formula limiting the power of the enemy to evaluate whether the irregular forces as a whole complied with the conditions laid down in paragraph 1 (a), (b) and (c) of the ICRC text and, in that connexion, the suggestion embodied in paragraph 2 of the Netherlands amendment (CDDH/III/256) was a very useful one. His delegation considered of great value, too, the text of article 42 bis in the joint amendment (CDDH/III/260), and requested that Italy be added to the list of sponsors.

12. With regard to the problem of wars of national liberation which had been raised by many delegations, he pointed out that, because Committee I had adopted paragraph 2 of article 1 at the first session, such wars were currently considered as international conflicts, covered by Protocol I, and consequently the members of armed forces belonging to the party that, in a war of national liberation, was fighting against the established Government, had acquired the status of lawful combatants and, when captured, had to be treated as prisoners of war. Consequently, he considered it unnecessary that article 42 should mention armed forces engaged in a war of national liberation at the side of the authority fighting against the established Government. That problem might, of course, be raised also in connexion with the irregular forces of national liberation movements. There again, by definition, the expression "irregular forces" was broad enough to cover also combatants of national liberation movements not enlisted in a regular armed force. If, however, a reference to national liberation movements was deemed to be essential in article 42, his delegation would welcome any solution which could be adopted by consensus. In that respect, paragraph 3 of the Polish amendment (CDDH/III/94) might be considered as a useful proposal.

13. Mr. JOSEPHI (Federal Republic of Germany) agreed in principle with the ICRC text of article 42, and even more with what was said in the ICRC Commentary (CDDH/3, pp.47 to 52). In general, his delegation supported the Netherlands amendment (CDDH/III/256) and United States and United Kingdom amendment (CDDH/III/257), and had been particularly interested in the amendments submitted by Poland (CDDH/III/94), Finland (CDDH/III/95) and Spain (CDDH/III/209). It was, however, unable to support either the Norwegian amendment (CDDH/III/259) which, in its opinion, would make the text confused, or the amendment submitted by the Democratic Republic of Viet-Nam (CDDH/III/253), according to which there would be no visible distinction between guerrilla fighters and the civilian population. Such a distinction was essential to ensure the protection of the life, health and property of civilians.
14. The addition of a possible paragraph 3, as suggested by the ICRC, no longer seemed necessary, for at the first session of the Conference Committee I had adopted a general provision on the subject in article 1, paragraph 2. His delegation supported the addition of a new article 42 bis as proposed in joint amendment CDDH/III/260, and he requested that his country be added to the list of sponsors.
15. Mr. AGUDO (Spain) also requested that his country be added to the list of sponsors of amendment CDDH/III/260, the original English version of which was the only one he could accept. The Spanish version did not render the English correctly. In paragraph 2, for instance, after the words "Third Convention" the English version used the word "or", signifying an alternative, whereas the Spanish version used the word "y", signifying an addition, which his delegation could not accept.
16. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that article 42 dealt with combatant fighting for their country's liberation from colonialist oppression and foreign occupation and hence the members of the Conference should make a concerted effort to find a solution which would improve the status of those combatants by giving them the means of attaining their objective.
17. There were different kinds of armed forces - regular and irregular forces - and the status of combatants falling into enemy hands in the course of an armed conflict should be defined in the light of that distinction. The ICRC draft of article 42 was an excellent working basis, on the assumption that there was agreement on article 1, of draft Protocol I already adopted. If that was not the case, his delegation would have to approach article 42 from a different angle, and drop the solution already adopted.

18. With regard to the amendments to article 42, his view was that the Committee should proceed from the principle that it should be very clearly stated that the individuals known as "mercenaries" were not eligible for the benefit of any protection. The mercenaries were guilty of crimes against humanity, and should be regarded as dangerous war criminals debarred from claiming any protection whatsoever. To provide in article 42 for any measure of protection in their favour would invite a violation of international law. Article 42 *ter* proposed by the delegation of the Democratic Republic of Viet-Nam in its amendment CDDH/III/254 set out the fundamental requirements concerning the treatment of such persons. His delegation was unable to accept amendments which made it possible for war criminals to evade the punishment they deserved - he referred in particular to the Netherlands amendment (CDDH/III/256) and joint amendment CDDH/III/260, because those texts might allow the justification of crimes which deserved unconditional condemnation. With regard to the United Kingdom representative's remarks that amendment CDDH/III/253 might make possible the summary execution of combatants, on the spot, without trial - as had happened in Indo-China, indeed, during the Second World War, and was still happening in the Middle East - he pointed out that the purpose of amendment CDDH/III/253 was precisely to prevent such crimes.

19. The notion of "just war" and "unjust war", to which reference had been made by the United Kingdom representative, should be considered in the context of the definition of aggression. That question was not, in any case, within the scope of the subject under consideration, which concerned the methods of war to be respected by combatants. In that connexion, he thought that the position of certain delegations was encouraging. For example, that of the Norwegian delegation, as reflected in its amendment (CDDH/III/259), made it possible to take into account the ICRC draft of article 42, and envisage a compromise solution, while bearing in mind adopted article 1. His delegation would not be able to accept amendment CDDH/III/260, particularly since paragraph 4 was inconsistent with article 5, and since the meaning of the expression "competent tribunal" was far from clear.

20. Mr. BLIX (Sweden) referred to, and analysed in detail, the conditions established by the third Geneva Convention of 1949 governing the eligibility of the members of the regular armed forces and of non-regular armed forces to the benefit of prisoner-of-war status. He compared the conditions governing the two categories of combatant, which showed that there were more and stricter conditions applying to the members of the irregular forces. Those conditions were, in fact, often difficult conditions for the irregular armed forces, as a community, to satisfy. If the irregular forces did not collectively distinguish themselves from the civilian population during military operations, or if they did

not collectively respect the laws of armed conflict, the result would be that the individual members would be deprived of prisoner-of-war status, even if they had respected those conditions. Such rigid rules did not apply to members of regular armed forces. It had already been observed that, in practice, belligerents sometimes acted generously and allowed those combatants to enjoy a status which they were not obliged to grant to them under the terms of the third Geneva Convention of 1949.

21. That being the case, the ICRC and some delegations had considered it desirable to enlarge the class of persons who should enjoy prisoner-of-war status in the event of capture, and it was for that reason that ICRC draft article 42 had been referred to the Committee. Several opinions had been expressed. Some delegations took the view that the conditions established by the third Geneva Convention should be maintained or made even more rigid; others thought that those conditions should be struck out, and yet others considered that they should be more flexible. His own delegation, which held that every effort should be made to extend protection to the largest number of combatants possible, that the different views should be reconciled and that a compromise solution should be worked out on the basis of a number of considerations. He, for example, questioned the advisability of characterizing precisely the groups of combatants as resistance or liberation forces, and, in that connexion, the Finnish amendment (CDDH/III/95) appealed to him. The United States and the United Kingdom amendment (CDDH/III/257), which referred to "irregular forces", did not strike him as appropriate because that expression might have a pejorative connotation.

22. In his opinion, the amendments submitted by Spain (CDDH/III/209), Pakistan (CDDH/III/11) and Argentina (CDDH/III/258) proposed a stiffening of the conditions governing eligibility to the benefit of prisoner-of-war status. That was an extreme view which could not be accepted.

23. Unanimity seemed to have been achieved on one point: the groups to be covered by Protocol I had to be organized groups under a responsible command. That condition was spelt out in amendment CDDH/III/257, and in other amendments.

24. Furthermore, before engaging in any hostile action, armed units had to distinguish themselves from the civilian population in their military operations. It was of the essence of guerrilla operations, however, that the guerrillero merged into the anonymity of the civilian population before and after his hostile act. The crucial problem was to define the moment at which he should disclose his identity as combatant. He considered that the amendment submitted by Spain (CDDH/III/209), which made the wearing of "permanent ... emblems" obligatory, went too far. The approach adopted in Norway's

amendment (CDDH/III/259), which endeavoured to build upon the notion of perfidy was more interesting but also gave rise to difficulties. It was possible but not certain that a condition of that kind would have to be fulfilled collectively and not individually. However that important point was resolved, there would necessarily be penalties for combatants who tried to profit from wearing civilian clothing when committing hostile acts. With regard to respect for the laws of war, his delegation would prefer that a collective condition should not be imposed on combatants, because such a condition might well be abused to deprive movements of prisoner-of-war rights. Some representatives had mentioned exceptions to be provided in the case of mercenaries. It was true that the United Nations had, with good reason, adopted resolutions directed against mercenaries, but in any legal context the meaning of "mercenary" would have to be precisely defined, if it were to be used. It would have to be made clear in particular, how it differed from volunteers.

25. With regard to joint amendment CDDH/III/260 to article 42 bis, he said that the moment at which a combatant fell into the adversary's hands was the most dangerous for him. The combatant should, therefore, be entitled to protection, and a competent tribunal or authority offering every guarantee of impartiality should determine his prisoner status. That was the substance of article 42, which his delegation endorsed.

26. Mr. NGUYEN VAN HUONG (Democratic Republic of Viet-Nam) said that he wished to comment on joint amendment CDDH/III/260 concerning the "Protection of persons taking a part in hostilities". According to that proposal, persons who had committed individual breaches of the rules of international law applicable in armed conflicts could retain prisoner-of-war status. In his opinion, prisoner-of-war status could not be accorded indiscriminately to all those who had broken those rules. A distinction should be made between grave breaches and other kinds of breach, and the jurisprudence established after the Second World War should be taken into account. Referring to various sentences passed at that period, he pointed out that the judicial decisions in question had been based on the well-established rule of customary law that those who had seriously violated the law of war could not claim the benefit of that law. Consequently, according to that jurisprudence, military personnel that committed war crimes or crimes against humanity within the meaning of the provisions of the 1945 London Agreement, <sup>1/</sup> the 1949 Geneva Conventions and the draft Protocol I could not claim

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<sup>1/</sup> Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on 8 August, 1945.

the benefit of prisoner-of-war status. The same argument should apply to mercenaries, used by colonial or racist régimes against liberation movements, in the words of United Nations General Assembly resolution 3103 (XXVIII). Those who committed violations which were not regarded as serious were, of course, entitled to retain their prisoner-of-war status.

27. Mr. ROSAS (Finland), introducing his delegation's amendment (CDDH/III/95) to article 42, said that his delegation approached the matter with an open mind. The ICRC text represented a good basis for work, but several amendments merited careful study before the Committee adopted one of the most important provisions under consideration.

28. He referred first of all to the problem raised by the amendments proposed by Poland (CDDH/III/94) and Norway (CDDH/III/259), which related article 42 back not only to the third Geneva Convention of 1949 concerning prisoners-of-war but also to The Hague Regulations of 1907<sup>2/</sup> concerning the status of combatant. In theory, such an approach should not give rise to objections. While not all persons entitled to prisoner-of-war status were legally recognized combatants, conversely, all legally recognized combatants could claim prisoner-of-war status. The amendments proposed by Poland and Norway demonstrated that relationship explicitly, whereas it was only implicit in the third Geneva Convention of 1949. The only objection to those amendments might be that the Conference's basic aim was to reaffirm and develop the four Geneva Conventions of 1949 and that any reference to The Hague Regulations of 1889 and 1907 should be avoided. He would nonetheless give those amendments serious consideration.

29. The three conditions contained in paragraph 1 (a), (b) and (c) of the ICRC text should, in his delegation's opinion, be respected by armed forces, regardless of whether they were regular or irregular forces or whether the conflict was international or non-international.

30. Article 42 dealt primarily with what the armed forces of Parties to conflicts had to do in order to be entitled to prisoner-of-war status. That status did not necessarily imply immunity from prosecution. On the contrary, the third Geneva Convention of 1949 contained provisions governing the institution of judicial proceedings against prisoners of war for crimes committed before their capture.

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<sup>2/</sup> Annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land.

31. Thus, international obligations might be prescribed for armed forces by limiting the individual responsibility of their members, without making compliance with those obligations an essential condition of prisoner-of-war status.

32. The purpose of the Norwegian amendment was to broaden the category of persons entitled to prisoner-of-war status by maintaining a modified version of paragraph 1 (a) and deleting paragraph 1 (b) and (c).

33. The effect of the amendment proposed by Madagascar (CDDH/III/73) would be to delete paragraph 1 (b), while that proposed by the Netherlands (CDDH/III/256) would leave out the condition contained in paragraph 1 (c), although part of the latter would be transferred to paragraph 1 (a).

34. His delegation had given particular attention to the Norwegian amendment and thought it warranted close consideration.

35. If certain conditions were to be dropped, condition (c) concerning respect for the Conventions and the Protocol seemed the easiest to delete. If that condition were reiterated in article 42, irregular forces would seem to be placed in an inferior position vis-à-vis regular forces.

36. The inclusion in article 42 of a reference to national liberation movements did not seem absolutely necessary since the legal status of such movements was already settled in article 1 of draft Protocol I.

37. If such a reference was none the less considered desirable, a distinction should be made between the liberation movement as an authority on the one hand and its armed forces on the other, since the movement might possess regular forces within the meaning of Article 4.A (1) of the third Geneva Convention of 1949. His delegation supported broadly the idea contained in joint amendment CDDH/III/260 proposing a new article 42 bis, but it would comment on the details of that amendment in the Working Group.

38. Mr. ABADA (Algeria) said that article 42 was one of the key articles in draft Protocol I, as was proved by the number of amendments proposed to it and the number of speakers who wished to comment on it. The consideration of the article should take account of the context in which it had been drafted. In the light of views expressed in 1972 at the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts by certain experts - mainly from developing countries - the ICRC had replaced its original version of article 38 on guerrilla combatants by the present version of



article 42 entitled "New category of prisoners of war" as a concession to those who thought that Protocol I should deal more fully with wars of national liberation and the status of combatants in such wars.

39. The adoption of article 1 of draft Protocol I by the Conference at its first session had made it possible to deal with the question of liberation movements from a completely different standpoint with the result that article 42 had to some extent been superseded. In fact, its brevity was no longer justified by the situation created by the adoption of article 1, which established the principle of the equality of the Parties to the conflict - the troops of liberation movements and those of the adverse Party, which were generally conventional armies. The logical consequence of that principle of equality was that a captured member of a liberation movement should be regarded as a prisoner of war. Any other approach, for example by stipulating conditions as was done by the ICRC text and by certain amendments would place that combatant in an inferior position in law and in practice.

40. At the thirty-fourth meeting (CDDH/III/SR.34) the Belgian representative had rightly drawn attention to the difficulties which might arise in determining whether such conditions were fulfilled.

41. At the 1972 Conference of Government Experts, the Algerian delegation had pointed out how unrealistic it was to require the wearing of a distinctive sign which was visible and recognizable at a distance. To retain that requirement as a condition of entitlement to prisoner-of-war status was to treat combatants belonging to liberation movements as second class subjects. That requirement would penalize the combatant and place him in an unacceptable position. Those who agreed that the combatant should be so penalized should likewise accept article 42 ter, proposed by the Democratic Republic of Viet-Nam, which provided penalties for breaches committed by soldiers belonging to regular armies. That would be a sound interpretation of the principle of equality. His delegation did not like the expression "irregular forces" which might be open to unfavourable interpretations.

42. The numerous amendments proposed reflected different concerns and showed that many ambiguities still remained.

43. In requesting the same status for combatants belonging to liberation movements and for soldiers of regular armies, his delegation hoped to encourage respect for reciprocal guarantees by the Parties to the conflict.

44. Such a balance was vital since, if it were upset, the humanitarian guarantees which the Conference sought to establish in Protocol I would be reduced to nothing and a spiral of violence, pressure and breaches would be triggered off. His delegation therefore called on the Committee not to neglect its humanitarian considerations, so that Protocol I as a whole might be harmonized. That desire for harmonization had already led to the submission of joint amendment CDDH/I/233 concerning articles 84 and 88, in Committee I.

45. He approved of the approach adopted by the Norwegian delegation with regard to article 42. Amendment CDDH/III/259 submitted by that delegation called for some drafting changes and should establish more clearly the principle of legal equality, so far as the third Geneva Convention of 1949 was concerned, between a soldier serving in conventional armed forces and a combatant belonging to a liberation movement. It was only subject to that proviso that his delegation could accept the article 42 bis proposed in document CDDH/III/260. He also appreciated the analysis in the Norwegian text of the conditions specified in paragraph 1 of article 42, which made it possible to consider articles 33, 35, 41 and 42 in the same light.

46. He expressed the hope that Committee III would, thanks to the interest shown by delegations in that important question, find means of overcoming the evident difficulties.

47. Mr. TODORIĆ (Yugoslavia) said that article 42 was of the greatest importance for the protection of those fighting for independence against foreign occupation, colonialism and racist régimes. Such protection should be accorded under the best possible conditions in conformity with the principles of the United Nations Charter and the provisions of article 1 of draft Protocol I, which the Conference had adopted at its first session. His delegation supported all the amendments tending to improve that protection, as a contribution to the development of humanitarian law applicable in armed conflicts. What was at issue was the protection of all combatants who raised the banner of sovereignty, political independence and freedom.

48. Mr. MAHONY (Australia) said that, in his delegation's view, the importance of article 42 and related articles was underlined by the number of proposals made and the number of speakers participating in the discussion. Article 4 of the third Geneva Convention of 1949 mentioned certain categories of persons who, if they fell into the power of the enemy, became prisoners of war. The purpose of article 42 was to extend the protection of prisoner-of-war status to a new category of persons.

49. His delegation supported the text submitted by the ICRC in principle, but would like it to be amended in certain respects. It preferred the phrase "members of irregular forces" to the words "members of organized resistance movements", which appeared in the original text. The former expression was a more representative way of describing the lawful combatants contemplated in the article. The Finnish amendment (CDDH/III/95), which proposed that those categories of persons should be called "members of organized armed units" was also acceptable.

50. It was important that article 42 should not in any way limit the protection to be afforded to the civilian population, either by the Geneva Conventions and draft Protocol I before the Committee, or under international law. Accordingly, his delegation supported in principle conditions such as those set out in paragraph 1 (a), (b) and (c). It was indeed important that the irregular forces to which the article referred should be organized and commanded by a person responsible for their conduct. Such irregular forces should, moreover, be distinguishable from the civilian population in military operations and should act in conformity with the Conventions and with draft Protocol I in their conduct of military operations.

51. Some representatives had said that irregular forces should have an internal disciplinary system. His delegation agreed with that proposition, as well as with the suggestion that article 42 should be considered in conjunction with articles 35, 41 and 65. It also supported in principle the proposals set out in joint amendment CDDH/III/260, which were useful and deserved careful consideration.

52. A number of delegations had referred to the treatment of mercenaries. His delegation was uncertain what they had in mind in that connexion, and would prefer to defer discussion on the question until proposals had been put forward.

53. Mr. IIJIMA (Japan) said he considered that the ICRC draft of article 42 constituted a good basis for discussion, though it might be improved in certain respects. Paragraph 1 mentioned only organized resistance movements. That did not seem to be enough. Theoretically, it would be possible to distinguish between the militia, volunteer corps and resistance movements, and to lay down different conditions for the treatment of prisoners. In practice, however, the methods employed by those separate categories did not differ significantly. Moreover, groups other than resistance movements employed very similar methods. Those groups should be mentioned in article 42 alongside the resistance movements. For that reason, his delegation supported amendments CDDH/III/95, CDDH/III/256 and CDDH/III/257.

54. In specifying the conditions to be fulfilled for the acquisition of prisoner-of-war status, three basic criteria should be adopted, namely the characteristic methods and means of combat employed, determination to protect the civilian population, and fair conduct of warfare. His delegation subscribed to the principles laid down in paragraph 1 (a) and (b), although it considered that paragraph 1 (b) should be formulated in more specific terms, since a clear-cut distinction should be drawn between combatants and civilians, in order to ensure the protection of the civilian population. It would, therefore, be necessary to provide some means of drawing that distinction in concrete terms. In that connexion, paragraph 2 (b) and (c) of Article 4 of the third Geneva Convention of 1949 already provided some appropriate examples. It would, however, be necessary to find other effective means of drawing that distinction. With that consideration in mind, his delegation accordingly supported amendments CDDH/III/256 and CDDH/III/257.

55. It realized that the application of article 42 would give rise to difficulties. In order to deal with them, it would be necessary to envisage provisions for protecting persons who had participated in hostilities. In that connexion, joint amendment CDDH/III/260 deserved careful consideration.

56. Mr. Moun Seun JANG (Democratic People's Republic of Korea) said that, in his delegation's view, all those fighting against imperialism, colonialism and racism should, if captured, be treated as prisoners of war. It was accordingly very important that article 42 should provide for the protection of members of national liberation movements. In their struggle against foreign occupation, colonialism and racism, they should enjoy the same rights as combatants belonging to the regular forces.

57. On the other hand, it should be clearly stated that imperialist aggressors who had committed war crimes, and crimes against peace or humanity, would not be treated as prisoners of war. Such criminals should be tried according to the law in the State in which they were detained.

58. It should, furthermore, be prohibited to employ prisoners of war for humiliating tasks and to slaughter barbarously. It was well known that the American imperialist aggressors had not treated prisoners of war in accordance with the Geneva Conventions, but had ill-treated and tortured them. They had behaved in that way towards prisoners from the Democratic People's Republic of Korea during the last Korean war.

59. Mr. DIXIT (India) said that his delegation subscribed to the principles set forth in article 42. He considered that paragraph 3 proposed by the ICRC should form an integral part of that article, but should be drafted in terms aligned with those employed in article 1.

60. Providing reasonable protection to members of groups who did not constitute the armed forces of a State raised a serious problem in the field of humanitarian law. In that connexion consideration should be given to two questions. If the Geneva Conventions and the Protocol did not cover such situations, a sizable area would remain uncovered and unprotected. Secondly, there was a danger that the degree of violence used by persons participating in an underground struggle might be in reverse ratio to the protection guaranteed to them in the event of capture. Such persons generally became desperate and cruel since no protection was available to them in the event of capture.
61. A distinction might be drawn between "prisoner-of-war status" and "prisoner-of-war treatment". In view of the peculiar nature of the organizations to which the persons in question belonged, would it not be better to give them prisoner-of-war treatment in order to facilitate their early release? They should not necessarily have to wait until the end of hostilities for their release.
62. The Indian delegation was in general agreement with the conditions which had to be met by the organizations mentioned in paragraph 1 (a) and (c), but perhaps the condition contained in paragraph (b) might be made more specific in order to facilitate a distinction being made between combatants and the civilian population.
63. The Indian delegation was opposed to the term "members of irregular forces", not knowing what was meant by that vague and ambiguous term. Perhaps it had been used to cover mercenaries, which would be unacceptable. Similarly, his delegation did not understand the purpose and meaning of the amendments contained in CDDH/III/260, which blurred the distinction between a civilian and a combatant. The object was surely to protect a person who was a member of an organization, and not just an isolated individual. Any individual, whether a mercenary or not, would be subject to the laws of the detaining Power, whereas if he belonged to an organization he would be protected under the terms of article 42.
64. He supported amendment CDDH/III/253 submitted by the Democratic Republic of Viet-Nam.
65. In a spirit of co-operation and constructive contribution the Indian delegation was open to any suggestion based on realities.
66. Mr. AJAYI (Nigeria) said that he considered the amendment by the delegation of Madagascar (CDDH/III/73) an improvement on the ICRC draft which was incomplete and failed to take into account the fact of the existence of national liberation movements. In

particular paragraph 1 (b) was unrealistic in that it expected organized resistance movements to distinguish themselves from the civilian population in their military operations. It was not always possible for such combatants, who had to fight against well equipped colonialist forces, to comply with that requirement. The amendment of Madagascar was drafted in simple and unequivocal terms. It pointed out clearly the categories of prisoners of war as being "members of organized resistance movements" (paragraph 1 (a)) and "members of organized liberation movements" (paragraph 1 (b)).

67. The Netherlands amendment (CDDH/III/256) failed to satisfy his delegation, although it attempted to widen the scope of application of article 42 by the use of the term "members of irregular forces". That formula was open to too wide an interpretation to satisfy the purpose sought in article 42.

68. So far as paragraph 2 of the Norwegian amendment (CDDH/III/259) was concerned, he said it was not clear who were the "combatants" to whom reference was made. It was to be hoped that the term did not mean mercenaries, for they had no right to protection, even out of humanitarian considerations.

69. Mr. NAVEGA (Portugal) said that the protection of combatants captured by an enemy, and of all persons participating in armed conflicts, was one of the aims of humanitarian law.

70. The third Geneva Convention of 1949 clearly reflected the desire to guarantee that protection. The object of Protocol I was to broaden that protection in order to take into account situations of the kind that had arisen since 1949.

71. The ICRC text and the amendments submitted constituted a sound base for discussion in the Working Group. The different points of view expressed by the various delegations concerning certain aspects of the application of prisoner-of-war status showed the complexity of the problem.

72. In the course of the discussions on article 42, reference had been made to the struggle by the peoples of Africa for independence and to their right to protection under humanitarian law. The right of the peoples of Africa to self-determination was a fundamental principle which the Portuguese Government had recognized and which it was putting into effect. The decolonization of Portuguese territories which was in process of being completed was proof of that fact.

73. The rules of humanitarian law which the Conference was proposing to draft should reflect the desire to extend to the peoples of all continents more effective protection in case of armed conflict. The Portuguese Government attached great importance to the problems of humanitarian law and their appropriate solutions.

74. Mr. SAMAD (Afghanistan) noted with satisfaction that draft article 42 submitted by the ICRC constituted a good basis for discussion and work. Paragraph 3, which appeared in the foot-note to article 42, should form part of the article, to emphasize its humanitarian nature. It would also tend to define more specifically the new categories of prisoners-of-war to be protected.

75. Afghanistan, one of the first States to fight for independence and for freedom from foreign domination, had pledged to extend its moral support and sympathy to all peoples asserting their right to self-determination.

76. Many peoples had fought for their independence, with success. But many others were still fighting for their liberation from colonial or foreign domination, and the prisoners were not covered by prisoner-of-war status.

77. It was to be hoped that, thanks to the proposals which had been made, the Conference would succeed in extending the legitimate rights contained in article 42 to that new category of prisoners of war.

78. Mr. SABEL (Israel) said that the distinction between lawful combatants and unlawful combatants was the legal and practical basis upon which the status of prisoner-of-war was founded.

79. That status as defined in the Conventions was perhaps one of the greatest achievements of international humanitarian law. By recognising such status a State knowingly and willingly renounced any right it might have to prosecute or punish combatants for lawful combat and other acts other than war crimes, acts which otherwise might be regarded as criminal offences. The Detaining Power thus accepted the inviolability of the prisoner of war from prosecution for acts of violence committed in lawful combat against its citizens or its property.

80. The question which every State had to ask itself was to whom and in what circumstances was it willing to grant such inviolability. States had agreed to grant prisoner-of-war status to members of the armed forces of other States with which they were in conflict. All other persons or groups claiming immunity under the third Geneva Convention of 1949 must establish that they were in a position to respect, and were respecting the rules of humanitarian law; they

must distinguish themselves from civilians by carrying their arms openly or wearing distinctive uniforms or signs. When they failed to do so the civilians would be the ones to suffer. Such other persons when acting in violation of the laws of warfare and aiming their attacks against civilians or civilian objects could not possibly be entitled to the status or privileged combatants. In that respect the accumulated acts of such groups or persons illuminated the practice of the group as a whole irrespective of any declarations that might be made in the name of the group.

81. Any person who was not a member of the armed forces and who wished to enjoy the rights of members of armed forces must, by his actions and bearing, have shown that he was acting as a lawful combatant, observing the laws of warfare and distinguishing himself from civilians. The political aims and declarations of such persons could not of themselves be of relevance and make them eligible for immunity, unless they themselves had demonstrated by their actions that they complied with the laws of warfare.

82. The Committee had drafted provisions prohibiting any form of attack or terror against civilians or civilian objects. It would be strange if, at the same time, it decided to grant a privileged status to groups and to persons who might have decided to devote their energies to fighting against those selfsame civilians and civilian objects.

83. The conditions laid down by article 42 must therefore be respected. To alleviate them no matter by how little would constitute a grave blow against humanitarian law.

The meeting rose at 12.30 p.m.



SUMMARY RECORD OF THE THIRTY-SIXTH MEETING

held on Monday, 24 March 1975, at 10.15 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 42 - New category of prisoners of war (CDDH/1, CDDH/56; CDDH/III/5/Rev.1, CDDH/III/11, CDDH/III/28, CDDH/III/73, CDDH/III/94, CDDH/III/95, CDDH/III/209, CDDH/III/253, CDDH/III/256, CDDH/III/257, CDDH/III/258, CDDH/III/259) (continued)

Article 42 bis - Protection of prisoners of war (CDDH/III/77, CDDH/III/254 and Corr.1, CDDH/III/260) (continued)

Article 42 ter - Persons not entitled to prisoner-of-war status (CDDH/III/254) (continued)

1. Miss BOA (Ivory Coast) said that the members of national liberation movements risked their lives to defend their right to self-determination, while certain Powers waged wars of territorial expansion and fought for so-called ideological and often barely acceptable reasons. Some peoples enjoyed the right to self-determination from birth as an undisputed heritage; meanwhile other peoples remained under alien, racist and colonialist domination and had to fight in order to become their own masters. The racist Powers, in their concern for the well-being of their own people and the preservation of what was usually called their civilization, did not always commit their own armed forces but instead hired the services of people who had nothing to lose and everything to gain by armed conflicts. Such mercenaries would do anything to get rich quickly and had no qualms about pillaging towns and villages and wiping out their inhabitants.

2. Yet, some delegations, on considering the Malagasy amendment (CDDH/III/73) had asked, or even demanded, that mercenaries should receive the same protection as members of national liberation movements. Her delegation was unable to understand what meaning was to be attached to the idea of a "just war" which was put forward in support of that request.

3. Some delegations had said that national liberation movements did not have the same characteristics as the regular armed forces of the developed countries. But how could the national liberation movements, under pressure as they were from all sides and often forced to adopt guerrilla tactics, possess regular armed forces with the resources at their disposal?

4. Her delegation whole-heartedly supported the Malagasy amendment (CDDH/III/73), which proposed that members of organized national liberation movements engaged in armed struggle where peoples exercised their right to self-determination should be considered to be prisoners of war. Her delegation could not agree that mercenaries should enjoy the same status as members of those movements. It must be borne in mind that the Diplomatic Conference had placed liberation movements on the same footing as international armed conflicts.

5. Mr. GIRARD (France) said that article 42 was concerned with organized resistance movements and, when speaking of members of those movements, it always made a point of referring to organization and responsible command. There was thus a question of terminology that ought to be settled, since the term "members of resistance movements" covered a number of widely different categories.

6. To begin with, there were the organized members of resistance movements, who stood apart from the civilian population. Such fighters were variously called guerrilla fighters, partisans or members of "the maquis". That category was expressly protected by article 42.

7. There was another category of great interest to his delegation - the underground fighters. They were organized into "networks" but the important point was that nothing distinguished them, and nothing must distinguish them, from the civilian population.

8. Article 2 of The Hague Regulations of 1907 respecting the Laws and Customs of War on Land, on the levée en masse, recognized that the inhabitants of a country had the right to resist the invasion of its territory by a foreign army. He could not see why, if such a reaction on the part of any people desirous of defending its independence and freedom was recognized to be legitimate, it had not also been recognized that the same basic relation might occur during an occupation and take the form of action by individual patriots. Fortunately, need for it had not arisen everywhere, but those countries which had known it - Belgium, France, the Netherlands, Norway, Yugoslavia, to mention only Europe - had immortalized in stone the names of those civilians who had died without revealing the slightest information about their network and who had embodied the very soul of their nation. Those countries had placed the ashes of those underground fighters in their Pantheons.

9. His delegation did not think that man's sense of honour had changed over the ages. Some centuries earlier, the Sultan Saladin, on seeing that his adversary, Richard the Lion Heart, had had his horse killed under him and was fighting on foot, had sent him one of his own horses. Time had not corroded that chivalrous respect for

the adversary. The Conference could not disregard civilians who, in a conflict between States, refused to allow their country to be occupied by an alien army. If such civilians were excluded from the scope of article 42, they would in effect be outlawed. The Norwegian representative had appreciated the problem, and the French delegation fully endorsed his proposal for broadening the basic guarantees offered by the Conventions. His delegation wondered whether it would not be possible to go even further and to accord at least prisoner-of-war treatment, if not prisoner-of-war status, to resistance fighters who, when captured, had found honour in silence. His delegation associated itself with the Belgian delegation, which had urged that such fighters under the cover of darkness should, when captured, enjoy the right to propose judicial safeguards. It was convinced that it would be possible to find a solution on those lines. His delegation would certainly be unable to accept any arrangement under which those resistance fighters would be handed over defenceless to the firing squad.

10. Mr. DAMDINDORJ (Mongolia) said that, in his view, article 42, which introduced a new category of prisoner of war was of great importance, as was evident from the numerous amendments and observations submitted by members of the Committee. The statements made had shown that delegations were adopting a realistic attitude, since they had urged that article 42 must take account of facts and of the new situation. The proposed amendments were worthy of careful consideration, particularly those of the Democratic Republic of Viet-Nam (CDDH/III/253), Poland (CDDH/III/94), Madagascar (CDDH/III/73) and Norway (CDDH/III/259). Those amendments could improve the ICRC text, which formed the basis of the discussion, and the Working Group should take them into consideration when drafting the article. His delegation shared the view of the Ukrainian delegation that the provisions of article 42 were not applicable to persons who committed crimes against humanity, particularly mercenaries who were intent on undermining world peace. The Conference should grant a respectful hearing to the representatives of peoples who had undergone the horrors and atrocities of alien domination and the experience of those peoples should serve as a basis for the drafting of humanitarian law.

11. Mr. KUSSBACH (Austria) said he would confine himself to general comments, though he might find it necessary to speak again later and to submit proposals to the Working Group.

12. His delegation attached great importance to the protection of the armed groups referred to in article 42. The political events of the past twenty-five years in certain parts of the world, which could be described as the historic process of decolonization demonstrated the relevance of that problem. It should, however, be stressed that what was called "guerrilla" warfare was not confined to the kind of warfare referred to in paragraph 2 of

article 1 of draft Protocol I, nor to civil wars; rather it was an extremely widespread method of combat, which had often been used in the past in international conflicts and would lose none of its significance even when the transitional period of decolonization was over. Military experts recognized that guerrilla warfare could sometimes be the most suitable method of combat for small armies fighting against adversaries of far greater strength. Indeed, that method could seriously jeopardize military successes achieved during open combat on the battlefield. His delegation therefore shared the view of the Finnish delegation that the reference to wars of national liberation in paragraph 2 of article 1 of draft Protocol I was sufficient to ensure that the provisions of the entire Protocol, including article 42, applied to that kind of armed conflict. Consequently, the inclusion of a reference to wars of national liberation in article 42, as proposed by the ICRC, no longer seemed necessary. It was also conceivable that a national liberation movement might have a regular army using traditional methods of combat; and it would moreover be preferable not to give the impression that the scope of article 42 was more or less restricted to wars of national liberation.

13. With regard to the wording of the article 42 proposed by the ICRC, his delegation would suggest that the words "organized resistance movements" in paragraphs 1 and 2 should be replaced by the words "organized armed groups", because the article dealt with armed forces or groups rather than with movements whose legitimacy lay in the nature of their struggle. The words "organized resistance movements" restricted the scope of the article in a way which was neither necessary nor indeed desirable.

14. With regard to the conditions to be fulfilled, his delegation would prefer to speak of "combat operations" rather than "military operations", since they were not always military operations in the traditional sense of the term. It would also like paragraph 1 (b) to include some such wording as that proposed by the United States and the United Kingdom delegations in amendment CDDH/III/257, which read: "by carrying arms openly or by a distinctive sign recognizable at a distance or by any other equally effective means". The Committee should always take care to make a clear distinction between civilians who did not participate in the fighting and other persons, even if that distinction was limited to the actual time when the fighting in question was taking place. Like the Swedish delegation, his delegation was anxious that there should be precise definition of the beginning and the end of the period during which it was obligatory to make that distinction. The Working Group should find a satisfactory answer to that question, since it was important to ensure the complete protection of the civilian population.

15. In the case of the condition set out in paragraph 1 (c), his delegation considered it advisable to use the wording of paragraph 2 (d) of Article 4 of the third Geneva Convention of 1949, which referred in more general terms to "the laws and customs of war". The Hague Regulations might also be mentioned. The United States and United Kingdom amendment CDDH/III/257 would also be acceptable.

16. The ICRC text provided an excellent starting point for the discussions in the Working Group. It could be further improved by including the useful suggestions contained in the amendments proposed. In particular, his delegation wished to congratulate the sponsors of amendment CDDH/III/260 proposing an article 42 bis. Though it supported the ideas behind that amendment, his delegation thought that its paragraph 1 should be based on Article 5 of the third Geneva Convention.

17. Lastly, the Austrian delegation wished to associate itself with those delegations which had expressed reservations about the expression "irregular forces", since the adjective "irregular" had a derogatory sense and should not be used in the present context.

18. The CHAIRMAN announced that the South West African People's Organization (SWAPO) wished to co-sponsor amendment CDDH/III/73.

19. Mr. ZAFERA (Madagascar) said that the series of amendments and the number of speakers proved that article 42 was one of the most important in draft Protocol I. The Malagasy amendment (CDDH/III/73) differed from the ICRC text in that it omitted the condition appearing in paragraph 1 (b). As had been pointed out by several delegations, particularly that of the Democratic Republic of Viet-Nam, in the armed struggles waged by peoples fighting for freedom and self-determination, the will of all the people was committed to the fight: consequently, their armed forces could not be likened to an army in the traditional sense of the word. On the other hand, his delegation had retained paragraph 1 (a) and (c) of the ICRC text, but wished to make it clear that mercenaries could in no circumstances benefit from the provisions of article 42, since their criminal activities were such as to exclude them from being placed on the same footing as members of liberation and resistance movements.

20. With regard to the deletion of paragraph 1 (b) which had been advocated by several speakers, his delegation regretted that the sponsors of amendments CDDH/III/256 and CDDH/III/257 had used the vague expression "irregular forces", since it was open to many different interpretations, and had seen fit to retain the unrealistic condition of the bearing of a distinctive sign or of carrying arms, the violation of which would, moreover entail forfeiture of the status of prisoner of war. Those amendments were in contradiction

with article 1, paragraph 2 of draft Protocol I, as adopted by Committee I at the first session, and they would tend to encourage a certain category of criminals to the detriment of the members of liberation movements. For the same reasons, his delegation reserved its position with regard to the amendment CDDH/III/95. In addition, it rejected the proposals in amendment CDDH/III/209 which excluded national liberation movements and introduced a formula which his delegation did not consider adequate, namely the idea of effective territorial jurisdiction.

21. Other delegations, in particular those of Norway and the Democratic Republic of Viet-Nam, had taken a constructive attitude in their amendments to article 42.

22. He might have occasion to speak later on the question of adding an article 42 bis and an article 42 ter but he wished to state forthwith that he found the formulation of certain amendments, including in particular amendment CDDH/III/260, unsatisfactory; others however, such as amendment CDDH/III/254 and Corr. 1 seemed to be useful additions to article 42. He thanked those delegations which had supported his amendment; he also thanked SWAPO which had asked to become a co-sponsor of his proposal.

23. Mr. LONGVA (Norway) said that he shared the view expressed by the Algerian representative that the new text of article 1 of draft Protocol I, which had been adopted at the first session by Committee I, had created a new situation and that consequently to a large extent the ICRC text of article 42 and many of the amendments to that text submitted prior to the adoption of article 1 had been overtaken by events. The text of article 42 should fully reflect the provisions of the new article 1. It might be asked, therefore, whether at present the ICRC draft provided the best basis for the discussion of such an important question.

24. As the United Kingdom representative and the representative of Algeria had suggested, the Committee should also take note of the amendments to article 84 and 88 which had been proposed by a large number of delegations (CDDH/I/233). Although those amendments had not yet been discussed in Committee I, the United Kingdom representative had rightly described them as consensus texts.

25. In the view of the Norwegian delegation, the new text of article 1 of draft Protocol I and the proposed amendment to article 84 (CDDH/I/233) provided the framework within which the problems raised in article 42 had to be discussed. There was no need in the context of article 42 to reopen questions which had already been solved in the new article 1, for which Norway had voted at the first session, or in the amendments to articles 84 and 88, which were co-sponsored by his delegation. He considered the amendments to articles 33, 35, 41 and 42 submitted by his delegation as a logical consequence of the new article 1, and of the proposed amendment to article 84 (CDDH/I/233).

26. With regard to the amendments to article 42 proposed by Madagascar (CDDH/III/73) and by Pakistan (CDDH/III/11), and the amendment to article 41 submitted by Ghana (CDDH/III/28), his delegation considered that even though they had been submitted prior to the adoption of the new article 1, all those texts contained important and valuable elements which should be taken into consideration by the Working Group. The interests those proposals purported to regulate were covered by the amendments submitted by his delegation. The view expressed by the representative of Lesotho fully conformed with those of his delegation.

27. In accordance with new article 1 of draft Protocol I, article 42 of draft Protocol I should apply in two situations: first, in interstate conflicts, and secondly, in armed conflicts in which peoples were fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination. It followed that contrary to what certain delegations had maintained, article 42 did not apply to armed conflicts not of an international character.

28. Article 42 should be applied equally within the whole material field of application of the 1949 Geneva Conventions and Protocols as laid down in new article 1 of draft Protocol I. While his delegation fully recognized the urgent need to provide members of regular armies and members of guerrilla units equal protection under the third Geneva Convention of 1949 in armed conflicts in which peoples were fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination, that need was not limited to such conflicts as certain amendments seemed to presuppose. Guerrilla combat situations might equally well occur in interstate conflicts and notably in cases of military occupation of the territory of one State by another State. In that respect he fully endorsed the statements made by the French and Belgian representatives, two countries with the same historical experience as Norway. He had nothing to add to the description of guerrilla combat situations given by the representatives of Belgium, and he emphasized and endorsed the remarks concerning clandestine resistance movements made by the representative of France. He had noted with satisfaction the positive attitude towards the Norwegian proposal (CDDH/III/259) expressed by the representatives of Belgium and France.

29. With regard to the remarks made by the United Kingdom representative, his delegation wished to make it clear that its proposed amendment to article 41 (CDDH/III/259) was in no way intended to narrow the definition of the armed forces of the party to the conflict as provided for in existing international law. His delegation would welcome any proposal that might be made to improve the drafting.

30. Referring to the proposed amendment to article 84 (CDDH/I/233), he pointed out that in accordance with that proposal the Geneva Conventions and Protocol I, and hence article 42, would apply in the relation between a High Contracting Party and an authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in paragraph 2 of new article 1 of draft Protocol I, only to the extent that such an authority had addressed a unilateral declaration to the depositary of the Geneva Conventions undertaking to apply the Conventions and Protocol in relation to that conflict. Furthermore, in accordance with the structure of the Conventions and draft Protocol I, a resistance movement in occupied territories would be able to claim protection under article 42 only to the extent that the Party to the conflict to which it belonged had ratified the Conventions and Protocol I. A claim for prisoner-of-war status under article 42 would therefore always have to be based on a commitment to apply the Conventions and Protocol I. His delegation could not accept the view put forward during the general debate that such a commitment should create an assumption that it would be honoured only if made by a certain category of combatants, while the quite opposite assumption would have to be maintained in relation to other categories of combatants. He was compelled to consider the incorporation into protocol I of such discriminatory assumptions as a reappearance of the medieval "just war" doctrine.

31. Referring to another element contained in the amendment to article 84 (CDDH/I/233) namely that "the Conventions and the present Protocol are equally binding upon all Parties to the conflict", he pointed out that the ICRC draft of article 42 and several of the amendments did not reflect that fundamental principle - a principle which was a reflection of the very basis of the implementation of international humanitarian law applicable in armed conflicts, namely the equality of the Parties to the conflict as far as humanitarian protection was concerned, and hence their reciprocal interest in the implementation of humanitarian rules.

32. The discrimination between the parties to the conflict in guerrilla combatant situations, as laid down in ICRC draft article 42 and in many of the amendments, did in the view of his delegation amount to an erosion of that fundamental principle of equality in humanitarian protection, and, hence, to an erosion of the very basis for the implementation of humanitarian rules in armed conflicts. Such a development would not only affect captured combatants but even more the civilian population. His delegation had been surprised to hear it repeatedly submitted that such discriminatory treatment against members of guerrilla units was necessary in order to compel them to distinguish themselves from the civilian population, and hence to guarantee the civilian



population immunity against attack. In the view of his delegation that proposition was based on an incomplete and hence inadequate analysis of the problem at hand. Since in guerrilla combat situations - as in other situations of armed conflicts - only a reciprocal interest in the implementation of the rules could guarantee their application, what was at stake was whether or not one wished humanitarian rules to apply at all in guerrilla combat situations. Any form of discrimination would disturb the fragile equilibrium on which the application of humanitarian law was based, and might hence entail an escalation of violence and counter-violence, the final victim of which would necessarily be the civilian population. The Norwegian proposals relating to articles 33, 35, 41 and 42 should therefore be considered as an attempt to protect all war victims in guerrilla combat situations, and, first and foremost, the civilian population.

33. The Norwegian delegation did not claim to have found the perfect solution to the problem at hand, and it was grateful for the constructive comments made by a number of delegations and in particular the positive comments made by the representatives of Algeria, Belgium, Finland, France, Madagascar, Mongolia, Sweden and the Union of Soviet Socialist Republics.

34. In reply to the question asked by the representative of Nigeria at the thirty-fifth meeting (CDDH/III/SR.35) he said that while the Norwegian proposal relating to article 41 (CDDH/III/259) contained several provisions relating to the organization and discipline of armed forces, it left the question of the recruitment of their members open. He would like to recall that the third Geneva Convention of 1949 provided for the prosecution and punishment of, and even for death sentences against, prisoners of war for crimes committed before capture, provided that certain minimum guarantees relating to penal procedure were safeguarded. His delegation would have to reserve its position regarding any proposals for the prohibition of certain means of recruitment of military personnel and for penal sanctions against such military personnel until they had been submitted and his delegation had had the occasion to study them. However, the Norwegian delegation shared the concern that had been expressed about the problem of mercenaries, since their activities might amount to a threat to international peace and security, particularly in developing countries, and above all in Africa. His Government would therefore lend its support to any constructive effort to eliminate such threats.

35. Mr. BIDI (Observer, Panafricanist Congress-PAC) said that liberation movements were grateful that the world had finally decided to take them into account in discussions on the laws of war. They had lived and fought in conditions of inequality and discrimination on the battlefield. It was because the world had ceased to turn a blind eye and a deaf ear to their unacceptable situation that liberation movements could note with satisfaction their inclusion in humanitarian law applicable in armed conflicts. Those movements firmly believed that the present discussions, particularly of article 42 of draft Protocol I, would do away with the existing inequalities between them and their adversaries.

36. Humanitarian law must not give the impression that it sought to perpetuate the inequality and discrimination that invariably attended any war of national liberation. Those movements had not only scrupulously observed the 1949 Geneva Conventions but had also complied with the letter and spirit of the provisions on prisoner-of-war status, even when their adversaries had adamantly refused to reciprocate. The colonial and racist régimes which enjoyed the respect for international humanitarian law shown by the liberation movements, while they themselves inflexibly refused to do likewise, had pointed out that no international legal instrument made any mention of liberation movements. It was for that reason that those movements demanded their clear-cut and categorical inclusion in the Geneva Conventions and the two Protocols, so as to preclude any possibility of confusion and misinterpretation on the part of the other parties to colonial conflicts. His delegation viewed with serious apprehension such phrases as "irregular forces". The rigidity and strictness of the conditions laid down in article 42, particularly in paragraph 1 (b) of amendment CDDH/III/257, had dangerous implications. The world knew only too well the difficulties facing national liberation movements in that regard and the Committee had heard numerous statements on the subject by various delegations, notably on the concrete problems of logistics that were part and parcel of the life and struggle of those movements. Those difficulties, in turn, dictated the movements, tactics and pattern of fighting. Experience showed that a national liberation movement's proper conduct of individual battles, or of the whole war, did not necessarily prejudice the situation of the civilian population. On the contrary, it was invariably the adversary that resorted to cruel and indiscriminate actions against the civilian population when it failed to achieve its objectives of crushing the liberation movement. At any rate, no national liberation movement could survive were it not for its demonstrable concern for the civilian population. If those movements disregarded the requirements of organization and discipline, and respect for the Geneva Conventions, they would not be represented at the present Conference.

37. Mr. NYATHI (Observer, Zimbabwe African People's Union - ZAPU) said that his delegation also attached great importance to article 42. He was speaking on behalf of the six million Africans whose country was the victim of a most barbarous colonial war. The article was not just one more vague theoretical exercise. It had a practical meaning in terms of innocent lives lost in the struggle for self-determination and national liberation, against colonial domination and racial discrimination.

38. His delegation hoped that the final version of the article would provide much-needed protection for those who had been captured in an international armed conflict, while at the same time it reflected a true compromise between the several views expressed by the various delegations at the Conference. Since the first day of occupation by the colonial régime, his country had been subjected to a systematic campaign of expropriation of land. The richest and best agricultural land, the mining areas and all the urban centres had been set aside by decree for the Europeans, the Africans having no right to own, purchase or use land. Five per cent of the population (the Europeans) owned 55 per cent of all the land and 95 per cent (the Africans) owned only 40 per cent the remainder being kept as a natural reserve. When the African farmers had demanded their land back, the colonial régime had responded by bombardment of villages and destruction of crops.

39. He went on to describe the severity of the régime imposed on the Africans, who were condemned to forced labour. They had had no alternative but to take to arms. He had some reservations regarding article 42, paragraphs 1 and 2. Persons fighting for self-determination should also be taken into account. He approved of the foot-note to article 42, proposed by the ICRC, and also amendment CDDH/III/253 submitted by the Democratic Republic of Viet-Nam. His delegation likewise supported amendments CDDH/III/259, submitted by the delegation of Norway, and CDDH/III/73, submitted by the delegation of Madagascar. His delegation endorsed the arguments advanced by the delegations of Algeria, the Union of Soviet Socialist Republics and the Ukrainian SSR. The Norwegian representative's statement had been brilliant, but he did not understand what was meant by "irregular forces". Were those cases of occasional mobilization and demobilization? Or were they mercenaries claiming prisoner-of-war status while they fought solely for ignoble causes of selfishness and greed?

40. Finally, he could not accept the discriminatory elements contained in paragraph 3 of amendment CDDH/III/257.

41. Mr. MASANGOMAI (Observer, Zimbabwe African National Union - ZANU) said that his delegation attached the greatest importance to the issues under discussion, namely articles 42, 42 bis and 42 ter of draft Protocol I. His organization was engaged in an armed struggle against colonialism and racism, in the exercise of his country's right to self-determination, and had always maintained that freedom fighters should be treated as prisoners of war when captured. A prisoner of war was not a criminal, but an enemy no longer able to use his weapons, and who should be humanely treated. In 1974, the United Nations had adopted a resolution calling upon the white racist minority Governments to treat captured freedom fighters as prisoners of war. But on 29 January 1975 a court in Salisbury had sentenced freedom fighters to death; three had been hanged. Since 1967 the régime had hanged over twenty freedom fighters.

42. The racist régime argued that national liberation movements were not covered by the Geneva Conventions or by customary international law. Nevertheless, and even when the law in force did not apply, the individual remained under the protection of the principles of international law and the dictates of the public conscience. The status of captured freedom fighters should be set out specifically and unambiguously in draft Protocol I, in the spirit of the United Nations resolutions and Charter. There should be no protection whatever for mercenaries, for the latter were merely hired assassins and murderers greedy for money.

43. He disagreed with amendment CDDH/III/257, submitted by the United States and United Kingdom delegations, and with CDDH/III/256, submitted by the delegation of the Netherlands, by reason of the term "irregular forces". Amendments CDDH/III/73, submitted by the delegation of Madagascar, and CDDH/III/254, submitted by the delegation of the Democratic Republic of Viet-Nam, were satisfactory, as also amendment CDDH/III/259 submitted by the delegation of Norway.

44. Paragraph 1 (b) of article 42 of draft Protocol I submitted by the ICRC, under which members of resistance movements must "distinguish themselves from the civilian population in military operations", was totally unrealistic and revealed a failure to understand the positive nature of wars of national liberation. Oppressed peoples took to arms against colonialists and racists. Guerrilla fighters were the vanguard of the people: they could not be distinguished from the latter, on which they depended constantly, especially for food. Guerrilla warfare, therefore, was very different from conventional combat. It was not easy to make a distinction between freedom fighters and the people. Popular freedom fighters were poorly armed and equipped - they could not afford the luxury of uniforms and emblems. The Conference should take into account the concrete realities of the present day. His delegation therefore called for the deletion of paragraph 1 (b) of article 42.

45. Regarding the amendment submitted in CDDH/III/260, he had misgivings about the second sentence of paragraph 1 of article 42 bis: "Such protection shall cease only if a competent tribunal determines that such person is not entitled to the status of prisoner of war". International law should prevail in order to avoid tendentious judgements. That sentence should therefore be deleted. His delegation supported article 42 ter as given in amendment CDDH/III/254 submitted by the delegation of the Democratic Republic of Viet-Nam.

46. The CHAIRMAN declared that the discussions, in which fifty-seven speakers had taken part, was closed. He proposed that the amendments, accompanied by comments, be sent back to the Working Group.

It was so decided.

The meeting rose at 11.35 a.m.



SUMMARY RECORD OF THE THIRTY-SEVENTH MEETING

held on Friday, 4 April 1975, at 10.30 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 48 bis - Protection of the natural environment  
(CDDH/III/276)

Article 48 ter (CDDH/III/276)

Article 33, paragraph 3 - Basic rules (CDDH/III/277)

Draft Protocol II

Article 28 bis - Protection of the natural environment  
(CDDH/III/282)

1. The CHAIRMAN suggested that the vote on articles 48 bis, 48 ter and 33, paragraph 3, of draft Protocol I and article 28 bis of draft Protocol II should be deferred, since some delegations wished to reflect on the questions dealt with in those articles and to consult their Governments.

It was so agreed.

Draft Protocol II

Article 24, paragraph 1 - Basic rules (concluded)

Article 25 - Definition (concluded)

Reaffirmation of approval

2. The CHAIRMAN recalled that the article 24, paragraph 1, and article 25 of draft Protocol II had been approved ad referendum at the first session of the Conference, before Committee I had considered the field of application of draft Protocol II. Since Committee I had now taken a decision on that subject, he had decided to allow delegations time for the possible submission of amendments to article 24, paragraph 1, and article 25. No amendments had been submitted, however, so both articles could presumably be regarded as having been finally approved.

3. Mr. DIXIT (India) said that the Committee should reconsider the articles in question, which, in his view, had received only preliminary consideration at the first session. Moreover, some of the articles of draft Protocol II had meanwhile been amended, and that in itself would justify a fresh look at article 24, paragraph 1 and article 25.

4. The CHAIRMAN pointed out that he had given delegations one week in which to submit amendments but that none had been forthcoming. Since the articles had been considered at the first session, he hoped that the Indian representative would not press for their reconsideration. He suggested that the Committee should regard both articles as having been approved.

It was so agreed.<sup>1/</sup>

#### Draft Protocol II

Article 24, paragraph 2 - Basic rules (CDDH/III/278) (concluded)

Article 26 - Protection of the civilian population (CDDH/III/36, CDDH/III/279) (concluded)

Article 26 bis - General protection of civilian objects (CDDH/III/280) (concluded)

Article 28 - Protection of works and installations containing dangerous forces (CDDH/III/36, CDDH/III/281) (concluded)

Article 28 ter (CDDH/III/278)

Article 29 - Prohibition of forced movement of civilians (CDDH/III/220, CDDH/III/283) (concluded)

Texts proposed by the Working Group (CDDH/III/275)

5. The CHAIRMAN invited the Committee to vote on the texts of article 24, paragraph 2 (CDDH/III/278), article 26 (CDDH/III/279), article 26 bis (CDDH/III/280), article 28 (CDDH/III/36, CDDH/III/281), article 28 ter (CDDH/III/278) and article 29 (CDDH/III/220, CDDH/III/283) as submitted by the Working Group. The delegations which had submitted the texts placed in square brackets in connexion with article 28 ter had signified their intention not to press their proposals. All texts appearing in square brackets should therefore be deleted. During the discussions in the

<sup>1/</sup> For the texts of article 24, paragraph 1, and article 25 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)



Working Group, some delegations had suggested that both articles should be deleted. The Committee's first vote would therefore relate to that issue. If the articles were not deleted, a decision would have to be taken on the manner of voting on both those texts, which dealt with the same subject.

The Committee decided by consensus to retain either article 24, paragraph 2 or article 28 ter.

6. Mr. BAXTER (United States of America), Rapporteur, pointed out that both articles, although presented in a different form, dealt with the same subject. The best course would therefore be to vote first on article 28 ter, the text of which was furthest from the original. If it was approved, there would be no need to vote on article 24, paragraph 2. If it was rejected, the Committee would then vote on article 24, paragraph 2.

7. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) said that it would be better to vote on each text in turn, beginning with article 24, paragraph 2. After the vote on that article, it would be easier for delegations to determine their position with regard to article 28 ter. There was no difference of substance between the two texts, but his delegation would prefer article 24, paragraph 2, which was briefer and more comprehensible.

8. Mr. DIXIT (India) supported that procedure. It was a question of two versions drafted by the Working Group dealing with a single issue. The Committee should therefore decide which form it wished to adopt.

9. Mr. SCHUTTE (Netherlands) pointed out that paragraph 2 (b) of article 28 ter contained a reference to article 26 bis (CDDH/III/280), which had not yet been put to the vote. It was possible that the latter article might be deleted. Since it would be difficult to decide on the two articles under consideration before a decision had been taken on article 26 bis, a vote should first be taken on the latter.

10. Mr. BLIX (Sweden) agreed. He supported the voting procedure proposed by the Rapporteur for article 24, paragraph 2 and article 28 ter, because rule 40 of the rules of procedure laid down that the Committee should vote first on the amendment which was furthest removed from the original proposal. Although there was no major difference between the two texts, they were none the less not identical.

11. The CHAIRMAN put article 26 bis to the vote and drew attention to the foot-note to document CDDH/III/280: the Committee could not take a decision on the words "or of reprisal" at present, for it was planned to set up a Joint Working Group of Committees I, II and III to consider the subject of reprisals.

Article 26 bis was adopted by 35 votes to 8, with 17 abstentions.<sup>2/</sup>

12. The CHAIRMAN put article 28 ter to the vote, in accordance with the procedure suggested by the Rapporteur.

Article 28 ter was rejected by 24 votes to 4, with 31 abstentions.

13. The CHAIRMAN put article 24, paragraph 2 to the vote.

Article 24, paragraph 2 was adopted by 50 votes to none, with 11 abstentions.<sup>2/</sup>

14. The CHAIRMAN put article 26 (CDDH/III/279) to the vote.

The introduction and paragraph 1 were adopted by consensus.

The Committee decided by 28 votes to 5, with 29 abstentions, to retain the words placed in square brackets in paragraph 2.

Paragraph 2, as amended, was adopted by consensus.

The Canadian proposal (CDDH/III/36) for the deletion of paragraph 3 was rejected by 27 votes to 13, with 21 abstentions.

The first alternative version of the first sub-paragraph of paragraph 3 was adopted by 29 votes to 15, with 16 abstentions.

The second sub-paragraph of paragraph 3 was adopted by 25 to 13, with 24 abstentions.

15. The CHAIRMAN said that, in view of the foot-note to paragraph 4 (CDDH/III/279), the Committee should postpone the vote on that paragraph.

It was so agreed.

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<sup>2/</sup> For the text of article 26 bis as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)

<sup>3/</sup> For the text of article 24, paragraph 2, as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)

Paragraph 5 was adopted by consensus.

Article 26, as amended, was adopted by 44 votes to none, <sup>4/</sup> with 22 abstentions.

16. The CHAIRMAN invited the Committee to vote on article 28 (CDDH/III/281).

The Canadian amendment (CDDH/III/36) for the deletion of article 28 was rejected by 26 votes to 10, with 25 abstentions.

The first alternative version of paragraph 1 was adopted by 39 votes to 2, with 22 abstentions.

The Committee decided by 26 votes to 15, with 21 abstentions, to retain in paragraph 1 the words "even where these objects are military objectives", placed between square brackets.

Paragraph 2 was adopted by consensus.

17. The CHAIRMAN suggested that the vote on paragraph 3 should be postponed, since the Committee would have to await the outcome of the discussion on the question of reprisals before taking a decision.

It was so agreed.

Paragraph 4 was adopted by consensus.

Article 28 was adopted by 43 votes to none, with 21 abstentions.<sup>5/</sup>

18. The CHAIRMAN put article 29 (CDDH/III/283) to the vote.

19. Mr. FRIEDRICH (Legal Secretary) pointed out that the words "convaincues de" in paragraph 2 of the French text should be replaced by the words "condamnées pour".

The Canadian amendment (CDDH/III/220) for the deletion of article 29 was rejected by 30 votes to 7, with 25 abstentions.

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<sup>4/</sup> For the text of article 26 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)

<sup>5/</sup> For the text of article 28 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)

Paragraph 1 was adopted by consensus.

The Committee decided, by 17 votes to 16, with 33 abstentions, to retain the words placed between square brackets in paragraph 2.

Paragraph 2, as amended, was adopted by consensus.

20. Mr. BAXTER (United States of America), Rapporteur, suggested that the vote on paragraph 3 should be postponed.

It was so agreed.

Article 29, as amended, was adopted by 40 votes to none, with 28 abstentions.<sup>6/</sup>

Explanation of votes.

21. Mr. WOLFE (Canada) explaining his delegation's vote, said that it did not reflect a negative attitude to draft Protocol II but rather the fundamental attitude of his delegation, which considered that several of the proposed new provisions tended to overload the draft Protocol II and at the same time to weaken it by making it difficult for the Parties to a conflict to apply and less acceptable to the Governments.

22. In particular, some provisions relating to internal conflicts would detract from the sovereignty of States and make it harder for Governments to restore public order. While it was true that, if a Government ratified a Convention, that in itself constituted an exercise of sovereignty, however, the point was that if a Convention imposed too many restraints in areas touching upon sovereign rights, Governments would simply choose not to ratify. Furthermore, to insert in draft Protocol II provisions which were very similar to those of draft Protocol I, although they were drafted somewhat differently, might lead to conflicting interpretations.

23. Mr. AJAYI (Nigeria), explaining some of his delegation's negative votes on the articles which had just been approved, said that, although the scope of draft Protocol II had been defined elsewhere in the Protocol, his delegation's view, based on experience, was that some of the provisions would tend to limit the sovereignty of States in cases of internal conflict. Nevertheless, for humanitarian reasons and in a spirit of compromise, it would accept draft Protocol II as a whole.

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<sup>6/</sup> For the text of article 29 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)

24. Mr. GILL (Ireland) said that his delegation's vote should not be interpreted as a negative approach to the drafting of Protocol II. He shared the misgivings of the Canadian representative and, like him, was anxious that draft Protocol II should not be overloaded with so many detailed provisions copied from draft Protocol I as to make it virtually unworkable. The useful considerations that applied to the articles of draft Protocol I did not necessarily apply to the corresponding articles of draft Protocol II.

25. Mr. SHERIFIS (Cyprus) said he had voted against the deletion of article 29 because of the particular importance his delegation attached to certain of its provisions. The displacement of the civilian population was totally unacceptable to his delegation, which maintained that the forced movement of sections of the population of any country from their homes and land for reasons connected with a conflict, was an inhuman and unacceptable practice. Members of the Committee would readily understand the reasons for his delegation's position.

26. Miss AHMADI (Iran) said that, in a spirit of compromise, her delegation had voted in favour of paragraph 2 of article 24, the first alternative version of paragraph 3 of article 25, article 26 bis and the first alternative version of paragraph 1 of article 28. On the other hand, her delegation had voted in favour of the deletion of article 29 because it considered it unacceptable that the Protocol should include provisions dealing with a State's conduct towards its own civilian population.

27. Her delegation accordingly wished to make reservations in connexion with the acceptance of those articles of draft Protocol II: such an acceptance could in no circumstances imply any overruling of municipal law or of the legal capacity of the State. In her delegation's view, municipal and constitutional law contained all the provisions necessary to deal with such situations; in the event of a conflict between municipal law and the provisions of draft Protocol II, municipal law took precedence.

28. Mr. LONGVA (Norway) said he had voted against the Canadian proposals (CDDH/III/36 and CDDH/III/220) for the deletion of articles 28 and 29, first because the two Protocols should be as similar as possible, and, secondly, because the articles concerned dealt with matters of vital importance. Moreover, the argument that some of the articles would make it difficult for Governments to restore order seemed to him to be entirely without foundation.

29. Mr. CRISTESCU (Romania) said that the reasons for his delegation's negative attitude and abstention in the vote on certain articles were the same as those given by the Canadian representative.

30. In view of the difference between the internal legal order and the international legal order, and between the situations obtaining in internal and in international armed conflicts, it was clear that the automatic application to internal conflicts of the rules governing international conflicts might have untoward consequences and lead to violations of municipal law and national sovereignty.

31. Rules relating to non-international armed conflicts should be based solely on recognition of, and respect for, a State's sovereign rights within its own territory, so far as the inhabitants and internal administration were concerned: those rules should in no circumstances lead to a weakening of the authority of the State or of its right to take all lawful steps to maintain public order and to ensure its security and that of its nationals.

32. Mrs. MANTZOULINOS (Greece) said that her delegation wished to make certain reservations with regard to the substance of draft Protocol II. Its interest in that Protocol arose from its desire to supplement the rules of humanitarian law set out in Article 3 common to the Geneva Conventions of 1949. Although her delegation's position was very similar to that of the Canadian delegation, it had nevertheless voted against the Canadian delegation's proposal for the deletion of article 29 of draft Protocol II, because that article dealt with the displacement of the civilian population and with the forcible displacement of civilians from their own national territory. As a result of civil war, her country was well aware of the methods used to compel sections of the civilian population to leave their national territory.

33. Mr. BLIX (Sweden) pointed out that every rule that was adopted and every treaty to which States became Parties, limited national sovereignty to some extent. In the case of internal conflicts, some provisions of the International Covenant on Civil and Political Rights (United Nations General Assembly resolution 2200 A (XXI)) applied at a higher level, Governments' freedom of action was limited by common Article 3 of the Geneva Conventions of 1949. At the same time, it had to be remembered that in the present case limitations applied not merely to Governments, but also to insurgents. His delegation had always favoured similarity between the two Protocols, thus avoiding difficulties of interpretation. His delegation had accepted shorter formulations for the purpose of meeting the concern of those who worried about "overloading" draft Protocol I with detailed provisions. He was puzzled at the complaint that was now heard about the difficulties that would arise in interpretation owing to the differences between the draft Protocols.

Draft Protocol I

Article 66 - Objects indispensable to the civilian population  
(CDDH/1, CDDH/56; CDDH/III/28, CDDH/III/101, CDDH/III/261,  
CDDH/III/264)

34. The CHAIRMAN invited the Committee to consider article 66 of draft Protocol I, together with the proposed amendments to that article.

35. Mrs. BINDSCHIEDLER-ROBERT (International Committee of the Red Cross) pointing out that article 66, like article 48, pertained to protection of objects indispensable to the survival of the civilian population, traced a comparative study of the provisions of the two articles. While article 48 sought to protect objects indispensable to the survival of the civilian population against attacks by the Party that did not exercise power over them, article 66 was designed to protect them vis-à-vis the Party that did possess that power - not merely the occupying Party, but, in general, any Party and thus the national Government also.

36. The words used to describe prohibited actions took account of the fact that the objects to be protected were in the hands of the Party against which it was necessary to protect them, the Party which was, accordingly, in a position "to destroy, render useless or remove" them. The words "to attack" were not included in draft article 66 because one did not attack what was in one's possession. If the words "to ... destroy" were also included in ICRC's proposed article 48, it was for the purpose of citing acts which might have been regarded as not constituting "attacks" as such, even though perpetrated by the adversary. She had spoken in the past tense in connexion with article 48 because it was no longer possible to speak of article 66 without taking into consideration article 48 as adopted by the Committee at the thirty-first meeting (CDDH/III/SR.31). Thus, although in ICRC's draft article 48 it was forbidden "to attack or destroy" indispensable objects in the possession of the adversary, the text produced as a result of the Committee's deliberations forbade not only to "attack" and "destroy", but also to "remove" and to "render useless" - words borrowed from article 66. Consequently, the present text of article 48 covered the cases referred to in article 66 also. Article 48 accordingly forbade attacks on objects indispensable to the survival of the civilian population which were in the possession of the enemy whether on national territory or on territory occupied by the enemy. It also forbade a Party to deny the use of or to exhaust objects in its possession, whether on occupied or on national territory.

37. In view of that situation, the Committee would have to make a choice between giving up article 66 as submitted in the ICRC draft, or revising article 48, as accepted by the Committee, by deleting the words "remove, or render useless". A study of article 66 made it possible to define more clearly the scope of the immunity that the Committee intended to grant to the objects in question in relation to the Party in possession of them. That question had in fact remained somewhat ambiguous during the debate on article 48, and that ambiguity had limited the scope of the rules governing attacks. That limitation would now have to be removed by distinguishing between the two rules - those relating to attacks and those relating to protection. The former were to be applied globally, but were also to protect specifically those objects indispensable for survival wherever they might be in the hands of the adversary; the latter concerned protection in relation to the party which was in possession of those objects. One way of making such a distinction would be to retain article 66, as submitted in the ICRC draft, and to modify article 48 in such a way as to respect the concept as a whole. Nevertheless it might be useful, whatever the legal solution adopted by the Committee, to review the scope of article 66.

38. In article 66, the ICRC proposed, for all objects indispensable to survival, total immunity in relation to the party in whose hands they were, whether on occupied territory or on that party's national territory. The case of objects on national territory constituted an entirely new rule; the case of objects on occupied territories was more a question of the development of existing rules. Indeed, objects of any kind on occupied territory, and not only those indispensable to survival, were covered by the protection laid down in Article 53 of the fourth Geneva Convention of 1949, which forbade the occupying power to destroy them. That prohibition, however, was subject to one exception: it did not apply "when such destruction was absolutely necessary for military operations". Consequently, article 66 extended the protection of objects indispensable to survival by abolishing that exception as far as they were concerned.

39. Moreover, the words used indicated that article 66 did not affect the right to requisition as understood by the law of occupation (Article 55, second paragraph of the fourth Geneva Convention of 1949 and Article 52 of The Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land). Article 66 would offer an additional guarantee with regard to the limits already imposed on the right to requisition.



40. The reprisals to which reference was made in the second sentence of the draft article constituted an extension of the rule under Article 33, third paragraph, of the fourth Geneva Convention of 1949, applicable in occupied and national territory, according to which "Reprisals against protected persons and their property are prohibited". The prohibition provided for in article 66 would in fact cover all indispensable objects, no matter in whose possession those objects were.

41. Those conditions indicated that the crux of the problem lay in the extension of such immunity to indispensable objects located on national territory. Extension of protection to objects in occupied territory in relation to the exigencies of the occupying Power should not present any difficulty.

42. Mr. NAMON (Ghana) said that his delegation's comments on article 48 of draft Protocol I applied also to article 66. While recognizing that the objects referred to in article 66 were indeed indispensable to the survival of the civilian population, he thought it not entirely rational to provide for their protection, if provision was not also made for access to them.

43. The delegation of Ghana therefore proposed (CDDH/III/28) the insertion of the words "... and the means of communications, such as arterial roads essential to the supply of such indispensable objects", in order to take into account the supply of foodstuffs to remote areas where they were often conveyed by road. The purpose of that amendment was thus to correct an obvious omission in draft article 66. Regarding water supply and irrigation works, he pointed out that Ghana had a number of dams which supplied not only hydro-electric power but also acted as water reserves for drinking and irrigation purposes, and which must therefore be left intact.

44. Mr. CASTREN (Finland) said that the amendment submitted by his delegation (CDDH/III/101) consisted in replacing the word "namely", in the second line of the ICRC text of article 66, by the words "such as", in order to point out that the list of protected objects indispensable to the survival of the civilian population was not complete, and to harmonize article 66 with article 48, which had already been unanimously approved by the Committee by means, inter alia, of that alteration. It was possible that other parts of article 66 could be made to correspond with the provisions of article 48, and even that the changes made in article 48 rendered article 66 no longer indispensable, provided that no doubt subsisted as to the general field of application of article 48, which, as he understood it, covered both occupied territories and the national territory. It was the function of the Working Group to decide whether article 66 could be eliminated.

45. Mr. SCHUTTE (Netherlands) noted that in the course of the discussions on article 48 by the Working Group, and following its approval in its present form, it had become clear that the text of article 66 as prepared by the ICRC could not remain unchanged; and certain delegations had already suggested its ultimate deletion. That was the reason for the amendment which he and two other delegations were were introducing (CDDH/III/261).

46. Section III of Part IV, which contained article 66, dealt with two different situations. On the one hand provisions were laid down complementary to those ruling the rights and obligations of an Occupying Power with respect to persons present on the occupied territory. On the other hand, rules were laid down governing the relations between a Party to the conflict and persons under its own jurisdiction within its own territory which was not occupied by the enemy.

47. Both situations were covered by the term "in the power of a Party to the conflict". Quoting the ICRC Commentary, (CDDH/3), he stressed that the simple fact of being on the territory of a Party to the conflict or in occupied territory implied that the persons concerned were in the power of the authorities of the Power involved.

48. Article 65, called "Fundamental Guarantees" dealt with both situations at the same time, i.e. both with persons in occupied territory who were not protected persons under the fourth Geneva Convention of 1949, and with the Parties' own nationals, in all circumstances.

49. With respect to article 66, however, a distinction between the two situations had to be made, since different conclusions might be drawn as to what justification might exist for the destruction of the particular objects mentioned in article 66, according to whether they were situated in occupied territory or in the non-occupied territory of the Power concerned.

50. The question had already been discussed in the Working Group, and the conclusion drawn there was that more explicit clarification was desirable.

51. He referred to the last paragraph on page 3 of the report of the Working Group to the Committee (CDDH/III/264), which stated that the question had been raised in connexion with article 48. At the suggestion of the Rapporteur the Working Group had "agreed to review subsequently the extent to which the provisions of that Section / Section I, Chapters II, III and IV / were intended to have such an effect within a State's own territory", and had

decided that the conclusions of the Working Group be reflected in the text in some appropriate way. During the debates in the Working Group, distinctions were made between four legal situations:

(a) the destruction of objects consequent on attack within the territory of the adversary not subject to occupation;

(b) the destruction of objects by way of attack within a Power's own territory subject, however, to enemy occupation;

(c) the destruction of objects within the territory of the enemy held under occupation;

(d) the destruction of objects within a Party's own territory being not, or not yet, subject to enemy occupation.

52. In the original ICRC draft the first two situations, the destruction by way of attack within territory controlled by the adversary, were both covered by article 48.

53. The third situation was covered by both article 66 of draft Protocol I and Article 53 of the fourth Geneva Convention of 1949.

54. The fourth situation was also covered by article 66.

55. Article 48, as adopted by the Committee, included the words "remove or render useless", which assumed that the prohibitions contained in paragraph 2 of that article extended to situations where those particular objects were in the power of the Party carrying out the destruction. That meant that article 48 now covered at least the first three legal situations just mentioned.

56. For article 66 only the fourth legal situation seemed to remain, namely the prohibition for a Party to the conflict to destroy the objects in question within its own non-occupied territory.

57. The prohibition of reprisals against those objects seemed in that respect to be completely purposeless. Moreover, the whole problem of the rights of a Party to a conflict within its own territory called for a different approach.

58. The amendment (CDDH/III/261), submitted by the Netherlands delegation together with the United Kingdom and United States delegations, served two purposes.

59. First of all, the sponsors thought it useful to codify what had emerged from the discussions held in the Working Group, namely that any Party to a conflict that attacked military objectives situated in parts of its own territory which were subject to enemy occupation, or in part of a combat zone, should be bound to respect the provisions and prohibitions contained in articles 46 to 51 of draft Protocol I.

60. Draft Protocol I spoke of "the civilian population" without drawing a distinction between "enemy civilian populations" and the "own civilian populations" of the party concerned. The civilian population as such was entitled to protection, and in that respect might be considered as neutral. Everybody knew that an Occupying Power was bound, under the terms of the fourth Geneva Convention of 1949, to conform to certain precise and restrictive rules with regard to its behaviour towards the civilian population and property in the occupied territories. He quoted the terms of Articles 53 and 55 of that Convention. In order to give the Occupying Power the fullest opportunities of observance of the provisions embodied in the relevant Articles of the fourth Geneva Convention and of draft Protocol I, it would seem appropriate to affirm the applicability of articles 46, 47, 47 bis, 48, 49 and 50 of draft Protocol I to any Party to a conflict extending hostilities to its own occupied territory or to the occupied territory of an ally.

61. He thought that Section III of Part IV of draft Protocol I might be the appropriate place to insert a provision of that kind, since the provisions in that Section were, according to article 63, complementary to Parts I and III of the fourth Geneva Convention.

62. The second purpose of the amendment which he was submitting (CDDH/III/261) was to make clear what still seemed to be an ambiguity in article 48.

63. The insertion of the words "remove, or render useless" in paragraph 2 of article 48 (CDDH/III/247), as adopted by the Committee, indicated that the provisions of that article should be applied in occupied territory by the Occupying Power, but that did not solve the question whether those provisions also applied to a Party to the conflict within its own non-occupied territory. The proposed amendment answered that question. The answer was not completely affirmative. The amendment would allow such a Party to the conflict to derogate from the prohibition, and especially to destroy, remove or render useless foodstuffs and food-producing areas, drinking-water supplies and the like, for the purpose of denying them to the adverse Party where such derogation was required by imperative military necessity. That idea was the

fruit of the Working Group's discussions, in the course of which a considerable amount of support had been given to the thesis that a State was legitimately entitled to use all the powers at its disposal to defend its territory and populations against invasion.

64. Finally, the proposed amendment did not enter into the question whether, notwithstanding imperative military necessities, there were still any limits to the powers of a Party to the conflict with respect to its own populations within its own territory. Everyone knew that the International Covenant on Civil and Political Rights allowed States that were Parties to a conflict to derogate from their obligations in time of public emergency which threatened the life of the nation, even if only to the extent strictly required by the exigencies of the situation, and provided that the measures taken were not inconsistent with other obligations under international law. In other words, the Covenant explicitly assumed the existence of such limits.

65. It seemed more appropriate to the sponsors of the proposed amendment (CDDH/III/261) to consider the question where those limits should exactly be drawn in the framework not of article 66 but of article 65, and consequently either in Committee I or in Committee III, depending upon which of the two Committees was entrusted with the consideration of that article.

The meeting rose at 12.30 p.m.



SUMMARY RECORD OF THE THIRTY-EIGHTH MEETING

held on Thursday, 10 April 1975, at 3.55 p.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

TRIBUTE TO THE MEMORY OF LIEUTENANT-COLONEL KJELL TRYGVE MODAHL,  
MEMBER OF THE NORWEGIAN DELEGATION

On the proposal of the Chairman, the members of the Committee observed a minute's silence in tribute to the memory of Lieutenant-Colonel Kjell Trygve Modahl, member of the Norwegian delegation

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 33 - Basic rules (CDDH/III/290/Rev.1) (concluded)

Article 34 - New weapons (CDDH/III/291) (concluded)

Article 36 - Recognized emblems (CDDH/III/288) (concluded)

Article 37 - Emblems of nationality (CDDH/III/289) (concluded)

Article 48 bis - Protection of the natural environment  
(CDDH/III/276) (concluded)

Article 48 ter (CDDH/III/276) (continued)

Texts proposed by the Working Group (CDDH/III/293)

1. Mr. FRIEDRICH (Legal Secretary) drew attention to some corrections to be made in the French text of the documents under consideration. In document CDDH/III/291, the first line should read: "Dans l'étude, la mise au point, l'acquisition ...". In document CDDH/III/288, the penultimate line of paragraph 1 should read: "ou signaux protecteurs reconnus ...".

2. Mr. BLISHCHENKO (Union of Soviet Socialist Republics), referring to the first paragraph on page 2 of the Rapporteur's report on the work of the Working Group (CDDH/III/293), suggested that a sentence be inserted to indicate that the Working Group had decided to postpone further consideration of document CDDH/III/GT/42 until the third session.

3. Mr. ALDRICH (United States of America), Rapporteur, said he thought it would be better if the report referred to the initial proposals rather than to working papers; but the question could be settled by consultation between the USSR representative and himself.

4. Mr. CRISTESCU (Romania) proposed the following alteration to the second sentence of the last paragraph on page 1 of the Rapporteur's report (CDDH/III/293): "Several representatives wished to have it recorded that they understood the injuries covered by that phrase to be limited to those which were more severe than would be necessary to render an adversary hors de combat."

It was so agreed.

5. Mr. BILGEBAY (Turkey) pointed out that documents CDDH/III/290 and CDDH/III/291 were dated 9 April 1975, not 10 April 1975, as erroneously shown in the Rapporteur's report (CDDH/III/293).

6. The CHAIRMAN invited the Committee to decide on article 33 - Basic rules (CDDH/III/290/Rev.1, CDDH/III/293).

Paragraph 1 was adopted by consensus.

7. The CHAIRMAN invited the Committee to decide by a vote whether the words in square brackets "and methods of warfare" in paragraph 2 should be retained.

The Committee decided by 58 votes to 1, with 7 abstentions, to retain those words.

Paragraph 2, with that change, was adopted by consensus.

Paragraph 3 was adopted by 57 votes to 4, with 3 abstentions.

Article 33, as a whole, as amended, was adopted by consensus.<sup>1/</sup>

8. The CHAIRMAN invited the Committee to decide on article 34 - New weapons (CDDH/III/291, CDDH/III/293).

Article 34 was adopted by consensus.<sup>2/</sup>

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<sup>1/</sup> For the text of article 33 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex).

<sup>2/</sup> For the text of article 34 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex).



9. The CHAIRMAN invited the Committee to decide on article 36 - Recognized emblems (CDDH/III/288, CDDH/293).

Article 36 was adopted by consensus.<sup>3/</sup>

10. The CHAIRMAN invited the Committee to decide on article 37 - Emblems of nationality (CDDH/III/289, CDDH/III/293).

11. Mr. LOPEZ IMIZCOZ (Argentina), supported by Mr. HERNANDEZ (Uruguay) and Mr. PINEDA (Venezuela) said that the Spanish text was not an accurate translation of the original English text.

12. The CHAIRMAN said that in that case the Committee's decision would be on the basis of the English text.

13. Mr. FRICAUD-CHAGNAUD (France) pointed out that, in the French text, the word "user" should be replaced by the word "utiliser", and the word "usage" by the word "emploi".

Article 37 was adopted by consensus.<sup>4/</sup>

14. The CHAIRMAN invited the Committee to decide on article 48 bis - Protection of the natural environment (CDDH/III/276).

15. Mr. ALDRICH (United States of America), Rapporteur, referring to the note relating to paragraph 2 at the foot of the page, said that, in the case of Protocol I, the Committee had adopted other articles on reprisals without waiting for the solution of the problem of reprisals in general. Logically, therefore, the Committee should do the same in the case of paragraph 2 of article 48 bis.

16. The CHAIRMAN invited the Committee to decide by vote whether it wished to delete the words in square brackets "to such a degree as to disturb the stability of the ecosystem" in paragraph 1.

The Committee decided, by 26 votes to 25, with 9 abstentions, to delete those words.

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<sup>3/</sup> For the text of article 36 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex).

<sup>4/</sup> For the text of article 37 as adopted, see the report of Committee III (CDDH/215/Rev.1, annex).

17. The CHAIRMAN put to the vote the words in square brackets "health cr" in paragraph 1.

The Committee decided, by 17 votes to 8, with 7 abstentions, to retain those words.

Paragraph 1, as amended, was adopted by consensus.

Paragraph 2 was adopted by consensus.

Article 48 bis as a whole, as amended, was adopted by consensus.<sup>5/</sup>

18. The CHAIRMAN invited the Committee to decide on article 48 ter (CDDH/III/276).

19. Mr. SCHUTTE (Netherlands) said that, following consultation with his Government after the thirty-seventh meeting of the Committee, his delegation would not be able to support article 48 ter as proposed by the Working Group. He suggested that the possibility of improving the article should be examined before it was put to the vote in the Committee. For instance, the words "designated by appropriate international agencies" might be inserted after the words "nature reserves"; or one text might refer only to "internationally recognized nature reserves"; or again, a combination of both suggestions might be used.

20. Furthermore, article 48 ter differed from the other articles in the same Section of draft Protocol I, since it did not prohibit attacks on nature reserves but required that they should be protected. It was not clear why the drafting differed in that manner. It would therefore be useful if article 48 ter could be sent back to the Working Group for further consideration.

21. Mr. PASCHE (Switzerland) agreed with the representative of the Netherlands. The present wording raised a number of questions which had not been settled: by whose authority were the nature reserves to be recognized, by what means would they be declared to be such, and so forth.

22. Mr. ALDRICH (United States of America), Rapporteur, said that he was not responsible for the drafting of article 48 ter, and that he could see certain problems with the text. If the Committee considered that the article should be sent back to the Working Group, he would be prepared to schedule a meeting before the Committee finished its work. Alternatively, it could be taken up again at the third session.

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<sup>5/</sup> For the text of article 48 bis as adopted, see the report of Committee III (CDDH/215/Rev.1, annex)

23. The CHAIRMAN said that the Committee had the choice of either voting or not voting on that article.

24. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that he understood the concern of some delegations, particularly those of Switzerland and the Netherlands. Certain comments had been made on the article both in the Working Group and in the Committee, especially in connexion with the "publicly recognized" character of the sites. What qualifications were necessary for nature reserves to be publicly recognized and declared as such? In the circumstances, the words "publicly recognized" were not clear. It was not the responsibility of the Conference to say which were the sites publicly recognized as nature reserves; that was a matter for geographers and specialists, who would tell Governments what they regarded as nature reserves so that such areas should be adequately delimited. The question was also related to problems of State security and survival of the population and it would be desirable for a provision along those lines to be added to draft Protocol I.

25. Mr. WOLFE (Canada) supported the proposal of the representative of the Netherlands that article 48 ter should be sent back to the Working Group.

26. Mr. FRICAUD-CHAGNAUD (France) said that he endorsed the Swiss representative's statement. There were indeed ambiguities and contradictions of form in the text which had not been considered in sufficient detail in the Working Group. He supported the delegations which had proposed that it should be sent back to the Working Group.

27. The CHAIRMAN suggested that a vote should be taken on the motion to send article 48 ter back to the Working Group.

The motion was adopted by 35 votes to 11, with 13 abstentions.

#### Draft Protocol II

#### Article 28 bis -- Protection of the natural environment (CDDH/III/275, CDDH/III/282) (concluded)

28. Mr. ALDRICH (United States of America), Rapporteur, said that article 28 bis (CDDH/III/282) represented the counterpart, in draft Protocol II, of paragraph 3 of article 33 and, in draft Protocol I, of article 48 bis.

29. If article 28 bis was adopted, it would be incorporated as a paragraph in article 20, which concerned certain types of weapons, and not as a separate article.

30. The CHAIRMAN said that in the French text a phrase was placed in brackets, whereas that was not so in the English and Spanish texts. He therefore suggested that article 28 bis should be adopted by consensus on the basis of the original English text.

31. Mr. EATON (United Kingdom) requested that the Committee should vote on that provision.

32. Mr. de ICAZA (Mexico) requested the Chairman to read out the original English text of article 28 bis.

33. The CHAIRMAN read out the English text (CDDH/III/282) on the basis of which the vote was taken.

The English text of article 28 bis was adopted by 49 votes to 4, with 7 abstentions.<sup>6/</sup>

Explanations of vote.

34. Mr. EL GHONEMY (Arab Republic of Egypt), speaking on behalf of the delegations of Algeria, Iraq, Jordan, Kuwait, Lebanon, the Libyan Arab Republic, Mauritania, Morocco, Sultanate of Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates and Yemen as well as his own, said that those countries had accepted article 36 by consensus on the basis of the definition of the Conventions and of draft Protocol I, which had been dealt with in Committee I and had been finally approved under article 2 of draft Protocol I. The delegations of those countries had considered that the emblems, signs and signals covered in the Conventions and the Protocols were already exhaustively enumerated there. Hence, any contrary interpretation of or amendment to that definition would cause those countries to reconsider their position on article 36.

35. Mr. CRISTESCU (Romania), explaining his delegation's affirmative vote on article 33, said that that article laid down the basic rules governing the prohibitions of the use of specific methods or means of warfare, supplemented by that of article 43 of draft Protocol I. That article, by its very nature, should lay down not only general rules concerning limitations on methods or means of warfare (paragraph 1) and prohibition of the use of methods or means of a nature to cause unnecessary suffering (paragraph 2), but also the provision in paragraph 3 concerning the environment, which corresponded to article 48 bis.

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<sup>6/</sup> For the text of article 28 bis as adopted, see the report of Committee III (CDDH/215/Rev.1, annex).

36. It was of vital importance, however, that paragraph 2 of article 33 should be supplemented by prohibition of the use of methods or means of warfare which had indiscriminate effects and which did not distinguish between military objectives and the civilians and civilian objects entitled to protection which were dealt with, but only partially, in other provisions of draft Protocol I. His delegation had supported the adoption of article 33 provided that those questions were considered at the third session of the Conference.

37. Since the purpose of draft Protocol I was to reaffirm and develop international humanitarian law applicable in cases of armed conflict, article 33 not only prohibited the use of weapons, projectiles, material and methods of warfare banned under the rules of international law and the dictates of the public conscience, but it represented a reaffirmation of those prohibitions.

38. He considered that the only valid interpretation of the provisions of paragraph 2 of article 33 was that made in the light of the provisions of international law unanimously accepted in the St. Petersburg Declaration of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime, in accordance with which the only legitimate goal that States should set themselves in time of war was the weakening of the enemy's military forces, at the same time respecting the rule governing the immunity of the civilian population - a rule firmly established in international law which was referred to in the resolutions of the United Nations and reaffirmed in article 43 of draft Protocol I.

39. Mr. HERCZEGH (Hungary), referring to paragraph 2 of article 33, which prohibited the use of weapons of a nature to cause unnecessary suffering, said that several delegations had given the Working Group their interpretation of the words "unnecessary suffering". His delegation considered that the unnecessary suffering to which reference was made in that article could be interpreted as suffering the gravity of which exceeded what was strictly necessary in order to render an enemy hors de combat, which was the only legitimate goal that the St. Petersburg Declaration of 1868 allowed a state at war.

40. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) welcomed the fact that the text of the Rapporteur's report (CDDH/III/293) had been submitted in a form calculated to gain the approval of the Committee. He requested that the Russian text of articles 33, 36 and 28 bis should be revised and brought into line with the English text.

41. His delegation had voted against the reference to the stability of the ecosystem in article 48 bis. It considered that it was essential, in that article, to strengthen the defence and protection of the environment and to prohibit all acts that disturbed its stability and were prejudicial to the health of the civilian population. The terms used in article 48 bis should consequently be stronger.

42. His delegation favoured the adoption of article 48 ter because it considered that that article concerned an important means of survival both for the civilian population and for nations. The article submitted by the Spanish delegation was therefore of great importance and its wording was entirely acceptable to his delegation.

43. The CHAIRMAN invited the USSR representative to participate in the preparation of the Russian text of those articles.

44. Mr. EATON (United Kingdom), explaining the position of his delegation in its votes on the provisions concerning the protection of the environment, said that it would have been preferable not to vote on them at the current session. Those provisions were of a technical nature and had nothing like the same history of detailed consideration by experts which applied to other provisions. His delegation regretted that some delegations had not been prepared to agree to a further time for reflection before the adoption of those provisions.

45. The United Kingdom delegation had nevertheless participated fully in the discussion on those articles in a spirit of compromise, and it considered that the text of article 48 bis, as adopted, was a fair one, since it struck the necessary balance by providing protection of the environment against deliberate and serious damage, while not making for instance, a tank commander who flattened a clump of trees liable as a war criminal. It accordingly would have voted in favour of the article had a vote been taken.

46. His delegation had voted against paragraph 3 of article 33 for two reasons. Firstly, the provisions on the environment should be envisaged in the context of the health and survival of the civilian population; that had been the majority view both in the "Biotope" Group and in the Working Group. Those provisions were therefore rightly placed in the part of the draft Protocol dealing with protection of the civilian population. Secondly, paragraph 3 of article 33, as at present drafted, duplicated the language of article 48 bis. There was no need for two provisions to say the same thing.

47. His delegation shared the concern expressed by the Netherlands representative about article 48 ter and was glad that the article had been referred back to the Working Group for further consideration.

48. His delegation had voted against the inclusion of article 28 bis in draft Protocol II, for reasons that also held good for its votes on a number of the articles in draft Protocol II voted on in Committee the previous week. His delegation's negative votes on the article in question and certain of the other articles in draft Protocol II should not be interpreted as votes against the Protocol itself and its humanitarian aims. His delegation supported the idea that parties to non-international armed conflicts should not adopt such methods of combat as attacks on dams, dykes and the like which might release dangerous forces. Nevertheless, it was convinced that the adoption of provisions expressly prohibiting such methods would, in fact, lessen the protection of the civilian population and other victims of internal armed conflict, simply by making it most unlikely that the Protocol would be adhered to by a significant number of States or, if adhered to, that it would be applied where it should be applied. The arguments deployed by the United Kingdom and other delegations in support of that view had been well summarized in that passage of the Rapporteur's report (CDDH/III/275), which described the two divergent positions in the Working Group as follows:

"Others argued, however, that there was a certain range of ambiguity in article I of Protocol II and that each attempt to import detailed provisions from Protocol I would in fact raise the level of application of Protocol II, because States would regard the Protocol as applicable only if it seemed that hostilities had escalated to the scale of requiring application of all or most of the provisions of Protocol I. The complexity and onerousness of the obligations might deter States from signature, ratification, or application of Protocol II. Rebels might refuse to carry out the Protocol because they would be unable to reach the standards set in the Protocol, while the authorities in power might use the inability of the insurgents to carry out the detailed provisions of the Protocol as an excuse for not complying with the Protocol. An approach placing emphasis on the protection of human rights, rather than on the conduct of military operations, should be preferred. And the Protocol should be as short and cogent and direct as feasible in order that the parties might clearly see their obligations.

No argument a contrario would be possible, as it would be understood that Protocol II is drafted in terms different from those of Protocol I and does not simply echo the norms in that Protocol. The two Protocols therefore did not have to be read together; each would be complete and self-contained, and no inferences a contrario could be derived from the two texts".

49. His delegation hoped that those arguments, as also the Canadian draft which had been circulated as document CDDH/212, would be given due consideration by delegations between the second and third sessions of the Conference, and that, as a result, when those provisions of draft Protocol II were reconsidered in Plenary, they would be simplified as far as possible.

50. Referring to article 33, paragraph 3, he said that his delegation welcomed the correction now made to the somewhat erroneous translations of the original French text of the corresponding Hague Regulations. It noted that the original wording in the French text had been retained, and in that respect saw no change in the meaning which had been, and was now, given to the expression "propres à causer des maux superflus".

51. Mr. CAMERON (Australia) said that his delegation had voted for the deletion of the words "and methods of warfare" from article 33, paragraph 2, as it had explained in introducing its proposed amendments to articles 33 and 34, the inclusion of those words would have marked a substantial and unexplored extension to the law. He merely wished to signify his delegation's concern, which, incidentally, was reflected in the Rapporteur's report (CDDH/III/293). His delegation had abstained from voting on article 33 for that reason.

52. Mr. GILL (Ireland) congratulated the head of the Australian delegation, who had led the Biotope Group, as well as all the other members of that Group, whose efforts had resulted in the adoption of article 48 bis. Although that article differed slightly in form from what the Group had envisaged, it none the less embodied substantially the principles whose recognition the Group had wished to secure. His delegation had voted for the retention of the word "health", which in its view gave an added dimension to the protection of the environment. The adoption of article 48 bis and of articles 33 and 38 was an event in the history of international humanitarian law.

53. With reference to article 37, he said his delegation would be happy to co-operate in formulating a new article or paragraph prohibiting the use by parties to an armed conflict of the insignia, uniforms or symbols of the United Nations. Like other nations with citizens serving with United Nations forces in dangerous sectors, Ireland attached considerable importance to the inclusion of such a provision in the Protocols.



54. Mr. MUKHTAR (United Arab Emirates) said that his delegation shared the views of the Egyptian representative and supported the reservations he had made.

55. Mr. WOLFE (Canada) said he agreed with the United Kingdom representative's views on article 43, paragraph 3 of which appeared to duplicate other provisions. He also endorsed everything the United Kingdom representative had said about the environment, including his comments on article 28 bis. He assured the Irish representative that he would pass on to the Canadian Government his remarks concerning the wearing of United Nations insignia, uniforms and symbols.

56. Mr. LONGVA (Norway) thanked the Chairman and members of the Committee for the sympathy they had shown his delegation on learning of the death of Lieutenant Colonel Modahl.

57. His delegation had voted for all three paragraphs of article 33 on the assumption that Committee III would continue its consideration of the matter and that an additional paragraph would be drafted at the third session of the Conference: he drew attention in that connexion, to the draft new paragraph for addition to article 33 which his delegation had proposed in document CDDH/III/259. The Working Group had decided that that proposal would be considered in the context of article 42, but there was no reference to that decision in the Rapporteur's report.

58. Mr. DIXIT (India), recalling the Committee's decision to refer article 48 ter back to the Working Group for reconsideration, said that his delegation had voted in favour of such a solution because of its consistent policy that all opportunities should be explored in an effort to arrive at a generally acceptable draft. No delegation present should feel that its views were not given due consideration. The Committee had been able to adopt some articles by consensus because delegations had made every effort to reconcile all points of view.

59. With reference to article 36, he said his delegation understood that the word "Conventions" referred exclusively to the four Geneva Conventions of 1949, and that the article was to be interpreted in accordance with the universally accepted principle of international law that States not parties to a particular Convention were not bound by the provisions of that Convention.

60. Mr. PASCHE (Switzerland) said that in the view of his delegation article 33 could never be interpreted in such a way as to prejudice the rights of victims of armed conflicts under existing customary law. Although the article reaffirmed and

developed customary law, it could in no way justify an offence against other basic principles, such as the rule which required that a distinction be made between military objectives and civilian equipment and personnel, and consequently prohibited the use of methods and means of warfare which struck blindly, without discrimination.

61. Mr. FRANKE (Federal Republic of Germany) explained that his delegation had voted against the adoption of paragraph 3 of article 33 because it did not believe that an identical provision need be inserted in both article 33 and article 48 bis.

62. While not opposed to the consensus reached on article 33 as a whole and on article 48 bis, his delegation would have preferred the deletion of the words "or may be expected" from articles 33, paragraph 3 and 48 bis, paragraph 1.

63. As stated during the Working Group's discussions, the purpose of those paragraphs was to prevent intentional damage to the natural environment, and there seemed to be a general understanding that incidental damage could not be excluded. In view of that, his delegation felt that the words "or may be expected" introduced into the paragraphs in question a certain vagueness which should be avoided. That remark also applied to article 28 bis of draft Protocol II.

64. Mr. HAMID (Pakistan), referring to the Rapporteur's report (CDDH/III/293), recalled that it had been decided to postpone the consideration of article 33, paragraph 2, particularly so far as concerned the translation into English of the term "maux superflus". Since no mention had been made of that fact in the report, he requested that the omission should be rectified by the Rapporteur.

#### PROPOSAL FOR THE ESTABLISHMENT AT THE THIRD SESSION OF THE CONFERENCE OF A JOINT GROUP ON REPRISALS

65. Mr. ALDRICH (United States of America), Rapporteur, said that the Chairman of Committee III had approached the Chairmen of Committees I and II concerning the possible establishment, at the third session of the Conference, of a small Joint Group to consider the question of reprisals. The Group would be set up at the beginning of the third session, and there was no need to appoint its members at the current session. Each of the Chairmen concerned would submit the proposal to his Committee for consideration, and for the time being it would suffice for each Committee to decide upon the advisability of establishing such a Group.

66. Mr. BLIX (Sweden) asked for clarification. Several Working Groups had met during the second session to consider the provisions of draft Protocol II, and there had been some question whether "reprisals" should be mentioned in that Protocol. His delegation had reserved its decision and believed that the matter should be settled jointly by the three Committees. His delegation would therefore support the Chairman's proposal so far as Protocol II was concerned; it believed that the members of the Group should be appointed by the Chairmen of the three Committees, and that the discussions should be open to all. So far as draft Protocol I was concerned, a number of articles had been voted upon and it was not advisable to go back on the decisions taken. He believed that the Group's terms of reference should be limited to Protocol II.

67. Mr. ALDRICH (United States of America), Rapporteur, said that the problem of reprisals had arisen in all the Committees and it had seemed advisable, from the outset, to seek a common solution. Committee I, however, had not yet begun discussing the problem, and the establishment of an ad hoc Group was not feasible until it had done so. The proposal did not suggest that the Group's terms of reference should be confined to draft Protocol II; the terms of reference, however, would not be laid down until the third session, and the Committee was merely being asked to decide upon the principle.

68. Mr. LONGVA (Norway) said that his delegation would like to consult its Government before a decision was taken; it was constrained to enter some reservations regarding the proposal until a decision had been reached on the question whether the Group's terms of reference would cover both Protocols.

69. Mr. BLIX (Sweden) suggested to the Rapporteur that it might be well to reconsider the articles of draft Protocol I in which reprisals were mentioned, but solely from the standpoint of drafting. There was no need to review their substance, for that would mean reconsideration by the Committee and require a decision by a two-thirds majority vote. At all events, his delegation was not against setting up the Group in question, and saw no urgent need for an immediate decision concerning its terms of reference. It merely hoped that the Group would be open to all.

70. Mr. ALDRICH (United States of America), Rapporteur, said he thought the Group's discussions should be open to everyone. Its terms of reference would depend upon its composition, and problems of substance would not arise again unless the Committees concerned took divergent views.

71. Sir David HUGHES-MORGAN (United Kingdom) referred to the reminder by the Rapporteur regarding the statement made in an earlier report concerning the establishment of a Joint Group of the type mentioned. Bearing in mind the work to be performed by such Group, his delegation and others had not discussed reprisals in any detail, as it would have been premature to do so. He felt that the Swedish representative was under a misapprehension in stating that the Group would be limited to mere questions of drafting.

72. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) proposed that, by way of compromise, the principle of establishing a Group should be approved on the understanding that the Group's terms of reference and working methods would be defined by the Conference at its third session.

73. The CHAIRMAN asked the Committee to decide on the question of principle, as each of the other Committees would do at their Chairman's request: whether a Joint Group consisting of members of the three Committees should be established, on the understanding that the Group's membership, terms of reference and working methods would be determined at the beginning the third session.

The proposal was adopted by consensus.

74. Mr. PASCHE (Switzerland) said it might perhaps be advisable to ask delegations interested in the question of reprisals to think about the matter between the two sessions of the Conference, and, if they wished, to send in their comments and conclusions on the subject to the Conference Secretariat, in preparation for the third session.

75. The CHAIRMAN pointed out that each of the Committees concerned should first of all decide on the principle of establishing such a group.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 42 - New category of prisoners of war (CDDH/1)  
(continued)\*

Draft resolutions CDDH/III/285 and Add.1

76. The CHAIRMAN announced that several delegations had suggested that article 42 of Protocol I should be referred to the Conference's third session. He had approached the Secretariat on the subject, and the Legal Secretary would read out a statement by the Secretary-General.

77. Mr. FRIEDRICH (Legal Secretary) read the following statement:

"The Secretary-General has given his careful attention to the request contained in documents CDDH/III/285 and Add.1. In accordance with the wish expressed by the General Committee of the Conference at its last meeting to ensure that the Secretariat facilitates the work of the third session to the fullest possible extent, the Secretary-General is prepared to give effect to the above request by the following means:

1. He will take steps to ensure that the summary records of the meetings of Committee III relative to the study of draft Protocol I, article 42, on first reading, are particularly faithful renderings. For the same purpose, delegations are invited to send to the appropriate service, in the usual way, any corrections they may wish to make to such summary records.

2. In addition, the Secretary-General will arrange for the preparation of a special annex to the summary records, to contain the written texts of oral statements handed in by representatives to the Secretariat at the time. Representatives who do not hand in written texts when they speak will have until 31 May 1975 to do so, it being

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\* Resumed from the thirty-sixth meeting.

understood that the texts must, of course, conform to their oral statements. The annex will be translated into the various Conference languages and distributed, together with the final version of the summary records, to Conference participants.

The Secretary-General wishes to make it clear that the issue of this annex will be exceptional in character and is not to be regarded as creating a precedent, or as prejudging his attitude to similar requests in the future."

78. The CHAIRMAN said that he had ventured not to submit draft resolutions CDDH/III/285 and Add.1 to the Committee. There was thus no need for a vote.

The meeting rose at 5.45 p.m.

SUMMARY RECORD OF THE THIRTY-NINTH MEETING

held on Monday, 14 April 1975, at 10.40 a.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

CONSIDERATION OF THE REPORT OF COMMITTEE III (CDDH/III/286 and Add.1)

1. The CHAIRMAN suggested that the meeting should be suspended until 11 a.m., since a number of delegations had only that morning received the draft report of Committee III (CDDH/III/286 and Add.1), and had asked for more time in which to study it.

The meeting was suspended at 10.45 a.m. and resumed at 11 a.m.

2. Mr. FRIEDRICH (Legal Secretary) drew the Committee's attention to three corrections that should be made to the draft report: in section I (Introduction), the name of Mr. Damdindorj in the list of Vice-Chairmen of the Committee should be replaced by that of Mr. Dugersuren and the foot-note on that page should be deleted; the first sentence of paragraph 9 should begin: "During the present session, and at the request of the Chairman of Committee I ..."; in the third sentence of paragraph 152 the number of votes against the deletion of paragraph 2 should be 17 and not 27. Furthermore, in paragraph 3 of the French text, the spelling of the names of Mrs. D. Bindschedler-Robert and Mr. J. Mirimanoff-Chilikine should be corrected.

3. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that his delegation had not received the draft report of Committee III until 10.30 that morning and would need at least two more hours to study it. He would not object to other delegations discussing the document without the participation of his delegation.

4. The CHAIRMAN suggested that Committee III should meet again at 2.30 that afternoon and go on working until the meeting of the General Committee of the Conference at 4 p.m. The Rapporteur of Committee III, who had engagements that afternoon, might, however, introduce the draft report of the Committee at the present meeting and then place himself at the disposal of any delegations which might wish to inform him of the corrections they would like to make to the report.

5. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that he accepted that suggestion on the understanding that the report would be adopted that afternoon.

6. Mr. ALDRICH (United States of America), Rapporteur, introduced the draft report of the Committee (CDDH/III/286 and Add.1). The report concentrated on the articles adopted during the second session and would help towards the understanding of those articles. It merely listed the articles on which the Working Group had not yet taken a decision because in the interval before the third session the positions on those articles might develop considerably in the direction of a consensus.

7. The draft report was based to a large extent on the four texts which had already been submitted to the Committee, but the authors had discarded some of the details that had appeared in those texts because they had considered them unnecessary; on the other hand they had added some new elements after hearing the explanations of vote given by the representatives.

8. He hoped that he had covered the principal points of interest to the members of the Committee.

9. The summary records of the meetings of the Committee supplemented the draft report in providing information on the discussions relating to the draft articles that had been adopted.

10. The four drafts which had already been submitted to the Committee were in no way binding on the Working Group and delegations could of course ask for any change that they might consider advisable to be made in the present text. He would be grateful if delegations would inform him of any such corrections at the end of the current meeting. He was at the disposal of members to reply to any questions they might wish to ask.

11. Mr. TODORIĆ (Yugoslavia) said that, through the joint efforts of the Chairman and all delegations, the Committee had adopted certain basic principles on the protection of the civilian population, civilian objects and the natural environment, as well as on the prohibition of the use of weapons that might cause unnecessary suffering and on the study and development of new weapons. The text adopted for draft Protocol I was based on the principle of the universality of humanitarian law.

12. Delegations had also shown a real determination to arrive at compromise solutions; though that course admittedly had advantages, it meant that there was some lack of precision and of clarity. As a result there were three questions that called for the Committee's attention.

13. First, there were several references in some of the articles of draft Protocol I adopted by the Committee to rules of international law and more especially to rules applicable in armed conflicts on land and in the air. For instance, a comparison of



articles 34, 37, 44, 46, 49, 50, 52 and 53 showed that some repetitions were not only unnecessary but were contradictory and even introduced some ambiguity. In order to avoid those repetitions, which could lead to differences of interpretation or provide pretexts for abuses, it was essential that there should be one or two provisions dealing with the relationship between the text of draft Protocol I and the other rules of international law, including those applicable in armed conflicts at sea and in the air. In that case, it was necessary to bear in mind the principle of international law whereby, in a conflict between obligations arising under international agreements and obligations laid upon States Members of the United Nations under the Charter, the latter would prevail.

14. Secondly a balance must be maintained in the text of draft Protocol I between military considerations and humanitarian requirements. Without in any way impairing the security and the defence of States, it was necessary to include a provision on the importance to be attached to the various rules governing humanitarian protection, so that the provisions most favourable to the protection of the civilian population, civilians and civilian objects would be applied. Such a provision would contribute to the development of humanitarian law.

15. Lastly, some delegations had expressed reservation concerning draft Protocol II as a whole and had abstained in the vote on certain articles. In order to facilitate the adoption and ratification of the text of Protocol II by certain States, that Protocol should include a provision corresponding to article 85 of draft Protocol I concerning reservations and the effects of reservations, under the law of treaties.

16. In his view, the most important thing was to continue to seek better ways of developing humanitarian law in accordance with the aims of the Conference and the terms of reference of the Committees. It was the duty of the Conference to meet the requirements of the international community and the vital needs of present and future generations, in order to further the establishment of a lasting peace and international security and co-operation based on respect for the sovereignty, political independence and equal rights of peoples and States, principles which were enshrined in the United Nations Charter.

17. The CHAIRMAN thanked all those who had contributed to the smooth progress of the Committee's work.

The meeting rose at 11.25 a.m.



SUMMARY RECORD OF THE FORTIETH (CLOSING) MEETING

held on Monday, 14 April 1975, at 2.45 p.m.

Chairman: Mr. SULTAN (Arab Republic of Egypt)

EXPRESSIONS OF APPRECIATION TO THE CHAIRMAN AND OFFICERS OF THE COMMITTEE

1. Miss BOA (Ivory Coast), speaking on behalf of the members of the Committee, said she wished to congratulate the Chairman on his masterly and impartial conduct of the Committee's proceedings and also to pay a tribute to the Vice-Chairmen and the Rapporteur. She hoped that the same spirit of courtesy and compromise would prevail at the third session of the Conference.
2. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said he associated himself with the views expressed by the representative of the Ivory Coast. Thanks to the talent, knowledge and qualifications of the Chairman, the Committee had been able to achieve significant results and to adopt, often by consensus, many articles of great importance for the development of humanitarian law. The current session of the Conference had been characterized by a spirit of mutual understanding and co-operation without which it would not be possible for humanitarian law to progress. It was his hope that the Chairman would continue his valuable work at the third session and that it would be possible then to adopt a large number of articles in both the draft Protocols. It was essential to achieve the greatest possible measure of protection for the victims of armed conflicts. The constructive attitude adopted by the Chairman had made discussion possible and had enabled the Committee to make considerable progress in its work. Solutions to the outstanding problems would, he hoped, be found at the third session of the Conference.

A vote of thanks to the Chairman and officers of the Committee was adopted by acclamation.

3. The CHAIRMAN, speaking on behalf of the officers, thanked the Committee for its expressions of appreciation.

## ADOPTION OF THE REPORT OF COMMITTEE III (CDDH/III/286 and Add.1)

4. Mr. ALDRICH (United States of America), Rapporteur, said that he wished to suggest certain amendments to the text of the draft report (CDDH/III/286 and Add.1). Some of the suggestions were his own, while others had been made by various delegations. In paragraph 15, the figure "21" should be replaced by "22". In paragraph 16, the figure "39" should be replaced by "38" and the phrase "which would deal with nature reserves" should be inserted after the figure "48 ter" in the first sentence. It had been suggested that the phrase "concerning aggression and non-discrimination" in the second sentence should be replaced by a fuller description of the proposal in question. He would be ready to accept such an amendment, the wording of which might be worked out by the sponsors of the proposal and transmitted to him after the meeting.
5. With regard to paragraph 17, it had been suggested that the word "arises" in the first sentence should be replaced by the word "appears" and that the phrase "considering that all three Committees are concerned with this problem" should be added at the end of the second sentence.
6. In paragraph 18, the name "Uganda" should be added after the name "Democratic Republic of Viet-Nam" and the words "and Add.1" should be added after the document symbol "CDDH/III/238".
7. In paragraph 26, the words "ecological system" should be replaced by the word "ecosystem". It had also been suggested that the phrase "because of its lack of precision" should be deleted.
8. With regard to paragraph 27, it had been suggested that the words "by some" should be inserted after the word "considered" in the second sentence. It had also been suggested that the phrase "must be ten years or more", in the fifth sentence, should be replaced by the phrase "may be perhaps for ten years or more", and that the following new sentence should be added after the fifth sentence: "However, it is impossible to say with certainty what period of time might be involved". It had been suggested that the word "was", in the sixth sentence, should be replaced by the word "seemed". In the last sentence, it had been suggested that the words "What is proscribed, in effect, is" should be replaced by the words "What the article is primarily directed to is, thus," and that the word "long-term" before "major health problems" should be deleted.

9. In paragraph 31, a comma should be inserted after the phrase "of the weapon" in the second sentence.
10. In paragraph 55, the phrase "Most representatives understood that" should be inserted at the beginning of the fourth sentence
11. In paragraph 56, the phrase "except for direct fire by small arms" in the first sentence should be moved to the end of that sentence, perhaps only in the English version.
12. In paragraph 66, the words "unconsented removal" should be replaced by "removal without consent", perhaps only in the English version.
13. In paragraph 70, a comma should be inserted after the word "understanding" in the first sentence and the phrase "accepted by the Committee," should be inserted before the words "that article 47 bis".
14. In paragraph 74, the word "are" in the first sentence should be replaced by the words "may be".
15. In paragraph 81, the phrase "as it relates to the survival of the civilian population" in the first sentence, should be deleted.
16. In paragraph 82, the word "particular" should be inserted before the word "prohibition", in the first sentence.
17. It had been suggested that the following sentences should be added at the end of paragraph 108: "Several delegations supported the view that, in case of a dispute between the Parties to the conflict regarding the true character of a locality outside the zone of contact, there should be a verification by some impartial body. They therefore proposed that a separate article 52 bis might be included in the Protocol to deal with the question of verification, as well as the mechanism".
18. With regard to paragraph 124, it had been suggested that the words "the only" in the second sentence should be replaced by the words "there is very little" and that the word "is" should be replaced by the words "other than".
19. In paragraph 126, the words "methods of means" in the fourth sentence should be replaced by the words "methods or means".

20. The CHAIRMAN asked if there were any objections to the changes suggested by the Rapporteur.

21. Mr. BLIX (Sweden) suggested that the Chairman take the report paragraph by paragraph.

22. The CHAIRMAN said that he would decide that later but first wished to know if the Rapporteur's suggested changes gave rise to any comment.

23. Mr. BLIX (Sweden) said that he had a number of comments to offer. The report reflected not only the proceedings of the Committee itself, but also discussions in the Working Group and even outside the Working Group. That was an unorthodox approach in drafting a report, since there was nothing in the summary record corresponding to passages based on discussions in private meetings.

24. He was satisfied with the Rapporteur's suggested changes in general, but felt that they were incomplete. For instance, the Rapporteur had suggested amending the beginning of the fourth sentence in paragraph 55 to read "Most representatives understood that the definition was not intended to mean ...". That referred to a discussion in the Working Group, not in the Committee: no vote had been taken and many delegations had not taken part in the discussion. It was not usual procedure to include a statement of that kind in a Committee report and he must object to it, since the view of his own delegation, which had not been that of the majority, was not included. As there had been a divergence of opinion, it was only reasonable that both views should be indicated. He would suggest using some such phrase as "Several but not all representatives ...".

25. Mr. BLISHCHENKO (Union of Soviet Socialist Republics), suggested that the Committee discuss the report paragraph by paragraph, taking into account the Rapporteur's changes and adopt each in turn.

26. Mr. DIXIT (India) supported the suggestion.

27. The CHAIRMAN asked whether the representative of Sweden found that suggestion acceptable.

28. Mr. BLIX (Sweden) said that that had been his original suggestion.

Part I - Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4 to 8

Paragraphs 4 to 8 were adopted.

Paragraph 9

29. The CHAIRMAN said the Rapporteur had suggested a correction to paragraph 9 whereby the phrase "and at the request of the Chairman of Committee I" was to be inserted after the phrase "In the course of this session".

30. Mr. SCHUTTE (Netherlands) said that his delegation understood that paragraph 9 was a description of the facts and should not be quoted as prejudicing possible proceedings concerning articles 63 to 65 and 67 to 69 at the third session.

31. The CHAIRMAN said he could confirm that.

32. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) suggested that the situation would be reflected more accurately if it were said that it was agreed that the articles "might be" transferred to Committee I.

33. The CHAIRMAN said that, at the first session, articles 63 to 65 and 67 to 69 of draft Protocol I had been left pending for Committees I and III. At the current session, the Chairman of Committee I had requested that they be transferred to Committee I. Later he had been asked whether they could be transferred back to Committee III but he had not been able to take a decision as he was not sure of Committee III's own programme of work. That was an interpretation of the paragraph and was in no way intended to prejudice the course of proceedings at the third session.

Paragraph 9, as amended by the Rapporteur, was adopted.

Paragraphs 10 and 11

Paragraphs 10 and 11 were adopted.

Paragraph 12

34. Mr. DIXIT (India) suggested replacing the full stop at the end of the paragraph by a comma and adding the phrase "although some representatives had suggested that they should be considered separately".

35. Mr. ALDRICH (United States of America), Rapporteur, suggested a slight re-wording of the Indian amendment to read "Protocol I, despite the preference of some delegations to have them submitted separately."

Paragraph 12, as thus amended, was adopted.

Paragraphs 13 and 14

Paragraphs 13 and 14 were adopted.

Paragraph 15

36. Mr. ALDRICH (United States of America), Rapporteur, said that although he had suggested two changes in paragraph 15, they were not relevant because the articles were those submitted by the Working Group to the Committee. It was true that the Working Group had not submitted texts for article 24, apart from paragraph 2, or article 25 of draft Protocol II. He therefore withdrew those changes, but the phrase "the twenty-two articles" should remain.

Paragraph 15, as amended by the Rapporteur, was adopted.

Paragraph 16

37. Sir David HUGHES-MORGAN (United Kingdom) said that the last two lines of paragraph 16 were inaccurate; they should be amended to read "and a proposal submitted to the Working Group concerning aggression and non-discrimination was remitted for consideration by the Committee. This proposal was reproduced as document CDDH/III/284".



38. Mr. ALDRICH (United States of America), Rapporteur, said that he did not accept that view. The Chairman of the Working Group had agreed to take the matter up at the third session of the Working Group.
39. Sir David HUGHES-MORGAN (United Kingdom) said that that was not his understanding.
40. Mr. ALDRICH (United States of America), Rapporteur, suggested that the misunderstanding was probably due to the fact that there had been two Chairmen of the Working Group.
41. Mr. GILL (Ireland) said he supported the contention of the United Kingdom representative that the proposal in document CDDH/III/284 was not pending before the Working Group as was suggested in the report. It was his recollection that an attempt had been made to introduce the same amendment under the symbol CDDH/III/GT/42 at a meeting of the Working Group, but that the United Kingdom representative had objected on a point of order, as he had himself, on the grounds that it was against precedent to introduce for discussion within the Working Group an amendment that had not previously been submitted to the Committee. The amendment in document CDDH/III/GT/42 had therefore been deferred and not submitted to the Working Group.
42. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said there had been lengthy discussion within the Committee on the amendment in document CDDH/III/284 during which different views had been expressed and the decision had been reached that as soon as a written proposal had been submitted, it would be referred to the Working Group. Such a document had been prepared and referred to the Working Group, but several delegations had taken the view that it was not suitable for discussion in the form in which it had been presented, and a decision had therefore been taken to leave it for discussion by the Working Group at the third session of the Conference. The Rapporteur was therefore correct in stating that the matter was in abeyance until the third session.
43. Mr. ALDRICH (United States of America), Rapporteur, said that he did not wish to reject the view of the representative of Ireland out of hand. The document in question could either be discussed by the Committee, or it could be agreed that it would be taken up again by the Working Group at the third session. In his view, the matter could be usefully discussed at that time and he regretted that he had not made his point clearly enough to the Working Group earlier.

44. Sir David HUGHES-MORGAN (United Kingdom) suggested that a possible compromise might be to leave the text as it had been proposed by the Rapporteur, with the addition at the end of the paragraph of the sentence: "This last proposal may be discussed by the Committee".

45. Mr. ALDRICH (United States of America), Rapporteur, suggested that a final sentence be inserted in paragraph 16 to read: "A number of delegations may wish to have this last proposal discussed first by the Committee."

46. Mr. GILL (Ireland) said he would prefer the word "will" to the word "may" in the text proposed by the Rapporteur.

Paragraph 16 was adopted as amended.

#### Paragraph 17

47. Mr. LONGVA (Norway) said he would like to have it put on record that one delegation reserved its position concerning the establishment of a Joint Working Group.

Paragraph 17 was adopted.

Mr. Herczegh (Hungary) took the Chair.

#### Paragraphs 13 to 28

48. Mr. BLIX (Sweden) said that in his view the last sentence in paragraph 27, on the question of the continued survival of the civilian population, went too far inasmuch it implied that general agreement had been reached within the Working Group on that point. In fact, several delegations had refrained from expressing an opinion. He suggested the penultimate sentence in paragraph 27 should read "It was the view of several delegations that battlefield damage incidental to conventional warfare would not normally be proscribed by this provision."

49. Mr. ALDRICH (United States of America), Rapporteur, said he felt that the text proposed by the representative of Sweden would carry an impression in contradiction to that which was intended. The provisions on environmental damage were acceptable to most delegations. He was prepared to accept the proposed modification, however, if that was the view of the majority.

50. Mr. GILL (Ireland) said no vote on the question dealt with in paragraph 27 had been taken, but the report did not accurately reflect the discussions within the Working Group. If the implication was that there had been general agreement, that was incorrect.

51. Mr. ALDRICH (United States of America), Rapporteur, suggested as a compromise text that the penultimate sentence should open with the words: "It appeared to be a widely held assumption ...".

Paragraph 27 as amended was adopted.

52. Mr. MENCER (Czechoslovakia) said the first sentence of paragraph 23 did not faithfully reflect the situation. He suggested the deletion of the words "as the issue of restriction on damage to the natural environment" in the first line of the paragraph and their replacement by the words "as the protection of the natural environment ...".

53. Mr. LONGVA (Norway) proposed that, in paragraph 22, the words "which will be discussed in the Working Group in the context of its discussion of article 42 of draft Protocol I" be added after the date "18 March 1975".

Paragraphs 18 to 28, as amended, were adopted.

Paragraphs 29 to 32

Paragraphs 29 to 32 were adopted.

Paragraphs 33 to 36

54. Mr. STARLING (Brazil) said that there should be no mention of the Brazilian proposal (CDDH/III/216) in paragraph 33, since it concerned article 23 of draft Protocol II and, moreover, had not been withdrawn.

55. Mr. ALDRICH (United States of America), Rapporteur, said that paragraph 33 would be corrected accordingly.

Paragraphs 33 to 36, as amended, were adopted.

Paragraphs 37 to 41

56. Mr. BLIX (Sweden) said that the purpose of the third and fourth sentences of paragraph 38 was not clear to his delegation, since they seemed to state the obvious.

57. Mr. ALDRICH (United States of America), Rapporteur, said that he had considered it appropriate to include those sentences, because they did have significance for some delegations.

58. Mr. PASCHE (Switzerland) said he agreed with the view that the sentences were not very clear. If the second of them were deleted, the sense of the paragraph would not be changed in any way.

59. Mr. STARLING (Brazil) said he would like the first of the two sentences to be retained since it had been included at the request of his delegation. He would, however, have no objection to the deletion of the second of them.

60. Mr. ALDRICH (United States of America), Rapporteur, suggested that the text of paragraph 38 be left as it stood.

It was so agreed.

Paragraphs 37 to 41 were adopted.

Paragraphs 42 to 46

Paragraphs 42 to 46 were adopted.

Paragraphs 47 to 60

61. The CHAIRMAN said it would be remembered that changes had been suggested by the Rapporteur to paragraphs 55 and 56.

62. Mr. BLIX (Sweden), referring to the suggestion by the Rapporteur that the words "Most representatives understood that" should be added at the beginning of the fourth sentence of paragraph 55, said that it was not appropriate to refer to a majority or a minority unless a vote had been taken. Not many delegations had expressed their views on the definition concerned and his delegation was among those that did not share the view expressed in the fourth sentence. If an introductory phrase along the lines of that suggested by the Rapporteur were included, it would be necessary to add another sentence which reflected the opposing view. Alternatively, the introductory phrase might be worded along the following lines: "It was the view of several, although not all, delegations that ...".

63. Mr. ALDRICH (United States of America), Rapporteur, said that his intention had been to reflect in the report what had been the predominant view in the Working Group.

64. Mr. CASTREN (Finland) said he agreed with the Swedish representative that the word "most" should not be used, since no vote had been taken. A term such as "a number of", "some" or "several" would be more acceptable.

65. Mr. WOLFE (Canada), supported by Sir David HUGHES-MORGAN (United Kingdom), said that he favoured the use of a phrase such as "The predominant view among those who spoke on the subject was that ...", which would be a purely factual reflection of what had taken place in the Working Group.

66. Mr. FRANKE (Federal Republic of Germany) said that a possible alternative might be: "Among the representatives who commented on the definition, the majority understood that it was not intended ...".

67. Mr. LONGVA (Norway) said that the view of the majority of representatives who had spoken on the subject in the Working Group could not be considered to be the majority view of the Committee as a whole. The text of article 46 was the result of a delicate compromise, and the greatest possible care should be taken to ensure that that compromise was not upset by the way in which the report was worded.

68. Mr. BLIX (Sweden) said that no difficulty arose in cases where there was agreement on the interpretations contained in the report. However, the fourth sentence of paragraph 55 dealt with a point that had given rise to a difference of opinion and one which indeed still prevailed. His delegation must insist that its dissenting view be reflected in the report. He accordingly proposed that the introductory phrase to the sentence in question should read: "Many, but not all, of those who commented were of the view that ...".

69. Mr. ALDRICH (United States of America), Rapporteur, said that the phrase proposed by the Swedish representative was acceptable to him.

The Swedish proposal was adopted.

70. The CHAIRMAN said that, if there were no objection, he would take it that the Committee accepted the change suggested by the Rapporteur to paragraph 56.

It was so agreed.

Paragraphs 47 to 60, as amended, were adopted.

Paragraphs 61 to 70

71. Mr. AGUDO (Spain) said that he wished the name of his delegation to be included in paragraph 68 among the list of co-sponsors of the amendment in document CDDH/III/17/Rev.2.

72. In the Spanish version of the last sentence of paragraph 70, "el artículo 47" should read "el artículo 47 bis".

Paragraphs 61 to 70, as thus amended, were adopted.

Paragraphs 71 to 77

73. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that he was not clear what was meant in the last sentence of paragraph 72 by the phrase "clearly needs further polishing". He felt that that was too categorical in a text which dealt with a general approach. He would like that phrase to be deleted, as the Drafting Committee would deal with such points, whenever necessary.

74. Similarly, he felt that paragraph 74 should end with the words "as such", and the reference to the Drafting Committee should be deleted.

75. Mr. ALDRICH (United States of America), Rapporteur, said he had considered that one of the useful purposes served by the report was to indicate such points to the Drafting Committee. He recognized, of course, that the Drafting Committee must be careful not to undo delicate points of consensus but if it could improve on the text, it should do so. However, if the representative of the Union of Soviet Socialist Republics maintained his proposal, he would delete the two phrases in question.

76. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said he maintained his proposal.

77. Sir David HUGHES-MORGAN (United Kingdom) said he shared the Rapporteur's view that it would be of assistance to the Drafting Committee if such points were indicated. It could do no harm and would make for clearer and easier reading. He suggested respectfully that the representative of the Union of Soviet Socialist Republics might reconsider his proposal.

78. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that he understood the view of the representative of the United Kingdom but wished it to be made clear that such statements were not the view of the Committee as a whole. He therefore suggested inserting a phrase in paragraph 72 such as "several delegations believed" instead of "it was generally recognized".

79. Mr. ALDRICH (United States of America), Rapporteur, said he could accept that suggestion. The beginning of the last sentence in paragraph 72 could therefore read "Nevertheless, several representatives believed the text to be less than fully satisfactory ...", and in paragraph 74 the last sentence could end "and several representatives expressed the hope that the Drafting Committee would ultimately find a clearer form of words".

80. Mr. BLIX (Sweden) referring to paragraph 74, asked what was meant by the words "to clear a field of fire".

81. Mr. ALDRICH (United States of America), Rapporteur, said that the phrase was readily understandable to military staff and meant cutting down a field of crops so as to fire through the area. If a better expression could be found, he would be willing to change the wording.

82. Mr. BLIX (Sweden) suggested the wording "to clear a field for fire".

83. Mr. ALDRICH (United States of America), Rapporteur, said he could accept that suggestion.

Paragraphs 71 to 77, with the amendment to paragraphs 72 and 74, were adopted.

Paragraphs 78 to 83

84. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said he felt that the last sentence of paragraph 81 might be deleted as it could be said that in article 48 bis the health and survival of the civilian population were particularly stressed.

85. Mr. ALDRICH (United States of America), Rapporteur, said that the point about the emphasis on health and the civilian population had been made in paragraph 82, but he thought that there was no doubt that the standard itself was the same as in article 33, paragraph 3. It was important to stress that, although the article was directed towards the protection of the civilian population, the latter was not part of the operative standard of article 33, paragraph 3. The standards were not inconsistent but simply applied to the civilian population in article 48 bis and not in article 33, paragraph 3.

86. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) suggested that, in order to bring out that article 48 bis was not a repetition of article 33, paragraph 3, but a development of that article, the end of paragraph 81 should read "The Committee thus approved here the standard or criteria along the same lines as in article 33, paragraph 3." The last sentence of paragraph 81 should be deleted.

87. Mr. ALDRICH (United States of America), Rapporteur, said that the words "standards and criteria" were identical until they were applied to the civilian population. He suggested that the penultimate sentence of paragraph 81 might read "the Committee thus approved the standard or criteria along the same lines as in article 33, paragraph 3, with the addition of material concerning the civilian population". Paragraph 82 then went on to give details of that material.
88. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that the last sentence of paragraph 81 should then be deleted.
89. Mr. ALDRICH (United States of America), Rapporteur, said that that would be acceptable.
90. Mr. BLIX (Sweden) said that he was concerned about the third sentence in paragraph 82 which referred to "major health problems, such as congenital defects ...". He felt that the wording was too authoritative and raised the level very high. He would be happier if the whole sentence were deleted, but if not he would request that the word "major" be deleted. He had no objection to the last sentence concerning temporary or short-term effects.
91. Mr. ALDRICH (United States of America), Rapporteur, suggested that the word "major" be replaced by "lasting" or "persistent".
92. Mr. BLIX (Sweden) said he was not prepared to accept any of the adjectives suggested before the word "health problems".
93. Mr. FRICAUD-CHAGNAUX (France), supported by Mrs. MANTZOULINOS (Greece) said he was in favour of maintaining the word "major" as it reflected the Committee's discussions.
94. Mr. DIXIT (India) suggested the word "serious".
95. Mr. LONGVA (Norway) said that his delegation was concerned over the whole construction of the sentence. It appeared as an interpretation of the article adopted. His delegation saw no objection to including such interpretations where they were agreeable to the Committee as a whole, but where there had been controversy, the utmost caution should be exercised. He therefore suggested deleting the whole sentence.



96. Mr. BLIX (Sweden) said he agreed with the representative of Norway that differing views must be reflected. He could, however, agree to the suggestion by the representative of India to replace the word "major" by the word "serious".

97. The CHAIRMAN suggested that, if there were no objection to the insertion of the word "serious", the text of paragraph 82 be adopted with that amendment.

Paragraphs 78 to 83, as amended, were adopted.

Paragraphs 84 to 95

98. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that the discussions on paragraph 93 had not centred around weapons in general for armed conflicts but those that could eventually be used. He therefore suggested that the words "the use of" be inserted after the word "Thus" at the beginning of the last sentence in paragraph 93.

It was so agreed.

Paragraphs 84 to 95, as amended, were adopted.

Paragraphs 96 to 100

Paragraphs 96 to 100 were adopted.

Paragraphs 101 to 107

Paragraphs 101 to 107 were adopted.

Paragraph 108

99. The CHAIRMAN said it would be remembered that the Rapporteur had suggested the addition of two new sentences at the end of paragraph 108.

Paragraph 108, as amended, was adopted.

Paragraphs 109 to 112

Paragraphs 109 to 112 were adopted.

Paragraphs 113 to 120

100. Mr. DIXIT (India) suggested that, at the end of paragraph 113, a further sentence be added, reading: "One delegation was of the opinion that article 24, paragraph 1, and article 27 should be discussed again by the Committee and by the Working Group before their final adoption and after the adoption of article 1 of Protocol II."

101. Mr. ALDRICH (United States of America), Rapporteur, said that it might be clearer if it read: "One representative was of the opinion that article 24, paragraph 1, and article 27 should be discussed again before their final adoption in view of the subsequent adoption of article 1 of Protocol II."

102. Mr. BLIX (Sweden) said that "Some delegations considered that ..." would be better than "It seems desirable that ..." at the beginning of paragraph 119.

103. Mr. ALDRICH (United States of America), Rapporteur, said that he preferred the wording "It was pointed out by some delegations ...".

104. Mr. BLIX (Sweden) said he could accept that wording.

105. Mr. BLISHCHENKO (Union of Soviet Socialist Republics), referring to paragraph 116, said he wondered what need there could be to renew the discussion of article 1 when it had already been adopted by Committee I. He suggested that the phrase "of violence" be deleted from the last sentence.

106. Mr. ALDRICH (United States of America), Rapporteur, said that article 1 had been adopted by Committee I only after discussion of article 24, paragraph 1 and article 27 in Committee III. He could accept the deletion of the words "of violence".

107. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that he was somewhat confused by that explanation because it was implied in the first sentence of paragraph 116 that article 1 had been adopted by consensus in Committee I. Why therefore raise the matter again?

108. Mr. ALDRICH (United States of America), Rapporteur, said that it was the wish of the Indian representative that Committee III should record the adoption of article 24, paragraph 2 in the way in which it now appeared in the draft report.

Paragraphs 113 to 120, as amended, were adopted.

Paragraph 121

Paragraph 121 was adopted.

Paragraphs 122 to 130

109. Mr. LONGVA (Norway) proposed that the word "conventional" be substituted for the word "general" at the end of the fourth line of paragraph 124.

110. Mr. DIXIT (India) suggested that instead, the word "general" be deleted.

111. Mr. LONGVA (Norway) maintained that the word "conventional" was more suitable since it left the question of existing international law open.

112. Mr. JOSEPHI (Federal Republic of Germany) preferred the text as it stood, on the grounds that the word "conventional" had no precise meaning.

113. Mr. ALDRICH (United States of America), Rapporteur, agreed with the Norwegian suggestion. The use of the word "general" would suggest that there was very little customary international law with respect to non-international armed conflicts, whereas the word "conventional" left the question open.

114. Mr. EL GHONEMY (Arab Republic of Egypt) supported the Indian representative's proposal that the word "general" should be deleted and that the phrase should simply read "the only international law."

115. Mr. LONGVA (Norway) said that if the word "general" were retained or deleted his delegation would have to oppose the entire paragraph 124 since it did not reflect the discussions within the Working Group or Committee III. He therefore proposed the replacement of the word "general" by "conventional" or the deletion of the whole paragraph.

116. Mr. ALDRICH (United States of America), Rapporteur, said that, whether or not there was a customary body of law for non-international armed conflicts, the position was not prejudiced by the use of the word "conventional" and he urged the representatives of India and Arab Republic of Egypt to accept that word.

Paragraphs 122 to 130, as amended, were adopted.

Paragraphs 131 to 134

117. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that the last sentence of paragraph 133 of the report should be changed. It should be possible to find a more acceptable way of expressing the fact that there was no single opinion.

118. Mr. ALDRICH (United States of America), Rapporteur, suggested two alternative versions for that sentence: either "The Drafting Committee may wish to consider..." or "Several representatives suggested that the Drafting Committee should consider ...".

119. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) thought that the second alternative was a more accurate reflection of the situation.

The second alternative was adopted.

Paragraphs 131 to 134, as amended, were adopted.

Paragraphs 135 to 146

Paragraphs 135 to 146 were adopted.

Paragraphs 147 to 153

120. The CHAIRMAN reminded the Committee that the voting figures given in the third sentence of paragraph 152 had to be changed, since the result of the vote had been 17 in favour and 16 against the proposal in question.

121. Mr. SCHUTTE (Netherlands) said that the text of paragraph 149 was not accurate. He proposed the deletion of the word "non-international" and of the phrase "and a reference to the 'circumstances under which this provision is operative.'" That would bring the report into line with the wording of the Working Group's proposal for paragraph 1 of article 29 (CDDH/III/253), which the Committee had adopted.

122. Mr. ALDRICH (United States of America), Rapporteur, agreed with the Netherlands representative's proposal that paragraph 149 of the report should be amended to end with the words "for reasons relating to that conflict".

Paragraphs 147 to 153, as amended, were adopted.

The report (CDDH/III/286 and Add.1) as a whole, as amended, was adopted by consensus.

123. Mr. REED (United States of America) said that his delegation felt encouraged by the progress achieved in Committee III. Although much work and some important problems had been left for the following year, his delegation considered that the Committee's work thus far represented significant progress towards the development of humanitarian law in armed conflicts, with consequent improvements in the protection afforded to combatants and civilians alike. In connexion with the articles adopted by Committee III, at the current session, his delegation drew attention to the relevance of the statement in the ICRC introduction to draft Protocols I and II that the International Committee of the Red Cross had not included any rules "governing atomic, bacteriological and chemical warfare". His delegation recognized that such problems, which called for urgent action in other forums, were beyond the scope of the Conference. An acceptable rule of law designed to be applicable to the use of weapons of mass destruction would almost certainly provide little or no protection in conventional war. Conversely, rules such as those under consideration at the Conference, being designed for conventional warfare, would not fit into the context of the use of weapons of mass destruction. Such an unavoidable limitation on the scope of the Committee's work should not, however, be understood as derogating in any way from the crucial humanitarian contribution of the Conference.

124. Mr. LONGVA (Norway) said that his delegation's attitude to the voting on the report had been governed by the consideration that the report had been drafted in an unorthodox manner. Several paragraphs gave unusual interpretations of articles adopted by the Committee. As delegations had had only a short time in which to study the report, his delegation would have to reserve its attitude until the text had been studied in greater detail. Moreover, while the interpretations in the report provided useful guidelines for future work on the problems considered, none of them should be considered as being authoritative.

125. Mr. DIXIT (India) wished to place on record the fact that at the first session of the Conference, when the relevant articles of draft Protocol II had been taken up for consideration ad referendum the Indian delegation had not made any comments and had reserved its right to make comments and contributions at a later date, when the scope of draft Protocol II became known in greater detail. At the thirty-seventh meeting of Committee III (CDDH/III/SR.37), when articles 24, paragraph 1, and 25 had been proposed for final approval, the Indian delegation had pointed out that the Committee should reconsider the two articles, since certain delegations, including that of India, had not yet made any comments and had reserved their positions. The particular procedure employed during the thirty-seventh meeting had resulted in certain delegations, including the Indian delegation, being denied the right to participate in discussion of the articles. The right of a delegation to participate in a discussion stood on its own merits and did not depend on whether any amendments had been submitted in relation to a given article. Since the articles in question had been adopted without further discussion after article 1 of draft Protocol II had been adopted, his delegation reserved its position on those articles. It was doing so, not only because it had had no opportunity of participating in the discussion and making its views known, but also because some articles of draft Protocol II had since been amended.

126. Mr. BLISHCHENKO (Union of Soviet Socialist Republics) said that he was sure that he was expressing the opinion of many representatives in stating that Committee III had achieved considerable success in its work in reducing suffering in armed conflicts, in protecting the civilian population and in sharply reducing the dehumanization of conflicts. All those present fully understood that their success had been due to long and involved discussion and was the result of a compromise between the States of different social and political systems which had participated. Moreover, the compromise reached by the Committee would ensure that, despite the evils of war, human rights would have to be respected to the fullest degree possible. Inspired by such hopes, his delegation would like to think that the work of the Committee would proceed along the same lines in future. All those present were united by a common desire to produce a situation where realistic conditions would exist for implementing the two Protocols, for assisting the victims of armed conflicts and civilian populations and for furthering the cause of democracy and social progress.

127. Mr. BLIX (Sweden) agreed with the representative of Norway with regard to the construction of the report and the interpretation it gave of many of the articles. His delegation considered that some of those interpretations did not reflect the discussions in the Working Groups or the plenary Committee but that some of them were useful. Members of the Committee had been given only a very short time to study the interpretations to see what changes they might wish to introduce. What his delegation and others had voted on and agreed to was the text of the articles, but the scrutiny given to the text of the report had been far less comprehensive. He agreed with the representatives of the Union of Soviet Socialist Republics and the United States of America that the Committee had made considerable progress in its consideration of draft Protocols I and II. It was his delegation's hope that the work of the Conference at the third session would be characterized by a similarly constructive spirit.

CLOSURE OF THE SESSION

128. The CHAIRMAN thanked representatives for their co-operation and said that the Committee had completed its work for the current session.

The meeting rose at 6.5 p.m.





SECOND SESSION

(Geneva, 3 February - 18 April 1975)

STATEMENTS CONCERNING

DRAFT PROTOCOL I, ARTICLE 42 - "NEW CATEGORY OF PRISONERS OF WAR"

(ANNEX TO SUMMARY RECORDS CDDH/III/SR. 33 TO 36)

INTRODUCTION

1. This document has been prepared by the Secretariat in pursuance of the requests made by certain delegations during the consideration of draft Protocol I, article 42<sup>1/</sup> "New category of prisoners of war", in Committee III.
2. It reproduces, in a chronological order, the texts of oral statements concerning article 42 made in Committee III at the second session of the Conference (thirty-third to thirty-sixth meetings).
3. This document includes only statements of representatives who have handed in written texts to the Secretariat.

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<sup>1/</sup> See the statement made in Committee III by Mr. Friedrich (Legal Secretary) on 10 April 1975 (CDDH/III/SR.38, para.77).

STATEMENTS MADE AT THE THIRTY-THIRD, THIRTY-FOURTH, THIRTY-FIFTH  
AND THIRTY-SIXTH MEETINGS OF COMMITTEE III CONCERNING  
ARTICLE 42 -- NEW CATEGORY OF PRISONERS OF WAR

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STATEMENT MADE AT THE THIRTY-THIRD MEETING, 19 MARCH 1975,

BY MR. VEUTHEY (INTERNATIONAL COMMITTEE OF THE RED CROSS)

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Original: French

1. Basing itself on the practice followed in contemporary conflicts, the ICRC has considered it essential to include in draft Protocol I a provision extending the categories of combatant entitled to prisoner-of-war status in case of capture. The conditions laid down in Article 4.A (2) of the third Geneva Convention of 1949 no longer afford effective protection to a large number of present-day combatants.
2. The title of article 42 and its text are the results of the work of the Conferences of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, held at Geneva in 1971 and 1972.
3. Article 42 consists of three paragraphs:
  - Paragraph 1 states the conditions to be fulfilled in order to obtain prisoner-of-war status;
  - Paragraph 2 indicates the consequences of the non-observance of the conditions laid down in paragraph 1;
  - Paragraph 3, which was introduced in the form of a note by the ICRC in 1973, has become obsolete as a result of the adoption, by the first session of the Diplomatic Conference, of paragraph 2 of article 1 of draft Protocol I.
4. Paragraph 1 lists certain conditions taken as a general rule from Article 1 of The Hague Regulations of 1907 and Article 4.A (2) of the third Geneva Convention of 1949. However, an attempt has been made to make these conditions more flexible in so far as the work of the Government Experts appears to permit. The ICRC has tried to reach a compromise in that paragraph between the conservative tendency to oppose any change in existing conditions and the contrary tendency which consists of seeking an extreme simplification of those conditions. That equilibrium is certainly very difficult to reach, and it is not for nothing that during the last century it has taken 25 years - from the Brussels Conference of 1874 to the International Peace Conferences at The Hague - to agree on conditions laid down in Article I of The Hague Regulations. It should be pointed out that only the complementary adoption of the Martens clause stating that "in cases not included in the Regulations adopted ... the inhabitants and the belligerents remain under the

protection and the rule of the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience" had enabled what was not yet known as a "consensus" to be reached.

5. It is essential that these conditions should be fulfilled by a resistance movement as a group. Apart from the organized character which the movement should have by definition, the first condition is the link that should exist between the movement and a Party to the conflict. That is in reality the basic condition reflected also in article 42, paragraph 1 (a). It guarantees, in particular, that an international armed conflict is involved and that the movement is under a certain discipline. On the basis of Article 4. A (3) of the third Geneva Convention of 1949, it has been agreed also in the case of resistance movements that the Party to which the movement belongs may be represented by a Government or by an authority not recognized by the adverse Party.

6. The second condition - that members of organized resistance movements should distinguish themselves from the civilian population in military operations - has been made more flexible in two ways: first, it has been agreed that the two conditions laid down in paragraphs 2 and 3 of Article 1 of The Hague Regulations have the same ratio legis: the distinction to be made between members of organized resistance movements and the civilian population, and the fact that it is no longer necessary to know how a fixed distinctive emblem should be worn or whether arms should be carried openly. Second, the obligation for organized resistance movements to distinguish themselves from the civilian population has been limited to military operations.

7. The third condition is that resistance movements must comply with the Geneva Conventions and the present Protocol. The Hague text spoke of "laws and customs of war". It had seemed clearer and more practical to mention only the Geneva Conventions and draft Protocol I, which are, moreover, the essential.

8. Paragraph 2 restricts the consequences which the non-observance of conditions by individual members of resistance movements may have on all the members of the movement. As in the case of regular military forces, individual acts should not deprive all members of prisoner-of-war status. Furthermore, paragraph 2 decides the fate of members of resistance movements who violate the Conventions and the Protocol by seeking to extend the application of Article 85 of the third Geneva Convention of 1949 to the new category of prisoner of war.

9. Lastly, the International Committee of the Red Cross hopes that the wording of article 42 as approved will be such that the largest possible number of captured combatants may benefit from the fundamental humanitarian guarantees of the third Geneva Convention of 1949.

STATEMENT MADE AT THE THIRTY-THIRD MEETING, 19 MARCH 1975,

BY MR. QUACH TONG DUC (REPUBLIC OF VIET-NAM)

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Original: French

1. At the beginning of the first session of this Conference our delegation submitted an amendment (CDDH/III/5 - see document CDDH/56,p.202) in which were specified the new situations in which members of organized resistance movements could be accorded prisoner-of-war status. That amendment reads as follows:

"After the words 'and provided that', delete the words 'such movements fulfil the following conditions' and substitute the following: 'such government or authority is fighting on behalf of a people against a foreign occupying force, the conditions of Article 4 of the Third Convention being applicable in their entirety'."

2. Article 1 of draft Protocol I was amended by Committee I at the first session and the new situations to be covered by the Conventions and the Protocol were laid down. The new conditions are "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination ...". Referring back to our original amendment, we now propose to amend as follows paragraph 1 of article 42 - after "and provided that" add "these movements are engaged in the situations referred to in article 1, paragraph 2, ...". That addition will make article 42 more precise and will have the advantage of avoiding as much as possible difficulties of interpretation which retard the application of humanitarian law.

3. After that necessary clarification, we wish to refer to other conditions which resistance movements must fulfil. The delegation of the Republic of Viet-Nam is of the opinion that the condition mentioned in paragraph 1 (b) of article 42 should be further clarified by adding the open carrying of weapons and the wearing of a fixed distinctive emblem recognizable at a distance, as laid down in Article 4.A (2) of the third Convention.

4. That distinction is necessary for the protection of the civilian population and should serve as a basis for the application of humanitarian law.

5. Under the cover of the foregoing considerations, the delegation of the Republic of Viet-Nam has the honour to propose below an amendment (CDDH/III/5/Rev.1), to replace its original amendment, reading as follows:

Article 42 - New category of prisoners of war

1. In addition to the persons mentioned in article 4 of the third Convention, members of organized resistance movements who have fallen into the hands of the enemy are prisoners of war provided such movements belong to a Party to the conflict, even if that Party is represented by a government or an authority not recognized by the Detaining Power and provided that such movements are engaged in the situations referred to in article 1, paragraph 2, and fulfil the following conditions:

(a) that they are under a command responsible to a Party to the conflict for its subordinates;

(b) that they distinguish themselves from the civilian population in military operations by openly carrying weapons and by wearing a fixed distinctive emblem recognizable at a distance;

(c) that they conduct their military operations in accordance with the Conventions and the present Protocol.

6. If adopted, our amendment will make unnecessary the addition of a third paragraph to article 42 as drafted in the foot-note to that article.



STATEMENT MADE AT THE THIRTY-THIRD MEETING, 19 MARCH 1975,

BY MR. HAMID (PAKISTAN)

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Original: English

1. My delegation considers article 42 of the ICRC draft to be one of the most important articles of draft Protocol I because it deals with a situation that has so far been considered as an internal conflict. Article 1 of draft Protocol I, which has been adopted by Committee I, and which deals with the scope of the present Protocol, has included within its ambit self-determination movements where people are fighting against colonial and alien occupation and against racist régimes. As article 1 deals with this new category of prisoners of war there should be express mention of it in article 42 also. This is important because my delegation makes a clear distinction between freedom fighters who, in the exercise of their right of self-determination are fighting against colonial and alien occupation and against racist régimes and situations where self-determination has already taken place and there is a rebel movement, by a handful of people, against the lawful authority of the State aimed at destroying the territorial integrity of that country. My country supports the granting of prisoner-of-war status in the former situation but in the latter situation we consider that rebels are subject to the municipal law of the State and may be tried for crimes against the State. With this in view my delegation has proposed the amendment contained in document CDDH/III/11 which suggests that paragraph 1 of article 42 should contain a reference to the self-determination movements fighting against colonial and alien rule.

2. My delegation supports the conditions mentioned in paragraph 1 (a), (b) and (c) of article 42 of the ICRC draft. We support the requirements that in order to qualify for protection under Protocol I a self-determination movement must comply with the principles of the law of armed conflicts, that freedom fighters in their operations should show their combatant status openly, that they are organized and that they are under the orders of a commander responsible for his subordinates.

3. In the opinion of my delegation the requirement for organization and internal discipline contained in article 41 of the ICRC draft should form the fourth condition for the self-determination movements to qualify for protection under the present Protocols. With this in view my delegation proposes the insertion of a new sub-paragraph (d) in paragraph 1 of article 42 of draft Protocol I.

4. In conclusion, I should like to state that my delegation will co-operate with other delegations in an endeavour to improve the text of article 42.

STATEMENT MADE AT THE THIRTY-THIRD MEETING, 19 MARCH 1975,

BY MR. NAMON (GHANA)

Original: English

1. The foot-note to article 42 of draft Protocol I asking for the consideration, by this Conference, of the inclusion of the proposed paragraph 3 clearly shows what must have transpired. It looks in itself a compromise solution. It should therefore be dealt with in a spirit of compromise. The amendment proposed by my delegation is the addition of the words "so far as is practicable" (CDDH/III/28) after the words "who comply" in paragraph 3 suggested by the ICRC.
2. I do not think that we can seriously say that the position of liberation movements can be equated with the armed forces of a State, in the proper sense of those words. Yet they are engaged in armed struggles.
3. Article 4 of the third Geneva Convention of 1949 has no provision for those engaged in the liberation struggle, yet experience has shown the need for making such a provision in the draft Protocols.
4. We welcome a provision which establishes that members of liberation movements who fall into the hands of a Detaining Power are accorded prisoner-of-war status. They are not criminals: they are fighting for what they conceive to be right, as all honourable men fight for what they consider right. History is a reasonable guide.
5. Article 42, paragraphs 1 and 2 of the ICRC draft are acceptable to the Ghana delegation, and we ask for the inclusion of proposed paragraph 3. In doing so we are conscious of the fact that it may not be completely practicable for the liberation movements - much as they would wish to do so - to comply with all of the conditions with which resistance movements must comply. We have to take into consideration the nature of the struggle in which they are engaged. We have to consider the conditions under which they operate. We must not lose sight of the circumstances of their struggle.
6. It is in recognition of these considerations that we have proposed the slight modification to the ICRC draft of new paragraph 3. Once liberation movements are organized, so long as they are "subject to an appropriate internal disciplinary system", we feel that they should be able to comply as much as possible, with the conditions laid down in paragraphs 1 and 2.

7. We drew attention earlier to the need for organization and discipline on the part of liberation movements when we introduced our oral amendment to article 41 at the thirtieth meeting (CDDH/III/30).

8. Before I conclude I should like, with the permission of the sponsors of amendment CDDH/III/260, to add the name of my delegation as co-sponsor of that amendment.

STATEMENT MADE AT THE THIRTY-THIRD MEETING, 19 MARCH 1975,

BY MR. ZAFERA (MADAGASCAR)

Original: French

1. At the first session of the Diplomatic Conference the delegation of Madagascar maintained that armed conflicts in which peoples were fighting for self-determination and against colonial and racist slave traders should be considered as international armed conflicts under the Geneva Conventions of 1949, and that the members of national liberation movements who had fallen into the hands of the enemy should be accorded prisoner-of-war status.
2. The international character of wars of national liberation was approved at the first session by Committee I. In order to strengthen the positions it had always defended, the Malagasy delegation has judged it opportune to submit an amendment to article 42. That amendment, which bears the symbol number CDDH/III/73 and appears on page 200 of document CDDH/56, aims at including in the new category of prisoners of war members of organized national liberation movements captured by the adversary.
3. Those who prepared the draft Protocols to the four Geneva Conventions of 1949 have referred in a foot-note to article 42 to a decision which the Diplomatic Conference might take to mention in the Protocol members of movements fighting for self-determination, and that would call for the inclusion of a third paragraph in article 42 (see CDDH/1, p.14). Such a paragraph would appear to have become unnecessary, as stated by the ICRC representative, in view of the decision taken by Committee I in 1974.
4. Our amendment does not differ much from the ICRC draft. The difference appears only as regards the arrangement of the text. Thus, paragraph 2 of the ICRC draft becomes paragraph 3 of our draft and the solution envisaged by the ICRC appears in paragraph 2. On the other hand, our draft does not include the condition mentioned in paragraph 1 (b) of the ICRC draft.
5. The inclusion of members of national liberation movements engaged in armed struggles in which peoples exercise their right to self-determination in the new category of prisoner of war was supported by many delegations at the first session of the Conference, and my delegation expresses the hope that the consideration of the amendment which it has submitted to the Committee will not give rise to any major difficulties.

STATEMENT MADE AT THE THIRTY-THIRD MEETING, 19 MARCH 1975,

BY MR. BIERZANEK (POLAND)

Original: French

1. The amendment to article 42, submitted by the Polish delegation in document CDDH/III/94, aims at clarifying the legal status of members of organized resistance movements and harmonizing it with the fundamental distinctions upon which the law of armed conflicts is based, especially the distinction between combatants and non-combatants.

2. It is well known that the Diplomatic Conference held at Geneva in 1949 assimilated the status of members of organized resistance movements to that of legitimate combatants on a very important point - namely the right to be treated as prisoners of war if they fell into the hands of the adversary. In particular, Article 4 of the third Geneva Convention states that the following are prisoners of war:

"(2) ... and members of other volunteer corps, including those of organized resistance movements ...".

3. The same legal construction is at the basis of article 42 of ICRC draft Protocol I which extends the status of prisoner of war to a new category of persons taking part in hostilities. The text suggested by the ICRC and Article 4 of the third Geneva Convention of 1949 do not give a clear and satisfactory answer to the following question: What are the rights and duties of members of resistance movements and what is their legal status apart from when they are captured by the adverse Party during an armed conflict? Are they or are they not legitimate combatants?

4. The problem is of definite practical importance especially in the case of members of a resistance movement who are citizens of the adverse Party, for example, in territories qualified by law as "an integral part of the metropolis", "overseas province" etc. If a member of a resistance movement or of a national liberation movement enjoys the rights of prisoner of war in times of armed conflict only, the interpretation a contrario may easily lead to the conclusion that when the armed conflict ends (for example, after the defeat of an armed insurrection) the former member of a resistance movement might be prosecuted and punished for offences against the penal laws of the country such as high treason.

5. In our opinion the members of organized resistance movements should have the same rights and the same legal status as other legitimate combatants. In accordance with article 41 of the ICRC draft resistance movements "shall be organized and subject to an appropriate internal disciplinary system. Such disciplinary system shall enforce respect for the present rules and for the other rules of international law applicable in armed conflicts."

6. It is easy to understand that in 1949, at a time when many delegations were far from supporting the idea of recognizing resistance movements as legitimate combatants, members of resistance movements were simply assured, within the framework of work aimed at improving the fate of prisoners of war, of the most important right from the humanitarian point of view - in particular the right to be accorded prisoner-of-war status if they fell into the hands of the enemy. But at present, after more than a quarter of a century, the position of many governments has changed in that connexion, and bearing in mind the new wording of article 1 of draft Protocol I as adopted by Committee I, we consider the time is ripe to accord members of resistance movements and national liberation movements all the rights of legitimate combatants.

STATEMENT MADE AT THE THIRTY-THIRD MEETING, 19 MARCH 1975,

BY MR. ROSAS (FINLAND)

Original: English

1. There is no need to stress in this assembly that article 42 concerning a new category of prisoner of war deals with questions of primary importance. The experience of past and present conflicts has shown the need for a certain enlargement of that privileged category of persons entitled to the status of prisoners of war, and at the same time, to the status of legal combatancy. The four well-known conditions to be fulfilled by irregular forces which are contained in Article 4. A(2) of the third Geneva Convention of 1949 date back to an instrument the centenary of which was held last year, namely the unratified Brussels Declaration of 1874 concerning the Laws and Customs of War, although the forms of warfare which call for a development of Article 4 of the third Convention were not entirely unknown to the drafters of the Brussels Declaration, or Article 1 of The Hague Regulations of 1899 and 1907. It is pointed out that the four conditions contained in these instruments were not regarded as the final word even in 1899 and 1907, as is shown by the Martens clause which, with a specific reference to Articles 1 and 2 of The Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War stated that the inhabitants and belligerents, irrespective of the conditions contained in those Articles, remained under the protection of the principles of the law of nations.

2. In 1949 a considerable step forward was made in that resistance movements operating even in occupied territory were included in the category of privileged combatants, but the four earlier conditions of the Brussels Declaration and The Hague Regulations to be fulfilled by irregular forces were incorporated as such in the third Geneva Convention of 1949. Today there seems to be general agreement that at least some modification of the law is needed, and the ICRC draft before us is a step in that direction in that it amalgamates the second and third conditions of Article 4.A (2) of the third Convention and formulates them as a general condition for resistance movements to distinguish themselves from the civilian population in their military operations.

3. Amendment CDDH/III/95, submitted by Finland to article 42, does not touch upon the three conditions in paragraph 1 proposed by the ICRC but relates to the article's scope of application as outlined in the introductory phrase of that paragraph. In this respect the ICRC draft makes an explicit reference only to resistance movements, whereas Article 4.A (2) of the third Geneva

Convention of 1949 mentions also militias and volunteer corps not forming part of the regular armed forces. The Finnish amendment attempts to include also these forces in the article's field of application. Moreover, as there may be irregular forces which can neither be labelled as militias or as volunteer corps, nor as resistance movements, we have chosen to speak more generally about organized armed units not forming part of the regular armed forces, mentioning resistance movements as an example. The term "irregular forces" has been avoided in our amendment in view of the negative connotations which this term might have.

4. As I mentioned earlier, by the adoption of Article 4.A (2) of the third Geneva Convention in 1949 resistance movements operating in occupied territories were also included in the category of persons entitled to prisoner-of-war status. In order to remove any possible doubts on this point our amendment, in line with the wording of Article 4.A (2) of the third Convention, expressly points out that the armed forces covered by article 42 may operate in or outside their own territory, even if that territory is occupied.

5. The Finnish amendment contained in document CDDH/III/95 is confined to the scope of application of article 42 and is not intended to be a final standpoint on this article as a whole. There are several other amendments to this article which my delegation has studied with a great deal of interest, and we wish to come back to those amendments during the general debate.



STATEMENT MADE AT THE THIRTY-THIRD MEETING, 19 MARCH 1975,

BY MR. AGUDO (SPAIN)

Original: Spanish

1. The amendment submitted by my delegation in document CDDH/III/209, aside from drafting amendments, presents three basic differences which we shall discuss in the order in which they appear in our text.
2. The first consists of the introduction of a condition which we consider indispensable and which should be fulfilled by the organized resistance movements mentioned in paragraph 1 of our text, namely "provided they exercise effective territorial jurisdiction ...". Why do we introduce this condition? Because, at present, article 1 of draft Protocol I is no longer the article drafted by the ICRC which served as a basis for the whole of draft Protocol I.
3. Article 1, paragraph 2, adopted by consensus states:  
"The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."
4. In drafting article 42 the ICRC envisaged a more limited scope for draft Protocol I, such as that mentioned in Article 2 common to the Geneva Conventions of 1949 which refers to "cases of declared war or any 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." It also applies to all cases of partial or total occupation of the territory of a High Contracting Party.
5. What does this mean? It means that organized resistance movements or the Governments or authorities on which they depend and which are mentioned in this article are linked to a High Contracting Party so far as the application of article 42 is concerned, and therefore they exercise effective territorial jurisdiction.
6. The new field of application is infinitely wider, since it also covers peoples fighting against colonial and foreign occupation and against racist régimes in the exercise of their right to self-determination.

7. But when do we have to consider that one of these peoples fighting in any one of these conflicts has obtained international recognition in order that this struggle may be regarded as a conflict to which the provisions of draft Protocol I not of draft Protocol II apply? We believe that it is when the movement can prove that it exercises effective territorial jurisdiction because, if the consideration of territory is not taken into account, we eliminate this territorial base which doubtless exists in conflicts envisaged by draft Protocol I.

8. The second basic difference as regards article 42 is the requirement mentioned in paragraph 1 (b) that members of resistance movements must distinguish themselves from the civilian population by means of fixed, permanent and clearly visible emblems.

9. The ICRC draft proposes the widening of the category of persons who, although not members of the armed forces, may enjoy prisoner-of-war status.

10. We point out the following:

(1) The combatant described in article 42 is already covered by paragraph (1) of Article 4.A of the third Geneva Convention of 1949. The effort made to create an entirely new category has not overcome the difficulty of avoiding a typical characterization both as regards the movements and the combatant, which appears already in Article 4 mentioned above. The distinctive signs or features mentioned in article 42 are almost the same as those mentioned in Article 4.

(2) Article 42 would be unnecessary if it was not for the fact that in drafting it the category of combatant taking part in wars of liberation was taken into account and in enunciating the characteristics it did two things:

- (a) The requirement for weapons to be carried openly has been omitted, and
- (b) The requirement for a combatant to distinguish himself from the civilian population has been limited to military operations.

11. Thus a confused situation is created between combatants and the civilian population with serious consequences for the latter.

12. It is argued in the ICRC Commentary that the condition of being visible during fighting is sufficient and that a member of the armed forces may dress as a civilian if he is demobilized or if he is on leave, forgetting that a member of an organized resistance movement, as that name indicates, is permanently in action and that

if his status as combatant is concealed when he is no longer taking part in what is strictly a military occupation, not only is the protection of the civilian population reduced, because of the doubt to which such action gives rise, but such concealment becomes perfidy.

13. Given the fact that the ultimate aim of the Protocol is the protection of the civilian population and in addition the prohibition of perfidy, one cannot omit the requirement of fixed, permanent and clearly visible emblems, clearly drafted as in the Spanish amendment, although in retaining it one might omit the requirement of carrying arms openly.

14. The third and last difference is the change made in the last line of paragraph 1 introducing the phrase "and their members ...". This clarifies the distinction between the characteristics of the movement as a participant in the conflict and of combatants as members of the movement. Of all the characteristic signs or features one only is general - the one which for reasons of unified drafting is mentioned here first - the requirement that the movement must be under a responsible command. The remainder - paragraphs 1 (b) and (c) - merely indicate the legal status of the combatant.

STATEMENT MADE AT THE THIRTY-THIRD MEETING, 19 MARCH 1975,

BY MR. NGUYEN VAN HUONG (DEMOCRATIC REPUBLIC OF VIET-NAM)

Original: French

1. In our amendment (CDDH/III/253) we proposed that article 42 should be redrafted. After having studied the amendments submitted by other delegations, we suggest that paragraphs 1 and 2 of the ICRC draft should be retained and that a new paragraph 3, worded as follows, should be added:

All combatants of liberation movements in the armed conflicts referred to in the new article 1, paragraph 2, provided that those movements fulfil the conditions set out in paragraph 1 (a) and (c), shall, if captured, have the status of prisoners of war throughout the period of their detention. Individual members of such movements shall also be subject to the provisions of paragraph 2."

2. We shall submit this new text to the Secretariat in order that it may be circulated to the Working Group.

3. Thus, in our opinion, the new category of prisoner of war would include two categories: The first would include members of organized resistance movements as defined in article 42 of ICRC draft Protocol I. The second would include all members of movements of peoples fighting for the right to self-determination such as are envisaged in the new article 1, paragraph 2, of draft Protocol I.

4. The sole difference between those two categories would be as follows: The first category would have to fulfil the condition of "visibility", that is to say "to distinguish themselves from the civilian population in military operations" according to the terms of paragraph 1 (b) of article 42 of the ICRC draft, while the second category would be exempt from that requirement.

5. Our amendment is based on concrete historical considerations, on material need and on practical considerations.

6. First, as regards the historical facts in the evolution of war situations: the commentary on article 42 of the ICRC draft when referring to Article 4. A (2) of the third Geneva Convention of 1949 and to Article 1, paragraphs 2 and 3 of The Hague Regulations of 1907, gave the following reasons for the condition "visibility": "What is essential in both conditions is the distinction between combatant and civilian, and this for two reasons: to protect the civilian population from attack and to ensure fairness in fighting."

7. We understand that the condition of "visibility" (which according to the ICRC commentary may be regarded as meaning the carrying of arms openly and the wearing of a distinctive emblem, uniform, or part of a uniform etc. ...) is justified in the war situations envisaged in The Hague Regulations of 1907 and the third Geneva Convention of 1949, which have three essential characteristics: first, the two parties at war are industrialized countries of Europe at about the same level of economic and military development; second, these countries can retaliate on the enemy's territory; third, in the case of conventional war, the activities of armies such as "militias or volunteer corps", according to the terms used in The Hague Regulation of 1907 and the third Geneva Convention of 1949 - "organized resistance movements belonging to a party to the conflict" - all such activities are completely distinct from the life of the civilian population. These three characteristics of war situations which we would call conventional, are intrinsically linked together and determine among other things the rationality of the condition of visibility in question in paragraph 1 (b) of article 42 of the ICRC draft Protocol.

8. But, at the present time, especially since the adoption of the 1949 Conventions, in the neo-colonial wars of the imperialist aggressors against the poor and ill-armed people of parts of Asia, Africa and Latin America who are fighting for their right to self-determination, other characteristics appear.

9. International humanitarian law additional to the Geneva Conventions of 1949 should be conscious that the question concerns combatants of the ill-armed and aggressed party who must use all their bravery and intelligence in the place of weapons in order at least to escape or to defend themselves, or to hold in check the fire-power of the adversary equipped with the most modern and most cruel means of combat, and who, in addition, does not fear the law of retaliation against his own territory and his own civilian population.

10. In these new unequal war situations, to demand similar conditions to those of equal war situations of which we spoke earlier, would manifestly result in injustice in the case of ill-armed and weak peoples who are attacked on their own territory.

11. Indeed, if the condition of the visibility of combatants is insisted upon in order to "protect the civilian population against attacks", what will happen? As regards the combatants of national liberation movements their poverty prevents the wearing of a uniform or of part of a uniform. The armies of national liberation movements will have to wait during years of fighting in order to set up regular armed forces, regional armies, people's militia and guerrilla forces. Even regular armed forces do not always have all that they need in the way of weapons and uniforms.

12. But the important matter that arises here in completely different situations is the question of distinguishing between the combatant of a national liberation movement and the civilian population. In the case of the imperialist aggressor it may be said that it is a rule in all neo-colonialist wars in Asia, Africa and Latin America that the condition known as "visibility" of combatants of national liberation movements has always been an excuse for reprisals against the civilian population. At the 1971 and 1972 Conferences of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, many representatives of African countries so stated. We can fully testify for Viet-Nam. We merely point to a statement recently made by Lieutenant William Calley, sentenced in 1971, under pressure of American public opinion, for having killed at least 22 Vietnamese civilians at My Lai in 1968. Set free last year he explained to students of the University of Kentucky that: "My mission was to kill human beings ... I was sent to Viet-Nam to destroy Communism. The first Communist I killed was a woman. She was unarmed. I then realized that Communists had a human form and that shocked me ..." (Extract from "Le Monde" of 9-10 March 1975). Does the condition of "visibility" thus protect the civilian population against attacks? And further, does it ensure loyalty in combat?

13. As regards the national liberation armies, from the intrinsic original fact that they are the armies of weak and ill-armed peoples fighting against a powerful and heavily armed enemy their activities and their lives are inseparable from the civilian population. That is the new law of the people's war. It is an historical material necessity of national liberation wars.

14. All the world knows that in guerrilla warfare a combatant must operate under the cover of night in order not to be a target for the modern weapons of the adversary. In such circumstances, does the spirit of humanity compel them to wear emblems or uniforms in order to "distinguish themselves from the civilian population" in military operations? To do so would expose the combatant to the infernal fire-power of the imperialist aggressors who monopolize modern weapon techniques, and to sacrifice man to the war machine. It would be the opposite of humanity. And the one practical result reached would serve the counter-guerrilla tactics of the imperialist aggressors.

15. In our opinion, the need to distinguish between the combatant of an army of national liberation and the civilian population is a basic principle of international humanitarian law applicable in such conflicts. Bearing in mind the historical, material and practical conditions of these wars, the fact of belonging to a military organization or to a responsible command would suffice as a distinguishing condition between the combatant and the civilian in military operations.

16. We would be glad if other delegations could find other distinguishing criteria applicable in the special conditions of contemporary wars of national liberation.

17. In amendment CDDH/III/254 and Corr.1, proposing the addition of an article 42 bis, our delegation has based itself on the tragic experiences of our people in their struggle against the imperialist aggressor and his puppets, in order to formulate new prohibitions with which the Detaining Power should conform vis-à-vis prisoners of war who have fallen into its hands.

18. We emphasize, in particular, four types of action that are clearly of the nature of reprisals as regards combatants belonging to the Provisional Revolutionary Government who dare to fight for independence and the freedom of their country. The concept at the basis of such actions has been acknowledged by GI Peter Martinsen who states that: "We have the power of life or death over our prisoners" (statement reproduced in the Bertrand Russell Tribunal, vol. II, page 84).

19. The first type of reprisal is the detention of prisoners of war in penal establishments each of which has its torture chamber - the celebrated "tiger cages" - the existence of which was revealed in July 1970 by two members of the United States Congress upon their return from visiting Poulo Condor. These establishments are built and maintained at the cost of millions of dollars to the imperialist aggressor. "Advisers" are specially attached to these establishments in order to supervise the work of these puppets. The island of Poulo Condor in which 10,000 prisoners of war and political prisoners are imprisoned, possesses rows of sixty "tiger cages", the island of Phu Quoc has 25,000. Each "tiger cage" is 3 metres long by 1 metre 50 wide by 2 metres high. At least five prisoners are shut up in each and attached in prone positions day and night. At prison number P.42, which is situated in the Botanical Garden of Saigon, dungeons have been built communicating directly with cages in which live tigers are kept. The roars of the latter grate on the nerves of the prisoners of war who cannot sleep and, when it is found necessary, the communicating door between the dungeons and the tigers' cage is opened. The prisoners of war then become the victims of the wild beasts, which has the effect of threatening other prisoners with the same fate if they continue to oppose their gaolers. These facts are described in the "Journal Saigon-Mai" of 12 November 1963. Further, two doctors of medicine belonging to the ICRC who visited the prison of Can Tho saw four rows of "tiger cages" constructed to contain 300 persons. These cages contain up to 1,300 persons and sometimes even up to 2,300 persons. The two doctors had tried to stay in the "tiger cages" but could remain only 30 minutes, after which they were compelled to come out because of lack of air. There are no large prisons without such cages - "dog cages" and "iron cages" at the military prison of Nha Trang, "bread ovens" or "tiger cages" constructed of barbed wire in the prison of Cay Dua (Phu Quoc) etc.

20. Second type of reprisal: repression by force of arms. In these penal establishments efforts are made systematically to degrade the human being: a suffocating stench and an unbearable heat pervade the place. Food, health care, clothing and medical care leave much to be desired. Prisoners of war therefore protest. These peaceful protests are met with ferocious repressive acts by automatic weapons, the most typical of which occurred in 1972 on the island of C   Dua when many hundreds of prisoners of war were either killed or severely wounded although they were empty-handed and separated from their jailers by barbed wire.

21. Third type of reprisal: Falsification of records in order to turn prisoners of war into prisoners under ordinary law. This practice, which is common in the zone controlled by the puppets, enables them to circumvent the provisions of the third Geneva Convention of 1949 both at the time of the detention of these prisoners of war and when they are handed over to the Provisional Revolutionary Government of South Viet-Nam. Many international organizations of lawyers have protested against this monstrous falsification of records, card indexes etc., especially in connexion with the implementation of the Paris Agreement on ending the war and restoring peace in Viet-Nam.

22. Fourth type of reprisal: This is the obligation for prisoners of war to attend courses described as "anti-Communist re-education courses", it is the obligation to salute the flag of the adversary, which is effected by the daily use of physical and moral constraints. They wish, whatever the cost, to compel prisoners of war to renounce their political convictions and their love for their country.

23. We have briefly described four types of reprisal to which our enemies resort in the hope of physically and morally breaking prisoners of war. Such acts should be the subject of explicit prohibitions.

24. Our amendment CDDH/III/254 and Corr.1 on the protection of prisoners of war, which we are submitting to the Committee, is intended to fill that gap. We hope that other delegations will co-operate with our delegation in perfecting the wording.

25. We have submitted a draft article 42 ter worded as follows:

"Article 42 ter. - Persons not entitled to prisoner-of-war status

1. Persons taken in flagrante delicto when committing crimes against peace or crimes against humanity, as well as persons prosecuted and sentenced for any such crimes, shall not be entitled to prisoner-of-war status.



2. Nevertheless, the persons mentioned in the foregoing paragraph shall be treated humanely during their detention, shall not be subjected to any attempt on their lives or on their corporal integrity and dignity, shall be fed and housed in average conditions of comfort for nationals of the detaining Party, and shall receive treatment in case of sickness or wounds. Should they be guilty of a serious offence against the law during their detention, their right to legal defence shall be guaranteed and they shall be entitled to a fair and proper trial."

26. Our Government arrived at this proposal after realizing the unjust state of affairs that existed during our resistance to the United States war of destruction by air and land. United States pilots taken in flagrante delicto are at once protected by the 200 or so articles of the third Geneva Convention of 1949. They are immediately looked after and given shelter under material living conditions equal to those enjoyed by our ministers while at the same time the Vietnamese citizens who are victims of the bombs just dropped by these same war criminals are still weeping over the bodies of their dead parents and children and over their burning houses. Also, if one considers that it is the work of these very victims which will and must contribute to the high standard of living assured by the third Geneva Convention for the authors of their unhappiness, one's feeling of justice is revolted. 1/

27. It is just that there should be equality of humanitarian treatment between war criminals themselves and those belonging to the adverse Parties, and between the war victims themselves and those belonging to the adverse Party. But justice demands that there should not be equality of treatment between war criminals and their victims. This is so because of the commonsense of mankind. The true spirit of humanity should be based on justice, and justice demands that a clear distinction be made between what is human and what is inhuman, between the criminal and his victim.

28. It is for that reason that we propose in article 42 ter that two categories of combatant should not have the right to prisoner-of-war status - they are first, persons taken in flagrante delicto when committing crimes against peace and against humanity. Second, persons prosecuted and sentenced for any such crime. This proposal is wholly in accordance with the principles laid down by the Nurnberg International Military Tribunal which our Government and many other Governments adopted when they entered a reservation to Article 85 of the third Geneva Convention of 1949 at the time they acceded to that Convention. We are not yet dealing here with serious contraventions of the Geneva Conventions.

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1/ Paragraph 26 includes Corr. 1 (CDDH/III/SR. 33-36, Annex)

29. These persons must continue to be treated humanely during their detention, that is to say they must not be subjected to any attempt on their lives or on their corporal integrity and dignity, they shall be fed and housed in average conditions of comfort for nationals of the Detaining Party, and shall receive treatment in case of sickness or injuries. It should immediately be emphasized here that the distinction between the maximum and the minimum rights and duties of humanity applied to prisoners of war and to those who may not enjoy that status, can be considered perhaps as matter of positive law since the adoption of the 1949 Geneva Conventions, common Article 3 of which lays down an irreducible minimum of principles governing humanitarian treatment.

30. The humanitarian provisions in the four Conventions place war criminals and their victims on an equal level and, what is more, in certain cases they grant the guilty more privileged treatment than their victims. This will result in encouraging war criminals, an unexpected result which the law of Geneva has not envisaged, but this inconsistency has not failed to be prejudicial to the strict application of the Conventions regarding which there is a widely held opinion that they are made to be violated.

31. That is why we think it is time to remedy this state of affairs as much as possible.

STATEMENT MADE AT THE THIRTY-THIRD MEETING, 19 MARCH 1975

BY MR. SCHUTTE (NETHERLANDS)

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Original: English

1. Like other delegations, we see article 42 as closely related to other articles of draft Protocol I. In fact the tenor of each of articles 41, 42, 42 bis and 65 cannot be well understood without taking into account their mutual connexion. The structure of the body of law contained in these articles is clear and sound. It sets out in what circumstances or conditions irregular fighters shall, when captured, be accorded prisoner-of-war status and, if not, to what general humanitarian protection they are entitled. From the fact that the Netherlands delegation has sponsored or co-sponsored amendments or initiatives with regard to articles 42, 42 bis and 65 our keen interest in the subject may be derived.

2. To start the introduction of amendment CDDH/III/256, I should first point out, that its wording is based upon the assumption that an article like article 42 bis, proposed in amendment CDDH/III/260, will ultimately be adopted, containing provisions now set out in paragraphs 1 and 2 of that proposed article i.e., the prescription that in case of doubt the final status to which a captive is entitled is to be determined by a competent tribunal, and the provision indicating in what circumstances individual infringements of the rules of international law applicable in armed conflict do not result in the forfeiture of prisoner-of-war status. From the introduction of our amendment it will become clear that the philosophy behind it has much in common, or is probably the same as the philosophy behind other amendments, in particular those contained in documents CDDH/III/95 and CDDH/III/257.

3. As in the last-mentioned amendment, we use the term "irregular forces" instead of "organized resistance movements". The term, which might need formal definition in article 2, is broader than the terms used by the ICRC and absolutely neutral. We understand it to mean organized armed units not belonging to the regular forces of a Party to the conflict. Thus we do not exclude the fact that in a guerrilla type of warfare, for instance in a war of national liberation, the liberation movement disposes of both regular and irregular forces. Members of their regular forces are covered by Article 4. A(1) of the third Geneva Convention of 1949, while members of their irregular forces are covered by the articles now under consideration.

4. The main question with regard to article 42 is what are the constitutive elements for entitlement to prisoner-of-war status by irregular fighters? These constitutive elements in our view are three:

(1) the fact of belonging to an organization. The individual, fighting his own private war, cannot be taken into consideration;

(2) the fact that such an organization has an internal disciplinary system, capable of enforcing respect for the rules and principles of international law applicable in armed conflicts. This requirement is set out in article 41, and

(3) the fact that military operations are carried out while the irregular fighter distinguishes himself from the civilian population. This requirement in our view relates to both the general policy of an irregular force and to the actual conduct of its individual members.

5. The constitutive elements to entitlement to prisoner-of-war status being thus established, the next question immediately arises. How does one prove that one or more of these criteria have or have not been lived up to? It is here that the ICRC draft, as well as many amendments thereto, leave us somewhat in the dark. It is exactly on this point that our amendment tries to improve the draft. We immediately recognize that we would be ill-advised if we tried to set up rules of evidence with regard to the question how to prove that one belongs to an organization. There are several possibilities, varying from just asserting so to showing identity cards as the particular distinctive sign adopted by the irregular force. In these cases the captive should always have the benefit of the doubt, as set out in the first paragraph of proposed article 42 bis (CDDH/III/260), until this status is finally fixed by a competent tribunal. Such tribunals should be able to develop certain standards, even if these are primarily related to the actual circumstances and features of the particular armed conflict. It is also conceivable that members of irregular forces, after being captured, simply refuse to admit their membership of that force so as not to betray its organization. Such persons, however, thereby have chosen not to claim prisoner-of-war status and have accepted the consequences.

6. The question how the second constitutive element is proved, that is, how one can prove that a certain given irregular force is organized with an internal disciplinary system, and that the rules and principles of the law of armed conflict are generally respected and lived up to - that question cannot remain unanswered. Too easily evidence to the contrary might be concluded by following an inductive reasoning, that since some members of the force - how

many - two, five, twenty - have violated one or more rules of international law applicable in armed conflict. This can be attributed to the whole irregular force as its general policy, even if one has no idea about the actual size of the force.

7. Our amendment wishes to exclude such a kind of reasoning. Like the individuals under the first criterion, the group as a whole should have under the second criterion - which in our amendment is set out in paragraph 1 (a) - the benefit of the doubt that it conducts its military operations in accordance with the rules and principles of international humanitarian law and the law of armed conflict. If it is doubtful whether an irregular force as such has violated these rules and principles, one has recourse to certain presumptions. The only presumptions which, in our opinion could be taken as valid in such a case, are set out in paragraph 2 of our amendment, namely that it has become clear from declarations or instructions emanating from the responsible command of the irregular force or from declarations of its members, that the force is not willing or able to respect in its operations the rules and principles of international law applicable in armed conflict. The actual behaviour of some of its members could thus never serve as a presumption to that effect. The question of how to prove the absence of the last constitutive element, that is whether a member of the irregular force has distinguished himself from the civilian population during military operations in a clear and unmistakable way, is fairly easy to answer. That is a matter of fact, physically observable. The only point of doubt may lay in the question whether the distinction was sufficiently effective, and here, again, the standard may vary from conflict to conflict.

8. I will not conclude my intervention without a final remark with respect to the requirement that a distinction between civilians and combatants shall always be made. It is this sole principle of the law of armed conflict, the individual infringement of which must lead to the forfeiture of any claim to prisoner-of-war status. All other individual infringements are dealt with in paragraph 2 of proposed article 42 bis. The fundamental issue can be reduced to the very simple question whether by distinguishing oneself from the civilian population one is prepared to take the risk of being recognized as a legitimate military objective, and so being the first to be shot at, or whether one is not prepared to take that risk and wishes to reserve the opportunity to be the first to shoot, under cover of the protection of a civilian under article 45, and, in particular, paragraph 4 thereof. The preparedness to take the risk implies that the person concerned deserves prisoner-of-war status. That does not, of course, mean that those irregular fighters who have not distinguished themselves and are captured, should be deprived of humanitarian treatment: on the contrary they, too, have the right to humanitarian protection and to the recognition of their

inalienable human rights. That is what Section III of Part III of the fourth Geneva Convention of 1949 is about, and that is what articles 42 bis and 65 are about. The persons concerned may not be subjected to violence, torture, degrading treatment, medical experiments nor may they be tried without due process.

9. Of course, it is true that civilians, in contra-distinction to prisoners of war, can be tried for the simple reason that they have taken up arms and taken part in hostilities, even without having committed any war crime. But those who for that reason wish to accord prisoner-of-war status to as many people as possible, seem to forget that these people being prisoners of war, even if they have not committed any war crimes, will probably be tried for the simple reason that they belong to an irregular or subversive organization. That might at least be the case with members of resistance movements in occupied territory.

10. I do not think that it is our task to encourage the idea that prisoners of war should be subjected to mass trials, although that might be implicit in the proposals to grant that status also to irregular fighters who have not distinguished themselves from civilians. Mass trials of prisoners of war have never been popular and I venture even to say that they are dangerous, since it is hard to imagine that such trials will not one way or another have repercussions on the treatment of prisoners of war, even captured members of the regular armed forces, in the hands of the adverse Party. Such a result would be completely counter-productive.

STATEMENT MADE AT THE THIRTY-THIRD MEETING, 19 MARCH 1975,

BY MR. REED (UNITED STATES OF AMERICA)

Original: English

1. On behalf of ourselves and our co-sponsor I should like to say a few words of explanation about our proposed text for article 42 - new category of prisoners of war contained in amendment CDDH/III/257. It is our intention, and indeed we believe the intention of the ICRC, to recognize the realities of modern warfare, and take into account the various categories of people who have fought in the conflicts which have been experienced in recent years. In so doing, we have broadened the availability of prisoner-of-war status to a much larger group. Further, we believe that group can be properly referred to as "irregular forces". In structuring our proposed substitute article we have followed the same order and format as the ICRC, but we have attempted to simplify the language in certain instances and to clarify it in others.
2. In the introductory portion of paragraph 1 we have substituted the term "irregular forces" for the term "organized resistance movements". In our view, the armed forces of a party to the conflict are made up of its regular military establishment including its established reserve forces and militia and its irregular forces. We believe the term "irregular forces" is a more representative term and includes all types of combatants or lawful belligerents that are not included in the regular armed forces of a Party to the conflict. In referring to a Party to the conflict, article 1 of draft Protocol I, as adopted by Committee I at the first session would, of course, result in including as Parties to the conflict - "liberation movements" in the situation covered by that article. The remaining part of the introductory portion of paragraph 1 is the same as the ICRC draft.
3. The conditions to be fulfilled by the irregular forces mentioned in paragraph 1 (in that regard I am referring to the forces as a collective or corporate body and not the individual members), in order for its individual members to be entitled to prisoner-of-war status on their capture, are essentially the same as the ICRC. However, I believe our changes are worthy of specific mention.
4. Regarding paragraph 1 (a), the use of the broader term "irregular forces" required that we add to this sub-paragraph the condition that the forces be "organized". If the more narrow term "organized resistance movements", as used by the ICRC were retained, the separate explicit requirement for organization would not be

necessary. We also prefer the requirement for the forces to be linked to a Party to the conflict through or under responsible authority, to be couched in terms of being commanded by a person. We recognize that irregular forces may not always be organized in the same way as the regular forces. However, it is our view that in all cases, there will be a commander of these irregular forces who is responsible for the conduct of his forces. He may not be at the lowest echelon. Indeed, he may be at an intermediate or even higher level in the over-all organization of the forces. But, it is our view that he will in all cases exist, and accordingly we prefer mentioning the responsibility of the commander rather than the somewhat imprecise and perhaps amorphous body called "a command".

5. Regarding paragraph 1 (b) - we fully concur with the ICRC and could support their language. We did believe it was appropriate to include in the text of the sub-paragraph some of the illustrative examples which the ICRC has in its Commentary, such as, carrying arms openly, or a distinctive sign, or any other effective means. This is a relaxation of the conditions required for lawful belligerent status contained in Article 1 of The Hague Regulations and the requirement for prisoner-of-war status in Article 4.A (2) (b) and (c) of the third Geneva Convention of 1949, and we believe properly so. The single important issue is that combatants be distinguished from civilians - how it is done is not so important as the fact that it is done.

6. Paragraph 1 (c) of the ICRC text only requires the irregular force to comply with the 1949 Geneva Conventions and Protocol I. In our view there is no need to be so limiting, even though we hope that much of the existing international law of war will be included in this Protocol. It is our view that it is not too great a burden to require that a Party to the conflict - all parties to a conflict - to inform their forces, all their forces, including irregular forces, of the obligation of those forces to abide by all international law applicable in armed conflict and indeed require such compliance. To do otherwise invites disregard of certain laws, and something less than an attitude of respect and compulsion to comply with other parts of the law. Accordingly, we would rephrase the ICRC text as follows:

"That they conduct their military operations in accordance with the Conventions and the present Protocol, as well as in accordance with other rules of international law applicable in armed conflict".

7. Regarding paragraph 2 - in our view the first sentence of paragraph 2 of the ICRC text is clear and we have virtually adopted it as our separate paragraph 2. We have, however, since we are talking about the continued entitlement of members of the collective or corporate group, repeated the requirement for the force as a



group to comply with the conditions in paragraph 1. The second sentence of paragraph 2 of the ICRC text is less clear on what we believe to be a crucial point. That point is whether an individual member of an irregular force is entitled to be a prisoner of war upon capture, if he individually violates either paragraph 1 (b) or paragraph 1 (c). In our view this issue must be squarely faced and we have done so in paragraph 3 of our proposal. Very simply, we say that an individual, who is a member of an irregular force listed in paragraph 1, or is listed in Article 4 of the third Geneva Convention of 1949, who commits a war crime or other violation of international law applicable in armed conflict, shall not forfeit his entitlement to be a prisoner of war - that is with only one exception. That single exception is the requirement that individuals distinguish themselves from civilians and the civilian population in their military operations. This requirement that they distinguish themselves from civilians is so fundamental to the purposes of Protocol I - so essential, if we are to give meaning to the protected status that we have conferred on civilians - so basic in lending credibility to article 45, paragraph 4, (which provides that in case of doubt an adversary must consider the doubt in favour of civilian status) and also article 46 (which not only provides that civilians shall never be attacked but also that they shall enjoy a general protection against the dangers of military operations), for all of these reasons, it is vital that Protocol I deny a privileged status to combatants who violate the requirement that they must in some manner distinguish themselves from civilians in their military operations. In so advocating, we in no way suggest that combatants who do not comply with paragraph 1 (b), should be treated summarily or be denied any of the judicial safeguards considered essential for fundamental fairness and justice, and I shall come back to that point in just a moment. First, I should like to say that lawful combatants cannot be punished for acts of violence against military objectives of the adversary. Unlawful combatants do not enjoy such immunity. In our view, a combatant who deliberately fails to distinguish himself from other civilians while engaging in combat operations has committed such an extraordinary violation of the laws of war and so prejudices the protection for civilians that he loses his entitlement to be a prisoner of war, and, along with it, any immunity from punishment he may have had for acts of violence against the adversary. The desire and urgency to protect the civilians is no different today than it was in 1907 - or 1949 - and the lives of civilians are no less important to-day than they were then.

8. Initially, we had intended to include an additional paragraph in article 42 which would provide that in case of doubt, that doubt will be determined by a competent tribunal, and pending such determination, the captive would receive prisoner-of-war treatment. Further, if it was determined that the captive was not entitled to

be a prisoner of war, he would in any case be safeguarded by the fourth Geneva Convention of 1949 and article 65 of Protocol I. I would note here that there have been amendments to article 65 which further enhance these safeguards. However, we have withdrawn that proposal in favour of article 42 bis which is more detailed and comprehensive in accomplishing the same purpose. It is our conviction that article 42 bis, which will be introduced later, is completely compatible with our proposed article 42, provides it with the proper balance, and also assures increased safeguards for persons who are not entitled to prisoner-of-war status. Finally, it is our view that this provision provides rights and obligations and protection for individual members of irregular forces essentially on the same basis, and to the same extent, as are available to individual members of regular forces.

STATEMENT MADE AT THE THIRTY-THIRD MEETING, 19 MARCH 1975,  
BY MISS ORTIGOZA (ARGENTINA)

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Original: Spanish

1. The amendment submitted by the Argentine delegation (CDDH/III/258) is designed to adapt the text of article 42 to the new article 1 of draft Protocol I which, as a result of the amendment submitted by the Argentine delegation in 1974 and supported by other delegations, was approved at a meeting which took place that year.
2. In the opinion of her delegation article 42 as at present drafted would be compatible with the other provisions of draft Protocol I and of the 1949 Geneva Conventions, particularly the third Convention, if the previous text of article 1 had been retained in the framework of international conflicts which did not include wars of liberation, the struggle against foreign occupation and racial conflicts.
3. It is thus difficult to conceive the possibility of other international conflicts in which a Party does not recognize implicitly or explicitly that the other Party has the necessary legal capacity to be a participant in an international conflict.
4. My delegation's proposal would also supplement the provisions of Article 4.A (3) of the third Geneva Convention of 1949 which deals only with regular armed forces.
5. This is absolutely logical since at the time the Geneva Conventions were drawn up in August 1949, liberation movements had not taken part in such conflicts.
6. In the present state of international affairs only in the case of wars of colonial liberation and foreign occupation or racial segregation can it be supposed that the adverse Party to the conflict, that is to say the colonial or occupying Power, or a Power which practises a policy of racial discrimination, will not recognize the Government or the authority responsible for the organized movements taking part in such conflicts.
7. Our delegation considers that the conditions to be fulfilled by such movements should be the same as those laid down in Article 4.A (2) of the third Geneva Convention of 1949.

STATEMENT MADE AT THE THIRTY-THIRD MEETING, 19 MARCH 1975,

BY MR. LONGVA (NORWAY)

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Original: English

1. Before I introduce the amendment to article 42 submitted by my delegation and contained in document CDDH/III/259, I should like to emphasize the utmost importance my Government attaches to the question on our agenda to-day.
2. As you will recall, the question of what was at the time called "irregular forces" led to the failure of the Brussels Conference of 1874. When the International Peace Conferences, held at The Hague in 1899 and 1907, led to concrete results as far as the laws and customs of war were concerned, this was mainly because the Conferences decided as a compromise solution to leave the question of the status of the so-called "irregular forces" open. The price humanity has had to pay for this compromise has been to go through two world wars and numerous limited conflicts without any adequate legal regulation of guerrilla combat situations. Those countries of Europe and of South East Asia that lived through military occupation during the Second World War, and the numerous peoples of Asia and Africa who have gained national independence through wars of national liberation, know the magnitude of that price.
3. Unfortunately, no satisfactory solution to the problem was found at the Diplomatic Conference in 1949 and my Government feels that the present Diplomatic Conference will fail in its task if it does not find an adequate basis for legal regulation of guerrilla combat situations. In this respect our attention should notably be concentrated on articles 33, 35, 40, 41 and 42 of the ICRC draft as well as on the provisions for the protection of the civilian population.
4. In introducing draft article 42 as proposed by my Government in document CDDH/III/259, I should like to use as a point of departure article 42, paragraphs 1 (a), (b) and (c) as contained in the ICRC draft.
5. My Government shares the view that compliance with the criterion of being under a command responsible to a Party to the conflict for its subordinates, as laid down in sub-paragraph (a) of the ICRC draft, should be a constitutive condition for prisoner-of-war status in case of capture. We feel, however, that as this is a condition which relates to organization and discipline, it should be contained in article 41, rather than in article 42. Consequently, in our amendment, this conditions is moved from article 42 to article 41.

6. My Government feels that the principle laid down in sub-paragraph (b) of the ICRC draft, namely that combatants should distinguish themselves from the civilian population in military operations, reflects a basic rule of positive international law, a rule which should be reaffirmed in the new Protocol we are in the process of elaborating. However, we feel that it would be much more appropriate to reaffirm this principle in article 33 as a basic rule of international law applicable to all armed forces, rather than as it is contained in the ICRC draft, namely as a constitutive condition for prisoner-of-war status in case of capture as far as a limited category of combatants is concerned. The significance of sub-paragraph (b) as contained in the ICRC draft is, in case of capture, to deprive a certain category of combatants of the basic guarantees relating to penal regulations, judicial proceedings and execution of penalties as contained in the third Geneva Convention of 1949 if charges of group violations of the principle in question are brought against them. My Government sees no legitimate justification for such a deprivation of basic guarantees. Moreover, as the deprivation of basic guarantees proposed in the ICRC draft does not apply to all groups of combatants, it maintains an element of discrimination in the system of international humanitarian law applicable in armed conflicts, an element which in practice may easily contradict the principle of equality of belligerents under international law of armed conflicts, and hence amount to a return to the mediaeval doctrine of "just war". For these reasons my Government proposes to state in article 33 as a basic rule, the principle contained in sub-paragraph (b), and to delete it from article 42 as a constitutive condition for prisoner-of-war status for certain combatants.

7. I shall now turn to sub-paragraph (c). In the view of my Government, it is the significance of sub-paragraph (c) to deprive the same group of combatants of the same basic guarantees in cases where charges are brought against them that as a group they do not conduct their military operations in accordance with the Conventions and Protocol. For the reasons I have just stated, my Government does not consider such a deprivation justified and therefore proposes the deletion of sub-paragraph (c).

8. I shall now say a few words on the distinction between group violations and individual infringements, which according to the ICRC draft constitute the decisive criterion as to which members of guerrilla units will be entitled to prisoner-of-war status in case of capture. While in theory it may be easy to make a distinction between group violations and individual infringements, it may be impossible to draw the dividing line in practice. A group consists of its individual members. How many individual infringements must take place before one may conclude that a group violation has taken

place? The answer to this question will always have to depend on a subjective assessment, in practice on the subjective assessment of the enemy. But my Government cannot admit that the question of whether or not a captured combatant is entitled to prisoner-of-war status should be left to the subjective assessment of the enemy.

9. As you will see, the observations I have just made regarding the ICRC proposal apply equally to certain of the other proposals relating to article 42 which we are discussing to-day. I shall therefore abstain from commenting in detail on these other proposals.

10. Before concluding my statement I should like to recall three essential conditions which must be fulfilled in order that the system of international humanitarian law applicable in armed conflicts may function in practice. First, the legal rules in question must place the Parties to the conflict on an equal footing; second, the legal rules must represent a well-balanced compromise between humanitarian considerations and military necessity and, third, the rules must be drafted in such a manner as to ensure that all the Parties to the conflict have an equal interest in their application.

11. In the view of my Government, the ICRC draft does not give full satisfaction to these three basic principles as far as articles 35, 40, 41 and 42 are concerned. It is the main purpose of our proposals relating to articles 33, 35, 41, 42 and 42 bis, to provide a basis for a legal regulation of guerrilla combat situations, imposing restraints on both Parties to the conflict and taking these three basic principles fully into account. Since, to our regret, the working programme of our Committee has not permitted a comprehensive discussion of these vital questions, it is our hope that such a discussion will take place in the Working Group. We shall go to this discussion with an open and flexible mind and it is our hope and belief that under the chairmanship of our Rapporteur, we shall find commonly acceptable solutions to these problems, solutions on which, in the final analysis, the success or failure of our entire Conference may depend.

STATEMENT MADE AT THE THIRTY-FOURTH MEETING, 20 MARCH 1975,

BY MR. SABEL (ISRAEL)

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Original: English

1. On behalf of the Israel delegation I should like to introduce amendment CDDH/III/77, which I believe is mainly self-explanatory, proposing a new article provisionally numbered article 42 bis.
2. The proposed amendment goes, we believe, to the heart of the matter of the third Geneva Convention of 1949. The protection and privileges of a prisoner of war are the crux of that Convention. Inhuman treatment of prisoners of war is considered a grave offence against the Convention, and the implementation of the protection of such prisoners has been a concern to the parties, we recall, in almost every conflict since the first clear affirmation of these rules at the beginning of this century. We are here convened, inter alia, to reaffirm existing international humanitarian law and we think it would be a grave default and lacuna were we to fail to refer to this vital and cardinal issue. It would seem strange, indeed, for the future soldier, or even lawyer, to find that out of the over 90 clauses and stipulations of Protocol I that we are drafting here, no reference whatsoever is made to the protection and privileges of prisoners of war.
3. Paragraphs 1 and 2 of article 42 bis which we are proposing, contain, we believe, a succinct précis of the relevant provisions of the third Geneva Convention of 1949, notably Article 13. Paragraphs 3 and 4 of the proposed article extend and develop the Conventions by stating expressly what is already binding in international law, namely that the ICRC must be informed immediately of the capture of, and details about, prisoners of war. The article further states that the grief and anguish of the families without knowledge of their next-of-kin is a subject that has already been the concern of this Conference and has found reflection in articles drafted by other Committees. These principles, all of them, are accepted in existing international law. The Protocol which we are now drafting is the first reaffirmation of international humanitarian law since the end of the Second World War and for us to ignore completely these principles would, we believe, be a serious default that might be grievously misinterpreted.
4. We would, of course, be happy to co-operate in the Working Group with other delegations that have suggestions or ideas on the subject.

STATEMENT MADE AT THE THIRTY-FOURTH MEETING, 20 MARCH 1975,

BY MR. DE BREUCKER (BELGIUM)

Original: French

1. Article 42 bis (CDDH/III/260) which my delegation has the honour to co-sponsor is based on concern for the protection of human beings in whatever capacity they participate in a conflict and in whatever the military situation (hostilities in progress or occupation). The only conditions laid down in paragraph 1 are "who takes part in hostilities" and "who falls into the hands of the adverse Party".
2. Everyone who is in that position will enjoy fully the advantages of the third Geneva Convention of 1949 and the present Protocol provided that he claims prisoner-of-war status and that it is clear from evidence that he has the right to that status, even if there exists any doubt as to that qualification.
3. The text of paragraph 1, however, further states that "such protection shall cease only if a competent tribunal determines that such person is not entitled to the status of prisoner of war". In the approach of that article there is a favourable "a priori" which can always be reversed by a competent tribunal but which no longer depends completely on the Detaining Power's decision alone. Support for such a provision already exists in Article 5 of the third Geneva Convention (Article 6 of the fourth Convention). Nevertheless, an important question arises, that of the status of the competent tribunal, its composition and the procedural guarantees it must offer.
4. In reality such a tribunal which would have as its function to decide whether a person who has fallen into the hands of the enemy is a combatant or a civilian, will accomplish by its judgement a radical act of selection within the framework of the Geneva Conventions.
5. To be practical, if an individual attacks the enemy and kills a certain number of members of its armed forces either in combat or under occupation, the wording of article 1 covers the two hypotheses: the selective judgement handed down by the competent tribunal could be the recognition of a "regular" combatant within the meaning of existing texts or of those to be adopted, who would therefore, except in cases of particular offences, such as resort to the use of poison or perfidy and so forth, incur no condemnation even if he had killed a large number of the enemy. But the same



tribunal might - second hypothesis - classify the person as a civilian. He would then come under the melancholy provisions of Article 68 of the fourth Geneva Convention, that is to say, the tribunal's selective judgement would act as a finger of destiny for the prisoner concerned.

6. The sponsors of the amendment before the Committee would associate themselves with any proposal specifying in precise terms the guarantees of protection that the competent tribunal could and should offer. Thus, Article 66 of the fourth Geneva Convention entitled "Competent Courts" speaks of "properly constituted non-political military courts". This is a guarantee of the utmost value, beyond which one could not go. Further, one could imagine the selection of guarantees which might be offered under the third Convention. Thus, in the spirit of the second paragraph of Article 99 of that Convention, "no moral or physical coercion may be exerted" on the person in question in order to induce him to agree that he belongs to the category of civilian rather than to that of combatant. Likewise, according to Article 105 of the third Geneva Convention, such a person should be able to call witnesses and, if necessary, to avail himself of the services of an interpreter. He should have the right to receive, before the opening of the trial, particulars of the charge in a language which he understands.

7. I shall not dwell at greater length on the guarantees which should accompany the verdict of the tribunal, the question being left open by the sponsors of the proposal before the Committee on the assumption that the Working Group will reach fruitful results in that connexion.

8. Paragraph 2 states that "Individual infringements of the rules of international law applicable in armed conflict shall not result in forfeiture of the right of any person referred to in Chapter I of The Hague Regulations of 1907, Article 4 of the third Geneva Convention or article 42 of this Protocol to be treated as a lawful combatant ... or to receive the benefits of this Protocol". That is a measure of public safeguard, it being understood that individual lawful combatants, enjoying statutory protection under existing law and of the law which the Conference is in process of drafting, could not be deprived of that right and of its conditions of exercise without having disturbing retrograde effects on humanitarian law.

9. The affirmation in paragraph 3 of the conditions of guarantee and of protection specified in article 65 for persons not recognized by virtue of the selective judgement envisaged in paragraph 1 as being entitled to prisoner-of-war status, is likewise satisfactory.

In the particular case of enemy occupation, the unqualified right to communicate with, and to be visited by, a representative of the Protecting Power or of the ICRC seems to be a great improvement on the authoritarian muzzling prescribed in Article 5 of the fourth Geneva Convention, the least humanitarian article of all four Geneva Conventions. This is a valuable guarantee.

10. Lastly, paragraph 4 provides that in the event of there being no Protecting Power, the ICRC will of a certainty act as a substitute in respect of the trial of which notification must be given to the Protecting Power under Article 104 of the third Geneva Convention and Article 71 of the fourth Geneva Convention of 1949.

11. In submitting this proposal, which they feel will save the humanitarian cause, the co-sponsors of this amendment will welcome not only all suggestions for the improvement of the text, but also any additional guarantees which might thus be offered to every combatant falling into the hands of the enemy.

STATEMENT MADE AT THE THIRTY-FOURTH MEETING, 20 MARCH 1975,

BY MRS. MANTZOULINOS (GREECE)

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Original: French

1. Draft article 42 concerning combatants who have the right to prisoner-of-war status in addition to those mentioned in The Hague Regulations of 1907 and Article 4.A of the third Geneva Convention of 1949, is well conceived.
2. The effective organization of every resistance movement, and its link with a Party to the conflict, and also the reflection in draft article 42 of present-day realities such as the representation of a Party to the conflict by a Government or an authority not recognized by the Detaining Power, are, in the opinion of my delegation, key factors for the right to prisoner-of-war status, provided that the combatants in question fulfil certain conditions.
3. Before introducing the comments of my delegation on these conditions, I should like to refer to certain amendments which in our opinion could improve the text or develop the concepts of article 42. First, the new term "irregular forces" suggested by the Netherlands amendment (CDDH/III/256) and by the United States and United Kingdom amendment (CDDH/III/257), appears justified since it takes account of the final or provisional situation of those forces vis-à-vis the regular armed forces of a Party to the conflict. Second, an idea of the magnitude of the objectives of those organized movements which in fact do not limit themselves to resistance stricto sensu - is reflected in the amendment of Finland (CDDH/III/95) which proposes in that context the term "organized armed units including resistance movements" - a proposal worthy of our consideration and support. Third, we also support the amendments submitted by Ghana (CDDH/III/28), Norway (CDDH/III/259) and the Netherlands (CDDH/III/256) that the organization of the movements in question should be effected within the framework of the discipline envisaged in article 41 of the Protocol.
4. As regards the conditions to be fulfilled by members of organized movements, my delegation, agreeing with the ICRC principles, would have preferred as regards paragraph 1 (b) of article 42, the wording proposed by the United States and United Kingdom delegations, by Spain (CDDH/III/209) and by the Netherlands (CDDH/III/256) which in a more precise and complete way meet the imperative need for members of resistance movements to distinguish themselves from the civilian population in military operations.

5. Referring to the conditions mentioned in paragraph 1 (a) and (c), we note that most of the sponsors of amendments on those points agree. As regards paragraph 1 (a), which provides that the organized movement must be under a responsible command, my delegation would like to refer to its national experience, the experience of a small country which suffered a lengthy period of military occupation during the Second World War, and had resisted strongly and widely through organized movements of every shade of political opinion, and the names of whose commanders were well known to all.

6. It is possible, however, that there are organized movements whose members do not wish to, or cannot, reveal the name of their commander in pursuance of the principles and directives of a clandestine organization. It is possible also that the members of these armed forces may be good patriots who in case of capture deserve to be recognized as prisoners of war. It is, however, also possible that such combatants are adventurers and mercenaries. It would therefore be dangerous to widen the concept of combatants entitled to prisoner-of-war status by laying down more flexible conditions to be fulfilled.

7. For persons not entitled to such a status within the framework of article 42 of draft Protocol I, we suggest in paragraph 3 of the joint amendment (CDDH/III/260), of which my delegation is a co-sponsor, the application of article 65 of draft Protocol I which refers to fundamental guarantees for persons who would not receive more favourable treatment under the Conventions or draft Protocol I.

8. I wish again to refer to the merits of the joint amendment (CDDH/III/260) which proposes the inclusion of a new article 42 bis because it evokes the presumption established in paragraph 1 that a combatant must be presumed to have the right to prisoner-of-war status.

9. That presumption is analogous to that of article 45, paragraph 4 concerning civilian status which is presumed in case of doubt.

10. The presumption in the joint amendment to article 42 excludes all possibility of the captor or the Detaining Power deciding at their discretion whether a combatant has the right to prisoner-of-war status.

11. Only a competent tribunal or an impartial and efficient authority could contest such a decision and over-rule it by its judgement of the presumed status of prisoner of war.

12. Lastly, referring to paragraph 2 of article 42 which refers to two different situations namely (a) the non-observance by individual members of the requisite consideration which does not result in the other combatants of the movement being deprived of prisoner-of-war status, and (b) prosecution or sentencing for an offence violating the Conventions committed by a member of a resistance movement before capture, a situation envisaged, moreover, in Article 85 of the third Geneva Convention of 1949, we think that the text proposed in paragraphs 2 and 3 of the United States and United Kingdom amendment (CDDH/III/257), could lend more light and precision to the text of article 42.

STATEMENT MADE AT THE THIRTY-FOURTH MEETING, 20 MARCH 1975,

BY MR. GENOT (BELGIUM)

Original: French

1. The Belgian delegation wishes to make some comments on article 42.

2. Modern warfare has seen a startling development in weapons and even more in tactics. The intervention methods used by small armed groups, and even those used by individual combatants in their operations or destructive action are no longer the exclusive preserve of those who could be called "irregular forces".

3. Indeed, conventional armed forces, even if over-equipped as a whole, may find themselves locally in an inferior tactical position which would make them avoid direct confrontation. They will then use guerrilla combat methods. In other circumstances such forces will seek what is considered to be a more "profitable" military advantage by means of commando operations sometimes carried out quite far behind the theoretical battle front. That front then becomes more of a demarcation line between territories controlled predominantly by each of the adversaries, rather than an absolutely linear contact zone.

4. Such considerations must have led to the drafting of article 40. It is interesting to note that the same considerations have more or less consciously influenced both the placing and the wording of article 42. In so doing one may risk creating confusion between methods of combat on the one hand and, on the other, conditions leading to an extension of prisoner-of-war status to other categories of individuals.

5. Article 42, indeed, envisages situations which are not necessarily connected with methods of combat.

6. The most marked difference between conventional and irregular armed forces should moreover be established in a different way.

7. In the case of regular armed forces, the groups which make up commandos usually have their point of departure in a base controlled by their own forces, and very often seek to return to that point after operations.

8. In an extreme case, combatants of an irregular force emerge as it were from the civilian population and return to it immediately after the operation, since they operate in enemy-controlled territory and must by definition remain there. Any number of nuances and

possibilities exist between these two extremes and consequently a great variety of types of conduct based entirely on the circumstances of the moment.

9. Faced with this range of reaction, whom do we seek to protect? And to what extent and how? None of these questions is easy to answer.

10. The Hague law expressly protects, and in well-defined terms, members of the regular armed forces and members of militias differing in fact only on minor points from armed forces. Members of all such forces benefit from prisoner-of-war status if captured. As is known, such status consists on the one hand of guarantees of correct treatment and, on the other, of immunity in case they have committed hostile acts. The Hague law also takes into account the case of mass levies at the approach of the enemy. In certain rare circumstances, however, those who take part in such a levy and are captured also become prisoners of war.

11. But once occupation is an established fact, the regular armed forces or enemy militia alone have the right to disturb that occupation during a reconquest operation for example. A mass levy, or any acts of resistance during occupation, will be penalized and put down by the adversary subject to the reservation of the application of the so-called Martens clause.

12. Progress had been made at Geneva in 1949 by the recognition on the one hand of resistance movements operating even in occupied territory provided they respect the four conditions laid down in The Hague Regulations and, on the other hand, the regular troops of a non-recognized Government. Mass levies in occupied territories are still not envisaged. Persons who do not belong to any definite category do not have the right to commit hostile acts and are therefore civilians. If they behave otherwise their fate will be sealed by the application of Article 68 of the fourth Geneva Convention of 1949.

13. Article 42 as proposed by the ICRC is intended to recognize prisoner-of-war status to captured members of certain armed movements. Two kinds of condition have to be fulfilled - the first applies to the movements themselves - The Hague conditions worded in somewhat less rigid terms; the second applies to members of such movements.

14. Before conferring prisoner-of-war status on a captured person who has committed a hostile act it must first be established, in order that he may be accorded prisoner-of-war status, that he has distinguished himself from the civilian population and belongs to a movement under a command responsible to a Party to the conflict for its subordinates.

15. There thus arise the first difficulties - first, the condition that a combatant must distinguish himself from the civilian population. Does that determine the person's status as a prisoner of war or is it a rule which should be included in the rules of war, but which in itself does not affect his status? There is no lack of arguments for and against. We do not have a definite reply to that question. But we wonder if it is the fundamental basis of the problem before us. Who in fact can prove that a captured person is a member of an organization belonging to a Party to the conflict? In many cases, especially in urban resistance, it will be the prisoner himself, and in order to do so what proof can he offer? The name of the officer responsible for him? And then all the hierarchy of the movement in question would have to be denounced, even the officer who ensured the liaison with the adverse Party to the conflict. That would be unthinkable.

16. The second matter to be decided also raises problems - the decision whether the movement as such fulfils the two conditions and whether it also respects de facto the Geneva Conventions of 1949 and Protocol I. Who but the Detaining Power can decide that? And according to what criteria? The criteria it chooses. The condition of belonging to a Party to the conflict and an organization may raise certain problems similar to those that arise vis-à-vis the individual. The other conditions raise an almost insoluble problem.

17. As can be seen, article 42 does not substantially change the 1949 situation. Only resistance movements similar to regular armies such as the Yugoslav maquis or the Vercors maquis of the Second World War can, we feel, supply practical cases of the application of such a text.

18. Are other solutions possible? Perhaps, but one must be careful to avoid going to the other extreme and encouraging private wars, that is to say banditry, or by completely removing all distinction between combatants and civilians, ignoring the fact that the immunity enjoyed by the civilian population is in law due to its non-participation in hostilities and, indeed, to the relative security of the occupying troops.

19. In this connexion we will refer briefly to the positive aspects of some amendments and only when they can put before us a new condition without our being able to say whether such condition is capable of being turned to account.

20. The amendment submitted by Pakistan (CDDH/III/11) and others, such as those of Ghana (CDDH/III/28) and Madagascar (CDDH/III/73), deal with a question which we should bear in mind. That question is worthy of our consideration, and we must make every effort to answer it in the most judicious terms, on the basis of the numerous interesting ideas submitted to us, and by considering all types of conflict.



21. The representative of Poland introduced his amendment in terms and in accordance with ideas which are worthy of serious study by the Working Group. The treatment of captured members of resistance movements seems to give rise to problems as soon as the conflict ceases in the circumstances described by Mr. Bierzenek (Poland).

22. The Netherlands amendment (CDDH/III/256), if retained in the general conditions laid down by the ICRC, contains three interesting elements - first it is a better and clearer draft than the text drafted by the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. Secondly, it converts the condition of respect for the rules of war into an implementing provision - the need for the movement concerned to be under a responsible command. Third, it presumes the existence of that condition in terms which we feel are balanced, realistic and applicable in practice.

23. Lastly, the ideas behind the Norwegian amendment (CDDH/III/259) are a meritorious attempt to set out the problem of article 42 according to new premises. They take into account the idea expressed by the Polish representative; they alter the place of the conditions traditionally covered by the same heading in various articles of Section II, and modify significantly the scope of that Section. We support those ideas, although the wording of the amendment does not express them in the best way. The discussions in the Working Group may perhaps be able to test that system and reach the conclusion that it can function in a way acceptable to all those who favour an essentially drafting amendment.

24. This problem is most important for a small country which has too often been occupied by foreign armies. Discussions have been intensive in both our delegation and in the capital of our country. And yet, so far, we have been unable to find a solution both basically new and acceptable. We feel that such a solution has not been found - even if it were possible to find one. Our sympathy goes out to those who continue to seek a solution. We shall not turn down any idea a priori, and we assure the Committee that we shall not overlook any in the Working Group.

STATEMENT MADE AT THE THIRTY-FOURTH MEETING, 20 MARCH 1975,

BY MR. GILL (IRELAND)

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Original: English

1. My delegation supports generally the amendment to article 42 introduced by the representative of the United States of America (CDDH/III/257).
2. Indeed, my delegation had initially asked to be considered as a co-sponsor but because of some minor disagreements on the text it was thought better that, while supporting the amendment generally, we remained free to offer some minor points of criticism.
3. Most of the points I wish to make may be simply matters for the Working Group or Drafting Committee. Like many other delegations who have already spoken, my delegation attaches great importance to article 42 and article 42 bis - the number and diversity of co-sponsors for 42 bis is proof, I think, of the spirit of co-operation of this Committee.
4. In paragraph 1 we wonder if perhaps a better term than "irregular forces" can be found. I know it is almost impossible to find a neater phrase, but for the consideration of the Drafting Committee I suggest the following phrase - "armed organizations not forming part of the armed forces regularly constituted in conformity with the national legislation of the Government in power".
5. The phrase "irregular forces" may lead to some confusion for not all countries consider their regular forces to include members of militia or territorial armies.
6. We would prefer to use the phrase "members ... who have fallen into the power of the enemy" rather than the rather metaphorical phrase "into the hands of".
7. With regard to paragraph 1 (b) we believe that it is sufficient to impose the condition "that they distinguish themselves from the civilian population in their military operations". It is entirely a matter for the organization to decide how that can be done. Experience has shown, and I speak also from knowledge of the long history of resistance movements in my own country, that such movements always succeed in adopting either articles of dress or equipment, or adapting conventional dress in such a manner as to distinguish them from the civilian population and to identify them to the adversary. It would be impossible to give a definitive list

of methods by which such movements could distinguish themselves from the civilian population and to give a list of examples would merely weaken the impact of paragraph 1 (c), and lead to confusion and misinterpretation.

8. It may be considered that the phrase "in their military operations" is too loose and may not indicate precisely enough to the member of the irregular force when he is in fact bound to distinguish himself from civilian population. If this is considered to be so then we suggest that consideration be given to the following phrase - "in their military operations intended to, or carried out to kill, injure or capture an adversary or to damage or destroy a military objective or the military property of the adversary".

9. Finally, as regards paragraph 2, we are of opinion that the word "other" should be inserted before the word "members" in the third line and that the word "forces" where it is used be qualified by the word "irregular" - if that is the word eventually adopted or by whatever adjective or adjectival phrase is finally adopted - rather than by the use of the word "such".

STATEMENT MADE AT THE THIRTY-FOURTH MEETING, 20 MARCH 1975,

BY MR. BELOUSOV (UKRAINIAN SOVIET SOCIALIST REPUBLIC)

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Original: Russian

1. The main purpose of article 42 now under discussion is, in our opinion, to confirm the status as combatants of those who fight against colonial and racist régimes and foreign domination. The final elimination of the shameful system of colonialism is not far away. The Soviet State and the allied socialist countries are opposed as a matter of principle to the imperialists' policy of aggression and colonial plunder and to all forms of exploitation. In accordance with this position of principle, the Soviet Union will, as in the past, grant all necessary assistance to peoples waging the struggle against colonialism. The duty of all the world's States is to heed the repeated appeals of the United Nations and to bring about the complete and final elimination of colonialism.
2. An important step towards supporting the fighters against colonialism through the provisions of international law was taken by the first session of the Diplomatic Conference, at which a majority of the participants approved a new text of article 1 of Additional Protocol I, thereby widening the scope of that Protocol to include peoples fighting against colonial domination, alien occupation and racist régimes, in the exercise of their right to self-determination as recognized in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.
3. That action by the first session of the Diplomatic Conference represents a most valuable contribution to the further expansion of the anti-colonial struggle of peoples which is characteristic of our time.
4. Not long after the end of the first session of the Diplomatic Conference, there took place in Africa events which could not but evoke a feeling of deep satisfaction among freedom-loving peoples throughout the world. The last colonial empire collapsed under the combined blows of the national liberation movements of the peoples of Mozambique, Angola and Guinea-Bissau and of the democratic forces in Portugal which overthrew the fascist régime.
5. This constitutes a fresh incentive to intensify the struggle against the centres of colonialism, apartheid and racial discrimination which still remain on the African continent and to bring about their elimination.

6. As the General Secretary of the Central Committee of the Communist Party of the Soviet Union, Leonid I. Brezhnev, has said, "The downfall of Portuguese colonialism represents a major advance in the struggle for the complete and final elimination of colonial servitude on the continent. We are convinced that the day is not far distant when all Africa, from the Cape of Good Hope to the Western Sahara, will be free!".

7. This latest defeat of colonialism does not mean, however, that the colonialists have abandoned their efforts to roll back the wheels of history. Not only are they determined not to permit the development of the liberation movements, they are even trying to restore a colonial system in those countries which have recently gained independence. In particular, world attention was recently drawn to the manoeuvres of extremists in Mozambique and Angola, who, supported by the colonialists, attempted to frustrate the process of the granting of independence to the former Portuguese colonies.

8. One of the shameful weapons which colonialism has employed and continues to employ in its struggle against national liberation forces is the mercenary. Bands of mercenaries long ago committed atrocities in the Congo and they made their appearance in Nigeria and the Arabian peninsula too. There are reports that recruiting agents are seeking mercenaries for further undertakings against the Portuguese colonies which are now in the process of achieving independence. According to recent information, a detachment of mercenaries has been formed within the territory of the Republic of South Africa and that of Rhodesia which is ready to mobilize and to enter the territory of Angola and Mozambique at 72 hours' notice. This unit numbers between 500 and 700 cut-throats equipped with secret supplies of arms. The recruiting agents are active in Western Europe, Canada and the United States of America. They vaunt the attractions of a career as a "carefree adventurer" or "knight of fortune" who will receive a cash bounty for each fighter against colonialism he kills. Their publicity statements create the false impression that the crimes of the mercenaries' trade go unpunished. One finds in Western countries literature and films which glorify the mercenaries' "exploits".

9. World public opinion demands that the activities of these mercenaries be declared illegal so that those who are likely to be tempted by the recruiting agents will be forced to think twice. The Organization of African Unity is calling for the use of mercenaries to be banned. This demand has repeatedly been reflected in decisions of the United Nations General Assembly. It has been heard in the pronouncements of the Security Council and in resolutions of the twenty-third and twenty-fourth sessions of the General Assembly, in which it is stated that "... the practice of using mercenaries against movements for national liberation and

independence is punishable as a criminal act and that the mercenaries themselves are outlaws" (Resolutions 2465(XXIII) and 2548(XXIV)). In its resolution 2708(XXV), the General Assembly reiterated "its declaration that the practice of using mercenaries against national liberation movements in the colonial Territories constitutes a criminal act" and called upon "all States to take the necessary measures to prevent the recruitment, financing and training of mercenaries in their territory and to prohibit their nationals from serving as mercenaries". And, finally, in the resolution adopted at the twenty-eighth session of the United Nations General Assembly, entitled "Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes", it was emphasized that "the use of mercenaries by colonial and racist régimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals." (Resolution 3103(XXVIII)).

10. In undertaking the elaboration of additional Protocols to the 1949 Geneva Conventions and of additions to the rights already recognized to the fighters for national liberation, the Diplomatic Conference cannot overlook the demands of world public opinion and the Organization of African Unity or the decisions of United Nations organs. It must follow clearly from the additional Protocols that mercenaries used in a conflict with a national liberation movement do not enjoy the status of combatants and shall, when taken prisoner, be considered as criminals, with all the consequences that entails. The introduction of such a rule would place a convincing obstacle in the path of the "adventurers" and bloody "knights of fortune", the professional killers.

STATEMENT MADE AT THE THIRTY-FOURTH MEETING, 20 MARCH 1975,

BY MR. MOKHOTHU (LESOTHO)

Original: English

1. I thank the Chairman for having given me the opportunity to speak on this very important issue, an issue which to my delegation may well be the pivot of this whole Conference.
2. It is our considered intention to provide the highest possible protection under article 42 to members of national liberation movements fighting against colonization, foreign domination and racism.
3. Article 42, as proposed by the ICRC, purports to carry out this intention. We note, with approval, that in the foot-note to article 42, a provision is proposed which, if accepted by the international community, would give the national liberation movements the protection they legitimately deserve. Despite the inclusion of a new paragraph 3 in that foot-note, my delegation has difficulties in accepting the article in its present form. Paragraph 1 refers to "members of organized resistance movements". To my mind, this is the most unacceptable phraseology in this article. At this stage, I should like to pose a question - what is an "organized resistance movement"? I believe that no one can deny that this phrase is vague, dangerous and embarrassing. Indeed, this phrase is likely to encourage chaos rather than maintain order in international relations. For instance, a small organized gang of criminals with unknown ulterior motives, may decide to take up arms against the legitimate Government in power. Surely such people are regarded as ordinary common criminals who should not be protected by this article of Protocol I, no matter whether they are able to take control of a certain portion or portions of a given territory. This band of criminals may be an organized resistance movement under a recognisable leader and resisting a legitimate Government. It is not the intention of my Government to encourage disorder and lawlessness anywhere in the world, and unless that phrase is well defined to our satisfaction, my Government cannot go along with article 42.
4. My delegation has also studied very carefully the amendments proposed by many delegations. Some of these amendments replace the phrase "organized resistance movements" by the words "irregular forces". With due respect, my delegation submits to Committee III that this is not a happy substitute. What is the meaning of the term "irregular" in this respect? On the face of it, one may assume that it is the opposite of "regular". If that is the case,

then mercenaries are irregular forces. Is it the intention of this Conference to give protection to mercenaries? We in Africa have experienced the atrocities committed by mercenary forces in action and my Government, for one, will not subscribe to any provision of Protocol I or II which protects mercenary forces.

5. Speaking generally, it is our view that the ICRC text is reasonable provided the ambiguities we have pointed out are removed. It is our opinion that the words "organized resistance movements" could be replaced by the following: "combatants belonging to a national liberation movement fighting against colonial domination or foreign occupation or against racist régimes and all forms of oppression, who fall into the enemy's hands, shall be treated as **prisoners-of-war**".

6. If that was the position, then it would be unnecessary to include the foot-note in the body of article 42.

7. It must be noted that national liberation movements are fighting for their people's right of self-determination but, because of their material situation and military inferiority in the field, combatants belonging to those movements cannot wear distinctive signs or carry arms openly. Experience shows that it is not difficult for the enemy régime to identify national liberation combatants in battle. For these reasons paragraphs 1 (b) and (c) are not acceptable to my delegation. What is needed here is a simple and explicit statement of international law providing protection to the members of a national liberation movement who are engaged in an armed conflict in pursuance of their people's right of self-determination.



STATEMENT MADE AT THE THIRTY-FOURTH MEETING, 20 MARCH 1975,

BY MR. FISCHER (GERMAN DEMOCRATIC REPUBLIC)

Original: English

1. Great importance must be accorded to article 42 within the framework of draft Protocol I. This importance is emphasized by the large number of amendments submitted to this article of which we have taken careful note.
2. My delegation is of the opinion that the text proposed by the ICRC constitutes a good basis for our work, because it contains in principle all essential ideas.
3. Nevertheless, we are somewhat concerned with regard to paragraph 2 of the ICRC proposal, which contains the idea that prisoners of war will retain that status even if they are sentenced.
4. As regards article 85 of the third Geneva Convention of 1949, my Government has stated that it will not recognize the benefits of that article to such prisoners of war, legally sentenced in conformity with the principles of the Nürnberg Tribunal for war crimes and crimes committed against humanity.
5. Therefore, we would prefer to delete the words contained in paragraph 2 of the ICRC proposal: "... and even if sentenced, retain the status of prisoners of war."
6. Furthermore, my delegation supports such proposals as those of the delegations of the Democratic Republic of Viet-Nam, Madagascar, Poland, and Pakistan, and also others which help to qualify the ICRC text in the interest of the protection of those who fight for the right of self-determination of their peoples against colonial domination and foreign occupation as well as against racism.
7. After having adopted article 1 of draft Protocol I we feel that the structure of article 42 must be changed.
8. One must proceed from the fact that the armed forces of the liberation movements must be treated in the same way as the armed forces of the other Parties to the conflict. It is not enough to treat them like irregular forces only, as provided for in the structure of the present article 42.
9. This idea should be considered in the Working Group of our Committee.

STATEMENT MADE AT THE THIRTY-FOURTH MEETING, 20 MARCH 1975,

BY MR. QUACH TONG DUC (REPUBLIC OF VIET-NAM)

Original: French

1. We have listened with the greatest interest to the introductions to amendments and the statements concerning article 42, whose importance has not escaped us.
2. We consider that the following points should be noted: first: many amendments propose that organized resistance movements should be commanded by a responsible person instead of being placed under a responsible command. Clearly, it is better to have a responsible leader than an anonymous or collective command. (Amendment CDDH/III/256, submitted by the Netherlands; amendment CDDH/III/257 submitted by the United States and United Kingdom delegations). Second, these amendments and amendment CDDH/III/209, submitted by Spain, provide that combatants members of resistance forces should distinguish themselves from civilians by distinctive, fixed, visible signs, or by the open carrying of arms. Amendment CDDH/III/259, submitted by Norway, proposes that such a distinction should be a fundamental rule. Our delegation has already made its views known on the subject. We consider that the distinguishing of combatants from the civilian population is essential for the effective protection of the latter. Third, Amendment CDDH/III/260, sponsored by Belgium and twelve other countries, suggesting the addition of a new article 42 bis entitled "Protection of persons taking part in hostilities" should be studied with the greatest attention. The idea of giving a competent tribunal the power to decide whether or not a person has the right to prisoner-of-war status is very interesting.
3. Referring to the amendments submitted by the delegation of the Democratic Republic of Viet-Nam, we feel that they are worth what they are worth. We ask the Chairman's permission to use our right of reply to the diatribes of the representative of Hanoi and assure him that we shall keep within the bounds of courtesy and honesty.
4. Ever since the session began the delegation of the Republic of Viet-Nam has observed an attitude of dignity and courtesy in the hope of making an effective contribution to the drafting of the two Protocols. We note with regret that once more the delegation of Hanoi has taken every opportunity to make grave and unfounded accusations against us. These controversial statements are inspired by visibly hostile feelings towards us.

5. If our delegation had been of the same mind we could have revealed the unnumberable and indescribable atrocities committed by North Vietnamese agents and troops against the South Vietnamese peoples and objects. We could have done so when the articles of draft Protocol I on the protection of the civilian population and civilian objects, on the prohibition of the use of methods designed to spread terror among the civilian population, for example by the summary execution of troops and civilians in public; mass burials in common graves like those discovered at Hue and elsewhere; on the prohibition of the use of projectiles for bombarding populated areas and schools during school hours, on the obligation to give quarter, and on the prohibition to kill combatants who surrender and so forth. We could have recalled the exodus of almost a million and a half South Vietnamese fleeing before the North Vietnamese troops which is now occurring at Ban Me Theot; the attacks against that city and a new mass exodus of the population. This needs no comment.

6. We have always remained silent in a spirit of reconciliation and concord, believing moreover that this is not the place or the time to go into that problem.

7. What does the representative of Hanoi know about the falsification of the files of prisoners of war in order to turn such prisoners into common law prisoners? The representative of Hanoi further accuses the Government of the Republic of Viet-Nam of repressing prisoners of war by force of arms, of detaining them in penal establishments, prisons and so forth, of physical and moral constraint in order to force such prisoners to renounce their political convictions, and so forth.

8. First, referring to the so-called falsification of the files of prisoners of war, we state the following: such files have never in fact existed. As soon as possible after their capture combatants of the North Vietnamese armed forces are interrogated and then sent to internment camps. Each one is given a number. It often happens that the prisoners themselves try to correct their first statements in order to enjoy better treatment. For example, physically fit troops who are prisoners of war can be set to work, whereas officers cannot be forced to work. Such corrections to their statements may lead to their being sent to another internment camp and consequently a change in their registration number. But, apart from all this, there can be no falsification of the files of prisoners of war in order to turn such prisoners into common law prisoners.

9. Referring to the treatment of prisoners of war and the organization of internment camps, the Government of the Republic of Viet-Nam has applied the provisions of the third Geneva Convention of 1949 as stated in the illustrated report submitted by the delegation of that country to the XXIIInd International Conference of the Red Cross, held at Teheran in November 1973. The representatives of the International Committee of the Red Cross can visit and indeed have often visited the internment camps of South Viet-Nam. Have similar measures implementing the 1949 Geneva Conventions been taken by the North Vietnamese Government? It seems not. It is all very well to take part in the work of developing humanitarian law but it is certainly much better to make a point of applying existing humanitarian law, in particular the four Geneva Conventions of 1949.
10. This information concerning the organization of the internment camp system for prisoners of war is enough for all to appreciate at their true worth the stories recently told on the subject of the repression of prisoners of war by force, of their detention in common law penal establishments, and of the constraints exercised in their regard in order to compel them to renounce their political convictions.
11. We add some facts concerning the Paris Agreement of 27 January 1973. The Government of the Republic of Viet-Nam has returned all military detainees, that is to say 26,880 prisoners of war belonging to the North Vietnamese armed forces captured before 28 January 1973.
12. In exchange the adverse Party has handed over to the Republic of Viet-Nam only 5,336 troops belonging to the South Vietnamese forces and captured by it, and continues to detain unlawfully 26,645 South Vietnamese troops (26,645 plus 5,336 equals a total of 31,981 South Vietnamese troops captured).
13. The offensive remarks of the representative of North Viet-Nam and the language he used in his statement at the thirty-third meeting (CDDH/III/SR.33) and in that of the twenty-sixth meeting (CDDH/III/SR.26), when article 33 of draft Protocol I on the prohibition of unnecessary injury was being considered, do not serve the purpose that he seeks to achieve.
14. The successive massive exoduses of the civilian population creates very heavy burdens and responsibilities for the Government of the Republic of Viet-Nam which has to feed the refugees, resettle them on new land and help them to form new centres of population. It is these new centres, often built with the financial assistance of international relief organizations, that the Hanoi delegation has called "concentration camps".

15. If the remarks of the representative of North Viet-Nam can be believed, the Government of the Republic of Viet-Nam has set out deliberately to destroy the civilian population ("So the adversary to be crushed was the entire civilian population" - see summary record of the twenty-sixth meeting - CDDH/III/SR.26), which was unthinkable on the part of any Government. The speaker had obviously been carried away by evil inspiration. Did that representative think that he could thus divert the attention of the representatives of the various countries of the world from the war of aggression that the expeditionary corps of North Viet-Nam was still waging against South Viet-Nam, from the general offensive that had just been launched against the positions, towns and centres of population of South Viet-Nam, that bleeding, torn, and devastated country?

STATEMENT MADE AT THE THIRTY-FOURTH MEETING, 20 MARCH 1975,

BY MR. STARLING (BRAZIL)

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Original: English.

1. The Brazilian delegation would like to point out that, in its opinion, article 42 - which establishes a new category of prisoner of war, beyond those already established in Article 4 of the third Geneva Convention of 1949 - involves three important issues which must be clearly settled: first, the question concerning the fact that the person considered is a member of an organized resistance movement belonging to a Party to the conflict. Second, the question related to the distinction between the members of organized resistance movements and the civilian population. Third, the question of respecting all the rules of international law applicable in armed conflicts, including the Conventions and draft Additional Protocol I to the same Conventions.
2. Referring to the first question - that related to the requirement for the organized resistance movement to belong to a Party to the conflict, we must draw attention to article 1, paragraph 2 of draft Protocol I, as adopted by Committee I of this Conference, where a new type of party to an international armed conflict is envisaged. According to this paragraph we must consider and precisely define such a new type of Party to the conflict, bearing in mind that, so far, the Conventions and other acts of international law applicable in armed conflicts have referred to the expression "Party to the conflict" understanding it to refer to a State.
3. Now, paragraph 2 of article 1 of draft Protocol I refers to "peoples fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination" - an expression which should be precisely defined, in order to make clear what kind of entity is to be considered in the concept of Party to the conflict, mentioned in the ICRC proposal and in most of the amendments to article 42. The Brazilian delegation hopes that this precise definition will be clearly stated in the appropriate article of the Protocol, in order to permit a perfect understanding of article 42 and, consequently, its full application and respect.
4. As far as the question of distinction between the members of organized resistance movements and the civilian population is concerned, the Brazilian delegation thinks we must decide either to maintain the conditions prescribed in Article 4. A(2) of the third Geneva Convention of 1949 which have to be fulfilled by the members

of all other organized resistance movements or, if new conditions for the members of the new type of organized resistance movements are adopted, extend them to all other organized resistance movements referred to in Article 4 of the third Convention.

5. Referring to the third question, the Brazilian delegation is of the opinion that the members of organized resistance movements should respect not only the Conventions and Protocol I but also all the other rules of international law applicable in armed conflicts. However, as the question of according prisoner-of-war treatment is one of those which offers unquestionable opportunities for reciprocity, the Brazilian delegation thinks that in article 42 or in other appropriate articles of the Protocol, it should be clearly stated that the Party to the conflict to which the organized resistance movement belongs must be legally bound by the Conventions and Protocol I.

6. Referring to article 42 bis, our delegation is of the opinion that the more appropriate subject for this article to cover is the protection of persons who fall into the hands of the adverse Party. However, we think that the reference to combatants in this article must be deleted, because the situation of combatants cease to exist when a person falls into the hands of the adverse Party. Consequently, there is no reason for referring to combatants in article 42 bis. Moreover, when dealing with persons referred to in chapter I of The Hague Regulations of 1907 and in Article 4 of the third Geneva Convention of 1949, we must bear in mind that as those specific dispositions refer not only to combatants, but also to persons which are non-combatants, any legal disposition extending to all those persons the status of lawful combatants will create a serious doubt on the validity of the specific international rules mentioned.

STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. DENEREAZ (SWITZERLAND)

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Original: French

1. The Swiss delegation follows with some interest, the reasons for which are clear, the consideration of prisoner-of-war status, a status which is linked to methods and means of combat by article 41, which refers to organization and discipline.
2. After having studied the ICRC draft of article 42, the Swiss delegation has decided not to submit an amendment or to co-sponsor the amendments submitted, although it recognizes their great value.
3. The Swiss delegation considers that the ICRC draft offers much more than a basis for discussion, which it is generally considered to be. It is clear, sufficiently precise and, above all, it confirms the already accepted and, to some extent, already legalized, principles of respect for the laws and customs of war as follows:
  - Respect for the laws and customs of war based on the will to conform to the Conventions and the present Protocol;
  - The fact that every combatant must distinguish himself from the civilian population;
  - The exercise of a command responsible to a Party to the conflict.

We think that there can be no new problem here.

4. The Swiss delegation could not agree to the disappearance of these three requirements, or any one of them, from article 42 which has treaty force.
5. The Swiss delegation has analysed the amendments submitted and wonders
  - whether, as the representative of Argentina proposes, the new category of prisoner of war should be defined solely by reference to other articles. We prefer the ICRC text which is more direct and explicit.
  - if, as the representative of the Democratic Republic of Viet-Nam suggests, it is necessary to define the status of combatant from an exclusive and particular point of view. We prefer the ICRC text which refers to resistance movements without regard to their origin, their motives or objectives.



- if, as the representative of Norway proposes (CDDH/III/259), one can speak of "legal combatants". That is an unusual expression. We prefer the wording of the ICRC draft which makes no allusion to any legality - a concept that might easily give rise to controversy.

6. The United States and United Kingdom amendment (CDDH/III/257) contains an obsolete term - "irregular forces" by contrast with regular forces. As everyone knows, irregular combatants were formerly known as "corps francs" (guerrilla fighters). That term - at least in French - is outmoded and inadequate. It has a distinctly pejorative connotation which could not be applied to resistance movements.

7. With regard to the ICRC text of article 42, the Swiss delegation would like to see the principle expressed in paragraph 1 (c) become permanent and universal, and suggests the deletion of the phrase "in military operations" which, in its opinion, implies an engagement on a scale unlikely to occur in the case of resistance movements.

8. Referring to paragraph 1 (b), the Swiss delegation suggests that the Working Group study the following texts: "to distinguish themselves from the civilian population in military operations". In our opinion it would be preferable to say that "combatants should distinguish themselves from the civilian population in regions where the fighting takes place on land" in order to specify clearly that it is not the nature or the extent of the conflict, but the sector of the engagement that is involved independently of the force engaged.

9. Further, the Swiss delegation could support the adoption of a paragraph 3, provided the text was similar to that of the ICRC draft.

10. The Swiss delegation does not object to the consideration of article 42 bis or 42 ter, but does not see the need for them.

11. The amendment submitted by thirteen delegations (CDDH/III/260), which was introduced by the Belgian representative, reflects the humanitarian concern of its sponsors. But is it truly realistic? And can one really accord the protection set out in article 42 to anyone who takes part in hostilities and falls into the hands of the adverse Party, without reference to any status, but by resorting to a special procedure destined to determine that status a posteriori? The Swiss delegation would find it hard to accept such an extension of protection. It is, however, fully appreciative of the idea of presumption which is evident from paragraph 1 of amendment CDDH/III/260. It considers that paragraph 3 of the same amendment

belongs in article 65. It suggests that paragraphs 2 and 4 of the amendment should be omitted since they seem merely to duplicate basic rules which, however, are alien to article 42.

12. In conclusion, the Swiss delegation emphasises its preference for the ICRC draft and for a more complete article 42, but not for articles 42 bis and ter, especially if those articles reduced the clarity of article 42.

STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. FISSENKO (BYELORUSSIAN SOVIET SOCIALIST REPUBLIC)

Original: Russian

1. The delegation of the Byelorussian Soviet Socialist Republic, like the delegations of other countries, attaches great importance to article 42 of draft Protocol I, which is devoted to the question of a new category of prisoner of war, and to the related articles, 42 bis and 42 ter. We consider that the text of article 42 as submitted by the ICRC, the result of protracted efforts by experts in this field, constitutes a good basis for discussion. The principles set out in the article, including those in paragraph 3, - principles designed to ensure better protection for members of organized resistance and of national liberation movements - represent a development of international humanitarian law and meet the needs of the present day. It has long been time for members of organized movements of resistance to alien invasion - members of a delegation close to us, participants in a war still fresh in our memories, and sufferers for the freedom of their homeland - and members of national liberation movements struggling against colonialism, racism and alien domination to enjoy the same status as other combatants. This is, in our opinion, the basic thought behind article 42, and we support it.

2. While we approve in general the principles set forth in article 42 of the ICRC draft, my delegation is, none the less, of the view that the text of this article can be still further improved in terms of both drafting and substance. In particular, we cannot accept the provision contained in paragraph 2 concerning the treatment of convicted war criminals on the same footing as prisoners of war, and we consider that the phrase "even if sentenced" should be deleted.

3. Our delegation also supports the thinking behind yesterday's statement (CDDH/III/SR.34) by the representative of the Ukrainian Soviet Socialist Republic concerning the treatment of mercenaries who are taken prisoner, and considers that his point of view, which has already been supported by a number of representatives, should find expression in Protocol I.

4. With regard to the amendments submitted to article 42 and to articles 42 bis and 42 ter, the delegation of the Byelorussian Soviet Socialist Republic is willing to support those which develop and render more specific the provisions of article 42 as proposed by the ICRC. This is the case, in particular, of the amendments submitted by Poland (CDDH/III/94), the Democratic Republic of Viet-Nam (CDDH/III/254), Madagascar (CDDH/III/73) and Pakistan (CDDH/III/11), which contain interesting ideas and should be taken

into account in the final drafting of the texts of the articles. We cannot, however, support amendments such as those submitted by Spain (CDDH/III/209), the Netherlands (CDDH/III/256), the United Kingdom and the United States of America (CDDH/III/257) or the thirteen countries (CDDH/III/260), which either depart substantially from the ICRC draft, or, as in the case of amendment CDDH/III/260, introduce directly into the Protocol elements which are entirely new and far from clear, such as the question of the role of the "competent tribunal" in deciding whether or not a person may be accorded the status of prisoner of war. (It is, moreover, unclear which tribunal is meant, whether it is an international or a national one), or the question of the special role of ICRC in the matter of judicial proceedings against certain persons, this latter being, in our view, at variance with the provisions of article 5 of the Protocol, concerning the appointment of Protecting Powers, as adopted by Committee I.

STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. RONZITTI (ITALY)

Original: English

1. Just a few words to explain our position in relation to article 42 of draft Protocol I, an article of primary importance. We agree in principle with the ICRC text of article 42 and we find it a good basis for discussion. At the same time, the Italian delegation thinks that many of the amendments submitted are very interesting and deserve careful consideration in order to find a compromise draft on which consensus may be reached.
2. As I have just said, the Italian delegation is basically happy with the ICRC formula. However, some minor changes might help to arrive at a more suitable text.
3. First of all, we agree with those delegations that have suggested that the expression "resistance movements", embodied in the ICRC text, should be changed to the more comprehensive expression "irregular forces". "Irregular forces" is a more representative and broader formula, to which we do not attach any negative significance.
4. According to us, irregular forces as a whole must comply with the conditions laid down in paragraph 1 (a), (b) and (c) of article 42 of the ICRC text. The Italian delegation attaches particular importance to the condition embodied in paragraph 1 (b) of the ICRC text - that is the distinction between irregular forces and the civilian population. Anyway, while we keep this principle as an essential one, we agree that its scope must be confined only to military operations. Besides that we realize that it might be very hard to find a realistic and workable formula laying down the manner in which irregular forces should distinguish themselves from the civilian population. On this point, as certain delegations have pointed out, we can only conceive some illustrative examples, which, by their nature, do not create additional burdens for irregular forces.
5. Although we consider it essential that irregular forces comply with the requirements laid down in paragraph 1 (a), (b) and (c) of article 42 of the ICRC text, we realize that it would be very dangerous to leave it to the subjective assessment of the enemy to judge if the irregular forces, as a whole, live up to these requirements. This problem should be examined in depth, in order to avoid the enemy refusing to treat as lawful combatants members of irregular forces, claiming that these forces do not distinguish themselves from the civilian population or do not belong to an organization capable of enforcing the laws of war. To avoid such

an occurrence, it has been proposed that the distinction to be made between combatants and the civilian population should be an essential rule of the law of war, but not a constitutive condition with which both irregular forces as a whole and individual combatants, must comply. We may understand the reasons for this proposal, but we are unable to support it, as we fear that too much relaxation might endanger the civilian population. On the contrary, we feel that the Committee - while stating that distinction from the civilian population is a condition that both irregular forces and individual combatants must fulfil - could find a formula limiting the power of the enemy to evaluate whether the irregular forces, as a whole, comply with the conditions laid down in paragraph 1 (a), (b) and (c) of the ICRC text. On this point the suggestion embodied in paragraph 2 of the Netherlands amendment (CDDH/III/256) to article 42 is a useful one. In this context we also consider article 42 bis, as proposed by Belgium and other delegations, of great value. Italy, with the permission of the States that have submitted amendment CDDH/III/260, would like to be added to the list of co-sponsors.

6. Lastly, some more words on the problem of wars of national liberation that has been raised by many delegations. These wars, because of the adoption of article 1, paragraph 2 by Committee I at the first session, are now regarded as international conflicts covered by Protocol I. The consequence is that members of armed forces, belonging to the Party that in a war of national liberation is fighting against the established Government, have acquired the status of lawful combatants and, when captured, must be treated as prisoners of war. We see no need to mention in article 42 armed forces engaged in a war of national liberation at the side of the authority fighting against the established Government. This problem, of course, might also be brought up in relation to the irregular forces of national liberation movements. Again, by definition the expression "irregular forces" - or, if it is preferred, "resistance movements" - is broad enough to include also combatants of national liberation movements not enlisted in a regular armed force. However, should reference to national liberation movements in article 42 be deemed to be essential, the Italian delegation would be open to any suitable solutions which might be suggested and on which consensus might be reached. In this respect, paragraph 3 of the Polish amendment (CDDH/III/94) might be considered as a useful proposal.

STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. JOSEPHI (FEDERAL REPUBLIC OF GERMANY)

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Original: English

1. My delegation agrees with the ICRC draft of article 42, Protocol I, in substance. We can support even more than the text itself what is said in the excellent ICRC commentary on this article by the ICRC. We share the opinion that some important aspects mentioned in the commentary should be included in the text of this article. We therefore support in general the amendment proposed by the Netherlands delegation (CDDH/III/256) and the similar amendment by the United States and United Kingdom delegations (CDDH/III/257). My delegation has also carefully considered the amendments proposed by Poland (CDDH/III/94), Finland (CDDH/III/95) and Spain (CDDH/III/209). My delegation is, however, unable to support the amendment introduced by Norway (CDDH/III/259). This amendment, in our opinion, could lead to confusion rather than to clarification. We do not think it advisable to spread over several articles of the Protocol conditions under which members of irregular armed forces should be accorded prisoner-of-war status if captured.
2. The amendment of the Democratic Republic of Viet-Nam (CDDH/III/253) is not acceptable to my delegation because, if adopted, there would be no visible distinction between guerrilla fighters and the civilian population. This distinction is, however, really essential to ensure the humanitarian protection of the life, health and property of a civilian.
3. Concerning a possible paragraph 3 covering members of organized liberation movements, as suggested in the foot-note to the ICRC draft of article 42, such a paragraph does not now seem necessary since Committee I adopted at the first session of the Conference a general provision in article 1, paragraph 2 of draft Protocol I. To include a special paragraph referring to liberation movements and their members later in article 42 might even weaken their position within the framework of Protocol I.
4. Lastly, my delegation wishes to express its support for a new article 42 bis (CDDH/III/260) proposed by the delegation of the Arab Republic of Egypt and others, which was introduced so ably by the representative of Belgium. We would like especially to congratulate the United Kingdom representative on his eloquent and convincing explanation. Our answer to that brilliant statement is: we wish the Federal Republic of Germany to be added as co-sponsor of amendment CDDH/III/260.

STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. AGUDO (SPAIN)

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Original: Spanish

1. I shall be very brief. My delegation wishes to co-sponsor amendment CDDH/III/260 which proposes the addition of an article 42 bis, and asks that its name be included in the list of sponsoring countries.

2. We wish to add that we accept only the original version of the amendment since the Spanish version contains, among other minor errors, an error in translation. In paragraph 2, after the words "third Convention" the English (original) version uses the word "or", whereas the Spanish version uses the word "y" signifying an addition which my delegation cannot accept.



STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. NGUYEN VAN HUONG (DEMOCRATIC REPUBLIC OF VIET-NAM)

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Original: French

1. Our delegation would like to comment on amendment CDDH/III/260 entitled "Protection of persons taking part in hostilities". According to that amendment, persons who have committed individual breaches of the rules of international law applicable in armed conflict will continue to have prisoner-of-war status.
2. In our opinion prisoner-of-war status cannot be accorded indiscriminately to all those who have committed breaches of the rules of international law applicable in armed conflict without a distinction being made between grave breaches and those that are not so serious.
3. Our Committee should bear in mind the laws which were established by tribunals after the Second World War. The case of the sentencing of General Yamashita by the United States Supreme Court, of Reuter in the Netherlands, and Wagner in Italy are still present in our minds. All those judgements were based on the well-established rules of customary law providing that those who seriously violated the laws of war could not claim the benefit of those laws. Consequently, according to that jurisprudence, enemy military personnel who before their capture committed individual breaches known as war crimes, that is to say violations of the laws and customs of war, or crimes against humanity, as provided in the London Agreement of 1945, in the 1949 Geneva Conventions and in the present Protocol, cannot claim prisoner-of-war status. The same argument should apply to the use of mercenaries by colonial and racist régimes against liberation movements struggling to obtain their freedom and their independence from the yoke of colonialism and alien domination, as specified in United Nations General Assembly resolution 3103 (XXVIII) of 12 December 1973. It is understood, of course, that perpetrators of breaches of the laws and customs of war that are not considered grave have always the right to prisoner-of-war status.

STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. ROSAS (FINLAND)

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Original: English

1. In introducing at the thirty-third meeting (CDDH/III/SR.33), amendment CDDH/III/95 submitted by Finland to article 42 and suggesting a certain enlargement of the category of forces covered by it, I had occasion to indicate that my delegation approaches this article with an open mind. While regarding the ICRC draft as providing a good basis for our work we think that several of the amendments submitted to it should be given careful consideration before we are able to proceed to adopt one of the most important provisions on the agenda of this Committee.

2. The first problem which comes to our mind is raised by the Polish amendment (CDDH/III/94), as well as the Norwegian amendment (CDDH/III/259), which relate article 42 not only to the third Geneva Convention of 1949 and the question of prisoner-of-war status, but also to The Hague Regulations of 1907 and the question of legal combatant status. Theoretically speaking, there would not seem to be any objections to such an approach. While all persons entitled to prisoner-of-war status are not legal combatants (one may point, for example, at war correspondents or members of merchant marine crews) the reverse is true, in other words all legal combatants are at the same time entitled to prisoner-of-war status. The Polish and Norwegian amendments state this relationship in explicit terms, while it is only implicitly contained in the third Geneva Convention of 1949. The only objection to the proposal contained in these amendments might be that we are here primarily concerned with a reaffirmation and development of the four Geneva Conventions of 1949, and that explicit references to The Hague Regulations of 1899 and 1907 should be avoided. We are not sure, however, whether this argument carries with it any considerable merit, and we are in any case prepared to give serious consideration to the interesting approach adopted in the Polish and Norwegian amendments.

3. Turning now to the three conditions contained in paragraph 1 (a), (b) and (c) of the ICRC draft, I should like first of all to note that my delegation attaches great importance to these conditions and regards it as indispensable for them all to be respected by armed forces, whether these forces are regular or irregular, and whether they operate in international or non-international armed conflicts. Sub-paragraph (a) concerning a responsible command is, of course, a necessary pre-condition for the fulfilment of the other conditions.

Condition (b) again is indispensable to ensure the protection of the civilian population, a fact on which there is no need to dwell at length in this connexion. As to condition (c) concerning respect for the Conventions and the Additional Protocol, it goes without saying that all parties to international armed conflicts who have ratified, acceded to or declared their acceptance of these instruments are under a legal obligation to comply with them, and to make all their armed forces do likewise.

4. On the other hand, we should bear in mind that in article 42 we are not dealing primarily with what the parties to conflicts and their armed forces should do as such, but more with what they should do in order to be entitled to prisoner-of-war status. As we all know, this status does not necessarily imply immunity from prosecution. On the contrary, the third Geneva Convention of 1949 regulates the instigation of judicial proceedings against prisoners of war, and also for crimes committed before capture, such as war crimes. Thus, we may well lay down international obligations for armed forces entailing individual responsibility for their members without these obligations being implicit in article 42 as conditions for prisoner-of-war status.

5. We note that the Norwegian amendment (CDDH/III/259) in particular aims at a broadening of the category of persons entitled to prisoner-of-war status by maintaining only a modified version of paragraph 1 (a) of the ICRC draft, while dropping paragraph 1 (b) and (c) as constitutive conditions for this status. Amendment CDDH/III/73, again, submitted by Madagascar, would leave out condition (b), while amendment CDDH/III/256, submitted by the Netherlands, refrains from reproducing condition (c) of the ICRC draft, although this amendment at the same time partly transfers this condition to paragraph 1 (a).

6. Reserving our final position on the question of what specific conditions should be fulfilled by the armed forces mentioned in article 42 in order that their members might be entitled to prisoner-of-war status, we would like to indicate at this stage that we have studied the Norwegian amendment in particular with a great deal of interest, and we believe that the general approach adopted in this amendment should be given careful consideration by our Committee. If we, as has been suggested by the delegations of Madagascar, the Netherlands and Norway, are to drop or modify some of the conditions laid down in the ICRC draft we tend to think that paragraph 1 (c) concerning respect for the Conventions and the Protocol would be the easiest one to delete, as the obligation inherent in this condition would be clear from the mere fact that the Party to the conflict in question had ratified, acceded to or declared its acceptance of these instruments. The repetition of this obligation in article 42 dealing with prisoner-of-war status

seems to put the irregular forces in an inferior position as compared with that of regular forces, since the application of the third Geneva Convention to the latter category of forces is as a general rule not dependent on the fact that the regular army as a whole, or the State it represents, complies with this Convention.

7. My third and final point relates to the inclusion of a reference to national liberation movements in article 42, as suggested in a note to the ICRC draft of that article and in some amendments. In the view of my delegation the legal status of wars of national liberation is already settled in article 1 of draft Protocol I, which makes the whole Protocol, including article 42, apply to these wars, and consequently we do not regard it as absolutely necessary for a specific reference to these situations to be made in article 42. If, however, such a reference is generally felt desirable we think that one should distinguish between the liberation movement as an authority on the one hand, and its armed forces on the other. It may well be that such a movement also possesses regular armed forces within the meaning of Article 4.A (1) of the third Geneva Convention of 1949, and accordingly it might be inappropriate to cover the whole question of the armed forces of liberation movements in article 42, provided that this article is confined to irregular forces.

8. There are, of course, several other problems of considerable importance relating to draft article 42 and the amendments submitted to it to which I have not alluded in this statement. In order not to prolong unduly this debate I shall not go into these problems in this connexion with the understanding that my delegation may come back to them in the Working Group.

9. Finally, I wish to indicate that we support the general idea contained in amendment CDDH/III/260 relating to a new article 42 bis, submitted by the Arab Republic of Egypt and several other delegations, but we wish to comment upon the details of this amendment in the Working Group.

STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. ABADA (ALGERIA)

Original: French

1. Our Committee, in considering article 42, is beginning the study of one of the most important articles of draft Protocol I: the number of amendments submitted and the lengthy list of delegations taking part in the debate is a definite proof of that fact.
2. At the present stage, which is more or less an introductory one, since the really decisive debates can take place only in the Working Group, the Algerian delegation would like to put forward some considerations in order that its approach to the problems posed by article 42 may be better known.
3. For my delegation the study of this article is inseparable from the context in which it was drafted and which it is necessary to recall.
4. In the light of the views expressed in 1972 by certain experts - in particular those of the third world - at the second session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, the ICRC substituted the present version of the article entitled "New category of prisoners of war" for the original version of article 38 on "Guerrilla fighters".
5. That was a concession to those who wished Protocol I to cover more fully wars of national liberation and the status of combatants in such conflicts.
6. Our Conference, which adopted at its first session article 1 of draft Protocol I with its important paragraph 2, has made it possible to deal with the question of liberation movements and conflicts from a completely different standpoint.
7. Thus, not only one article but the entire Protocol must cover such situations. In this new context, article 42 has to some extent been superseded, more exactly it is an inconsistent after-effect of an out-of-date situation. In our opinion its brevity is no longer justified by the situation created by the adoption of article 1 - namely the principle of equality, in a conflict considered as international, between the Parties to a conflict, that is to say, the troops comprising the liberation movements and the adverse Party, which in most cases is a conventional army.

8. The logical consequence of that principle of equality is that a captured member of a liberation movement must be considered a prisoner of war within the meaning of the third Geneva Convention of 1949. Any other approach, for example by stipulating, as is done in the ICRC text and certain amendments, that the combatant member of a liberation movement must fulfil precise conditions in order to be accorded prisoner-of-war status, would place that combatant in an inferior position in law and practice thus opening the way to every breach.
9. Yesterday (thirty-fourth meeting - CDDH/III/SR.34) the Belgian representative rightly emphasized the difficulties which might arise in determining whether such conditions had been fulfilled.
10. At the 1972 Conference of Government Experts, the Algerian delegation had pointed out how unrealistic it was to require the wearing of a distinctive sign which was visible and recognizable at a distance, for such requirement did not take into account the special nature of guerrilla warfare and the circumstances in which a liberation movement began and developed. To retain this requirement as a condition of entitlement to prisoner-of-war status and to draw the conclusion that in case of the non-observance of the conditions a guerrilla fighter would be deprived of that status, would be to continue to regard that combatant as a second class subject, and that would run counter to the equality which we are seeking.
11. The sanction accompanying such a condition, such as that which appears in certain amendments, would place the combatant of a liberation movement in an unacceptable position. If that occurs, those who introduce that type of sanction should accept as a lawful and logical request article 42 ter proposed by the Democratic Republic of Viet-Nam, which provides penalties for breaches committed by a member of a regular army by depriving him of prisoner-of-war status. That would be a sound interpretation of the principle of equality.
12. In the same order of ideas, my delegation does not like the reference to "irregular forces", a formula which is vague and may be open to unfavourable interpretations.
13. It is true that the amendments submitted to our Committee reflect different concerns and that many ambiguities still remain, as can be seen from the texts submitted and as they were proposed during the general debate.

14. As far as we are concerned, we wish it to be clearly understood that when we ask for members of liberation movements to be given the same status as troops belonging to a conventional regular army, it is not for the sole reason of giving them an advantage which no one can contest. We believe that in establishing such equality we shall be supporting in the most correct way the reciprocal recognition of, and respect for, guarantees by the Parties to the conflict.

15. That balance is vital since if it were upset, the humanitarian guarantees which the Conference seeks to establish in draft Protocol I would be reduced to nothing and a spiral of reciprocal violence, pressure and breaches would be triggered off. We would then be perpetuating those negative legal situations which had tragically marked the armed conflicts of peoples engaged in the struggle for freedom and self-determination.

16. In the hope of effacing such facts, we invite the Committee, and later on the Working Group, not to lose sight of this humanitarian consideration. This would enable us to harmonize draft Protocol I as a whole with the principle set out in article 1. This desire for harmonization has already led us, thanks to the worthy efforts of many delegations, to submit amendment CDDH/I/233 concerning articles 84 and 88 in Committee I.

17. I should now like to express our sympathy with the Norwegian approach to the problems of article 42 in amendment CDDH/III/259. The proposals contained in that amendment are worthy of attention. Drafting changes are, however, necessary, but they can be taken up at a later stage.

18. The Norwegian amendment to article 42 calls for more precision. In our opinion a new article 42 should unequivocally affirm the principle of the legal equality of a combatant belonging to a conventional regular army and a combatant belonging to a liberation movement so far as the third Geneva Convention of 1949 is concerned. That proviso alone would enable us to accept article 42 bis proposed in document CDDH/III/260.

19. We also appreciate the analysis made by the Norwegian delegation of the conditions laid down in the ICRC draft of article 42, paragraph 1, which has made it possible to consider articles 33, 35, 41 and 42 in the same light. That was an effort of imagination which warrants our attention.

20. Lastly, the Algerian delegation is pleased to note the interest shown by many delegations in this important item of our agenda. The Algerian delegation is convinced that in the worthy traditions of Committee III we shall be able to surmount the evident difficulties.

STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. MAHONY (AUSTRALIA)

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Original: English

1. The Australian delegation intervenes in this debate to record the importance my delegation attaches to article 42 and related articles of draft Protocol I, and to record its views on some of the important principles that emerge.
2. The importance of this article and related articles has already been emphasized and underlined by the important proposals that a number of representatives have put forward and by the many interventions by various representatives in this debate.
3. Article 4 of the third Geneva Convention of 1949 mentions a number of categories of persons who, if they fall into the power of the enemy, become prisoners of war. The purpose of article 42 is to extend this category of persons.
4. The Australian delegation supports in principle the approach by the ICRC to article 42 which we believe merits a sound basis for the work of this Committee, but there are a number of modifications all of which have been mentioned in the proposals to which we wish to draw attention.
5. The Australian delegation prefers the phrase "members of irregular forces" to the phrase "members of organized resistance movements" which appears in the ICRC text. We believe that the words "members of irregular forces" is a more representative way of describing the lawful combatants this article has in mind. Some delegations mentioned that this article would apply to members of national liberation movements who are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination. Some have taken a contrary view. Our view that one of the results of paragraph 2 of article 1 of draft Protocol I would have been to make members of those national liberation movements who fall into the power of their opponents, prisoners of war as a matter of law quite independently of article 42. It may be, however, that national liberation movements or at least some of them, do have irregular forces as that term is usually understood. The term "irregular forces" is one of long standing in international law and my delegation would not object to it. In this connexion we note the proposal by Finland (CDDH/III/95) that these forces should be called members of organized army units. This description would also be accepted.



6. The Australian delegation is concerned to ensure that article 42 does not in any way limit the protection to be afforded to the civilian population, either by the Geneva Conventions or by Protocol I or under international law. This leads us to support in principle conditions such as those set out in paragraph 1 (a), (b) and (c) of article 42 but not necessarily in the present terms of those sub-paragraphs. We believe it to be important that the irregular forces to which the article refers should be organized and commanded by a person responsible for the conduct of those forces of conflict.

7. We believe that the irregular forces should be distinguishable from the civilian population in military operations. We are not committed to any particular method of distinction. At this stage we do not offer any comment about the point of time when the forces should identify themselves. We shall pursue this further in the Working Group. Unless satisfactory safeguards are established the civilian population will be in peril.

8. We also believe that the irregular forces, by whatever name, should be required as a matter of law to conduct operations in accordance with the laws of war, and we think that respect for the law of war should be maintained.

9. Some representatives have referred to the requirement that the irregular forces should have an internal disciplinary system. We agree with this proposition and this leads us to say that we think there is much merit in the proposition that this article should be considered with articles 35, 41 and 65.

10. Without traversing the details in this debate my delegation supports in principle the propositions set out in amendment CDDH/III/260 proposed by the Arab Republic of Egypt and others; we think that the propositions set out therein are useful and deserve our careful consideration.

11. During this debate there have been a number of references to the treatment of mercenaries. We are uncertain of what representatives have in mind on this matter and we would prefer to discuss the legal principles raised by this question after we have seen what proposals, if any, are put forward.

12. The Australian delegation looks forward to working with other delegations in the Working Group on the principles raised by this article.

STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. IIJIMA (JAPAN)

Original: English

1. Two great world wars in the past and many other armed conflicts that have unfortunately occurred since then tell us of the importance of humanitarian law, particularly as concerns the question of prisoners of war. The Japanese delegation appreciates article 42 drafted by the ICRC; it is certainly the product of a careful study of painful but significant experiences in the recent past, and we regard it as a good basis for further discussion of the question of a new category of prisoner of war. With this basic attitude, I should like to make a few comments as follows.

2. First, paragraph 1 of article 42 of the ICRC draft refers only to resistance movements. I do not think that is enough. Theoretically speaking it would be possible to distinguish militia and volunteer corps from resistance movements and to lay down different conditions for the treatment of prisoners of war but, in practice, the methods and means of warfare which militia, volunteer corps and resistance movements follow resemble each other in most cases. Moreover, there may be other combat groups than those mentioned above who also follow similar methods and means of war. We should therefore like to suggest that provision be made in article 42, for the inclusion of other groups or forces of a similar nature to resistance movements. For this reason, we support the proposals made respectively by the United Kingdom and the United States delegations (CDDH/III/257) and by the Netherlands delegation (CDDH/III/256).

3. Second, we believe that the conditions laid down for according prisoner-of-war status to the members of irregular forces should be provided on the basis of the following considerations:

- (a) characteristics of methods followed;
- (b) full realization of the protection of civilian population;
- (c) ensuring the fair conduct of combats.

For this reason we subscribe to the principles laid down by the ICRC draft in paragraph 1 (a), (b) and (c) of article 42. However, my delegation believes that paragraph 1 (b) should be formulated in more specific terms.

4. No one would question the fact that in order to ensure protection of the civilian population it is imperative to make a clear distinction between combatants and civilians. This principle of distinction between combatants and civilians constitutes one of the most fundamental bases for the protection of the civilian population.

5. The question is how to put this important principle into effect so that the civilian population is fully protected. It is therefore not enough merely to lay down this principle - it is necessary to provide some standard means of distinction in concrete terms.

6. In saying this I should like to make it clear that my delegation has no intention of denying the significance of guerrilla warfare often adopted by irregular forces in modern times.

7. As regards the means of distinguishing combatants from the civilian population, we believe that Article 4. A (2), (b) and (c) of the third Geneva Convention of 1949 already provides appropriate examples. We feel, however, that of the two means of distinction mentioned either of them is sufficient. We also feel that the means of distinction should not be limited to those mentioned and that there should be other effective means of distinction.

8. For this reason my delegation supports the amendments submitted, respectively by the United States and United Kingdom delegations (CDDH/III/257) and by that of the Netherlands (CDDH/III/256).

9. Lastly, we also share the concern of those representatives who have stated that, however unfortunate it may be, disputes and doubt will unavoidably occur in the course of the application of article 42. To deal with such cases it would be necessary to have a provision covering the protection of those who participate in hostilities. For this reason we support the joint proposal by the twelve Powers (CDDH/III/260).

STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. JANG (DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA)

Original: French

1. Our delegation has certain problems in connexion with article 42.
2. First, we consider that all those fighting against imperialism, colonialism and racism should, if captured, be treated as prisoners of war. It is accordingly very important that article 42 should provide for the protection of members of national liberation movements. In their struggle against foreign occupation, colonialism and racism they should have the same rights as combatants members of regular forces. That fact should be borne in mind when drafting article 42.
3. Second, it should be clearly stated that those who have committed crimes against peace, war crimes and crimes against humanity should not be treated as prisoners of war. That was a condition laid down in the 1949 Geneva Conventions and in the present Protocol. The principles of international law and the decisions of a recognized international military tribunal must be applied justly. We consider that crimes against peace, war crimes and crimes against humanity should be judged in accordance with the laws of the Detaining Power.
4. Third, the employment of prisoners of war in the performance of humiliating tasks and their barbarous slaughter should be prohibited.
5. We are well aware of the abominable way in which the imperialist aggressors have treated prisoners of war. They have not treated them in accordance with the Geneva Conventions but have killed them by means of torture, beatings, toxic grenades, burial alive and burning because such prisoners failed to agree not to be repatriated. They have killed the wives of prisoners by the most cruel means after having violated them. They have killed them even as they would a mad dog. This is an example of the cruelty shown by the American imperialists against our prisoners during the last Korean War.

STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. DIXIT (INDIA)

Original: English

1. Article 42 is an important article of draft Protocol I which is applicable in international armed conflicts. This article extends protection to a new category of prisoner of war who would also be entitled to the protection of the Geneva Conventions and of Protocol I, provided they fulfilled the conditions laid down in paragraph 1 of this article. We generally agree with the principles contained in this article. In this connexion, my delegation is of the view that the proposed paragraph 3 in the ICRC draft should also form an integral part of this article as the scope of article 1 of draft Protocol I has been redefined so as to include armed conflicts carried out by national liberation movements. But the language of this paragraph must conform to that used in article 1.
2. The problem of affording reasonable protection to members of groups that do not constitute the armed forces of a State is one of the intractable fields of humanitarian law. There are two considerations that influence our thinking in this connexion: first, if the Geneva Conventions and this Protocol do not cover such situations, a sizable area remains uncovered and unprotected. Second, the degree of violence used by persons participating in underground struggles is likely to be in a reverse ratio to the protection guaranteed to them in the event of capture. Such persons generally become desperate and cruel, since no protection is available to them in the event of their capture. Cruelty thus becomes a spiral spreading the area of suffering.
3. A distinction may be drawn between "prisoner of war status" and the "prisoner of war treatment". In view of the peculiar nature of the organizations to which these individuals belong, I wonder whether it would not be better to give them prisoner-of-war treatment in order to facilitate their early release. These persons do not necessarily have to wait until the end of hostilities for their release.
4. We are generally in agreement with the conditions laid down in paragraph 1 (a) and (c) which must be fulfilled by the organization concerned. However, we wonder whether the condition contained in paragraph 1 (b) could not be made more specific in order to facilitate a distinction being made between civilians and these combatants. However, we will not insist on this if that is the wish of a large majority of the representatives.

5. In view of the nature of the conflict, my delegation is of the view that the provision should be limited to a situation where the Detaining Power has occupied a territory in course of an international armed conflict.

6. I shall not take up the valuable time of this Committee by discussing each and every amendment in detail. Our attitude to the various amendments will be guided by the above considerations, but we wish to offer some general comments. We are opposed to the term "members of irregular forces" as we do not know what it means. This term is vague and ambiguous. Perhaps it has been invented to cover mercenaries to which we are totally opposed. Similarly, we fail to understand the purpose and meaning of amendment CDDH/III/260. It blurs the distinction between a civilian and a combatant. The person we are trying to protect is an individual who is a member of an organization and not just any individual. The ICRC Commentary itself points out that the condition of belonging to a Party to the conflict, which is borrowed from Article 4. A (2) of the third Geneva Convention of 1949, is essential to the interplay of international responsibility, for the fact alone of belonging to a Party to the conflict creates the link whereby a subject of international law can be held internationally responsible for the actions of members of resistance or liberation movements. Failing that, such actions involve at best the individual responsibility of the authors. As a matter of fact, mercenaries are the creators or perpetrators of wars and must be dealt with as war criminals. Any individual, whether he is a mercenary or otherwise, will be subject to the law of the Detaining Power; but if he belongs to an organization and takes part in hostilities, he is then protected under the present article 42.

7. We support amendment CDDH/III/253 submitted by the Democratic Republic of Viet-Nam.

8. Having said the above, my delegation wishes to emphasize that in a spirit of co-operation and constructive contribution, we would be open to suggestions which help to make our task successful, bearing in mind the realities of life.

STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. AJAYI (NIGERIA)

Original: English

1. I thank the Chairman for granting my delegation an opportunity to add its own voice to many others to which we have listened during the seemingly long debate on this very important article of draft Protocol I.
2. My delegation regards the proposal made by the delegation of Madagascar in document CDDH/III/73 as a big improvement on the ICRC's draft which, in our humble and sincere opinion is first, incomplete as it fails to take into account the fact of the existence of national liberation movements. Second, it imposes what we regard as an unrealistic condition in paragraph 1 (b) where it expects national liberation movements to distinguish themselves from the civilian population in their military operations. This condition is unrealistic in our view because it is not always possible for such movements who operate in handicapped conditions against well-equipped and sophisticated colonial masters and racist régimes, to comply with such a condition.
3. It is, therefore, unrealistic and tantamount to demanding too much of the national liberation movements to expect them in the circumstances to comply with the ICRC's condition in paragraph 1 (b) of its draft.
4. This is why our delegation favours and prefers paragraph 2 of the amendment of the delegation of Madagascar which has reduced the ICRC's conditions from three to two by deleting paragraph 1 (b) of the ICRC's draft.
5. We have found paragraph 1 of Madagascar's amendment very ample and unequivocal in its wording. We regard it as unequivocal because it sets out clearly new categories of prisoners of war in two sub-paragraphs: (a) and (b) where the former refers to "members of organized resistance movements" while sub-paragraph (b) refers to "members of organized national liberation movements". We regard this simple classification as very helpful because interpretation of one category may not necessarily include the other category of prisoner of war. Consequently, my delegation prefers paragraph 1 of Madagascar's draft to paragraph 1 of the original ICRC draft.

6. Paragraph 1 of the amendment proposed by the delegation of the Netherlands (CDDH/III/256) fails to satisfy us in its magnanimous attempt to widen the scope of the provisions relating to the new category of prisoners of war by the use of the phrase "members of irregular forces", because in our opinion the word "irregular" is capable of too wide an interpretation which we think will be injurious to the scope of this provision.

7. With regard to paragraph 2, submitted by the representative of Norway, my delegation does not know who are the "combatants" to which reference is made. We only hope that the word "combatants" here does not refer to the notorious international gangsters usually called mercenaries because, if they are the ones expected to benefit under the provision, my delegation will not agree - not even in the name of humanity - to such a proposal intended to give these notorious villains protection. We regard them as opportunist criminals who should not be given any protection whatsoever.

8. It is for the same reasons that my delegation finds it very difficult to go along with other proposals which try, in the name of humanity, to grant these infidels status quo and protection in this humanitarian legal document. We, as one of the countries that have been victims of the mercenaries' dirty and inhuman activities, know for certain that they deserve no status quo and no protection in a document such as the one we are now considering.



STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. NAVEGA (PORTUGAL)

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Original: French

1. In order to comply with the Chairman's appeal I shall be very brief. The importance of article 42 has been emphasized many times in this Committee, both by the ICRC representative in introducing the article and by delegations who have expressed their points of view.
2. The large number of amendments submitted by the various delegations aimed at making a positive contribution to the work before us reflect the interest taken by those delegations in the problem of prisoners of war.
3. The protection of combatants captured by the enemy and of all persons taking part in armed conflicts is one of the objectives of humanitarian law. The third Geneva Convention of 1949 clearly reflects the desire to guarantee protection to combatants. Draft Protocol I refers to that protection, taking into account the new situations which have arisen since 1949.
4. The ICRC text and the amendments submitted constitute a sound basis for the discussion of the article in our Working Group. The divergent points of view expressed by various delegations on certain aspects connected with the granting of prisoner-of-war status shows the complexity of the problem, but it will perhaps be possible to overcome the difficulties which arise.
5. In the statements concerning article 42 reference has been made to the struggle by the peoples of Africa for independence and for their right to protection under humanitarian law.
6. The right of the African peoples to self-determination is a fundamental principle recognized by the Portuguese Government and which it is putting into effect. The decolonization of Portuguese territories, which is in process of being completed, is proof of that fact.
7. The rules of humanitarian law which the Conference is in process of drafting should reflect the desire to extend to the peoples of all continents more effective protection in case of armed conflicts.
8. The considerations which I have just mentioned clearly show the importance attached by the Portuguese Government to the problems of humanitarian law and their appropriate solution.

STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. SAMAD (AFGHANISTAN)

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Original: French

1. As requested by the Chairman, I shall try to be brief.
2. The delegation of the Republic of Afghanistan notes with satisfaction that the text of article 42 of draft Protocol I prepared by the International Committee of the Red Cross constitutes a good basis for discussion and work concerning this new category of prisoner of war which is the subject of our study of article 42.
3. Paragraphs 1 and 2 of that article as drafted satisfy our delegation. Paragraph 3, which appears in a foot-note to article 42, should be included in the text of article 42. It will emphasize the humanitarian nature of the article and define more specifically the new category of prisoner of war whose status we are discussing.
4. My country, one of the first States to fight for independence and freedom from foreign domination, has always promised to extend its moral support and sympathy to all peoples struggling to free themselves from colonialism or foreign domination, and to those who are still struggling for their right to self-determination and independence. It is with great pleasure that we note that a large number of those who were struggling for the right to self-determination have obtained their lawful rights. But we note with regret that there are still people deprived of their lawful right to self-determination. It is for that reason that armed conflicts are still taking place against colonial and foreign domination and for the right of people to self-determination, and any of those fighters taken prisoner are not covered by prisoner-of-war status.
5. It is therefore opportune for this assembly, in the light of all that has been said in the various proposals made, to support and grant to the new category of prisoner of war the lawful right covered by the legal provisions of article 42.

STATEMENT MADE AT THE THIRTY-FIFTH MEETING, 21 MARCH 1975,

BY MR. SABEL (ISRAEL)

Original: English

1. The distinction to be made between lawful combatants and unlawful combatants lies at the very roots of humanitarian law in armed conflicts and is the legal and practical basis upon which the status of prisoner of war is conferred or denied.
2. The status of prisoner of war, as defined in the Geneva Conventions of 1949, is perhaps one of the greatest achievements of international law. By granting such status to an adversary a State knowingly and willingly renounces its right to prosecute or punish that adversary for acts of lawful combat he may have committed which otherwise would be regarded as criminal offences. That combatant may have planned and participated in actions that killed and maimed scores of members of the armed forces of the Detaining Power, yet that Detaining Power agrees not to punish the perpetrator. What is granted is in fact a form of complete inviolability from prosecution for acts of violence committed against military objects and members of the armed forces of the Detaining Power.
3. Such inviolability is in addition to other important humanitarian privileges granted.
4. The question which every State must ask itself is to whom is it willing to grant such inviolability? Are States willing to grant such inviolability to any and every person committing organized acts of violence against its armed forces, knowing that the granting of such privileges might well be at the expense of its own civilian population? States have agreed mutually to grant such status to members of the armed forces of other States with which they are in conflict. Beyond that, and beyond the provisions of Article 4 of the third Geneva Convention of 1949, any person or groups claiming to be entitled to such status with the immunity it entails must satisfy the State requirement that they come completely within the gambit of humanitarian law. It must be verified that the form of armed violence such persons commit ensures the vital distinction between civilians and non-combatants; that they are organized in such a way that they are capable of complying with humanitarian law and are willing to comply and do comply with these rules in practice; that they knowingly take upon themselves the risk that all lawful combatants take of clearly distinguishing themselves from civilians by carrying their arms openly or wearing distinctive signs. For it is only by such distinction that the civilian population can hope to be protected. Where this distinction is blurred the civilians may be the ones to suffer.

5. The question must arise as to what are the targets of such person or persons claiming the high privilege of lawful combatancy. If such person or persons act as a matter of system and practice in contravention of the laws of war by aiming their attacks against civilians or civilian objects are they still entitled to lawful inviolability and privileges subject only to possible prosecution as war criminals? Is it proposed that a group of individuals whose method of warfare is aimed specifically and maliciously at women and children should be granted the status of privileged and lawful combatants? Such a step would eliminate the basic and elementary distinction between lawful combatants and those who are not.

6. It must be reiterated that what is involved are not the basic humanitarian rights and safeguards for such are, and should be, granted to all, irrespective of the crime of which they may be accused. The question is one of the granting of the valued and privileged status of lawful combatants with the inviolability it entails.

7. It is essential that there exist this barrier between the rights of all persons committing acts of violence and the rights of lawful combatants, and that any person who is not a member of the armed forces and who wishes to enjoy the latter's rights must, by his actions and behaviour, cross that barrier by showing the credentials of a lawful combatant, and by showing that he and his group comply with the laws of war, and distinguish themselves from civilians by carrying their arms openly or other such method. Their political aims, objectives and declarations cannot by themselves be sufficient to grant their individual members the inviolability to which we have referred unless they, themselves, by their actions have manifestly brought themselves within the compass of the laws of war.

8. In this Committee we have carefully and painstakingly drafted regulations forbidding any form of attack or terror against civilians or civilian objects. It would be strange, indeed, if at the same time we decided to grant privileged status to groups who may decide to devote their energies almost exclusively against those same citizens and civilian objects.

9. The three basic requirements - organization, carrying arms openly and complying with the laws of war - are three essential requirements for the granting of such privileges and inviolability to irregular forces belonging to a party, and we believe that any watering-down of these requirements will do irreparable damage to humanitarian law.

STATEMENT MADE AT THE THIRTY-SIXTH MEETING, 24 MARCH 1975,

BY MR. GIRARD (FRANCE)

Original: French

1. Article 42 raises a problem for my delegation on which I must make a statement not in the Working Group but in the Committee.
2. Article 42 speaks of organized resistance movements and when it is a question of what the Protocol refers to as "members of resistance movements" places the accent always on "organization" and "responsible command".
3. This is a question of terminology which must be clarified. The term "members of resistance movements" covers many different categories of movement. First, there are the members of organized resistance movements who distinguish themselves from the civilian population. They are what is known in Latin America as "guerrilleros" and are called "partisans" in other countries, and are what we called during the last war "partisans" and members of the resistance movements of the "maquis". That category of resistance movement is formally protected by article 42. But there is another category which interests us greatly, namely the underground fighters. They are organized into "networks", but their characteristic is that precisely nothing distinguishes them and must not distinguish them from the civilian population.
4. Article 2 of The Hague Regulations of 1907 which refers to a mass levy, recognizes that the people of a territory have the right to take up arms to resist the invading troops. The recognition of the legitimacy of that reaction by the whole population devoted to their independence and freedom has never gone so far as to recognize that such a basic reaction by individual patriots might occur during occupation by enemy forces. Why?
5. I know that the cases I mention do not occur in all countries -- thank Heavens! But those who have known them -- Belgium, France, Norway, the Netherlands and Yugoslavia, to mention only the countries in my area, remember them reverently. They have immortalized in marble the names of those civilians who died without ever divulging the slightest information about their network and who embodied the very soul of their nation. The ashes of those underground fighters have been placed by their countries in their Pantheons.
6. I do not think that man's sense of honour has changed over the centuries. Some centuries ago, the Sultan Saladin seeing that his adversary, Richard the Lionhearted, had had his horse killed under him and was fighting on foot, sent him one of his horses. I am sure that time has not corroded that nobility of heart -- that chivalrous respect for the adversary.

7. We cannot disregard the resistance fighter and I speak of inter-State conflicts - the civilian who refuses to agree to the occupation of his country by a foreign army - by approving an article 42 which would exclude such resistance fighters and place them outside the law.

8. The representative of Norway has appreciated that problem. He has serious reasons for paying attention to it and I can but support the wording he has outlined for the purpose of broadening the basic guarantees offered by the Geneva Conventions.

9. I do not know whether it will be possible to go still further and accord, if not the status, then at least the treatment of prisoner of war to those whom we call properly speaking "resistance fighters" and who, once they are captured, find honour in silence.

10. I do not wish to complicate the work of the Committee. We have studied with interest the statements of the representatives of Belgium who know very well what they are talking about, and who have urged that when captured these underground fighters should benefit from all the guarantees of appropriate legal procedure and not risk, according to Mr. de Breucker's happy formula, finding themselves exposed to the finger of destiny.

11. I do not doubt that such a solution can be found. In any case, our delegation could not support a formula which would hand over these defenceless resistance fighters to the firing squad.

STATEMENT MADE AT THE THIRTY-SIXTH MEETING, 24 MARCH 1975,

BY MR. KUSSBACH (AUSTRIA)

Original: French

1. The Austrian delegation has followed with great attention the general discussion on article 42 of draft Protocol I which introduces a new category of prisoner of war. Apart from the ICRC draft in that connexion we have also studied with great interest the various amendments to that draft submitted by a number of delegations. In order not to take up the time of the Committee we shall limit ourselves at present to general comments while reserving the right to speak later and to submit proposals at the appropriate time in the Working Group.
2. My delegation attaches great importance to the protection of the armed groups and their members to which reference is made in article 42. We are conscious of the relevance of that problem especially in the light of the political developments of the past twenty-five years in certain areas of the world, constituting the historic process of decolonization. We are of the opinion, however, that the method of combat usually called "guerrilla warfare" is not restricted either to the combats mentioned in article 1, paragraph 2 of draft Protocol I or to civil war, rather it is a very general method of combat which has been used many times in the past in inter-State conflicts and which will lose none of its significance in the future, not even when the transitional era of decolonization is over. The experience of the last decades has shown us, and military experts moreover agree, that guerrilla warfare may become, among others, the most suitable method of combat for small armies in their struggle against adversaries of far greater strength. The great advantage of this method of combat is the considerable chance of seriously jeopardizing military successes achieved during open conflict on the battlefield.
3. The Austrian delegation therefore shares the opinion of the delegation of Finland that the mention of wars of national liberation in article 1, paragraph 2 of draft Protocol I is sufficient to ensure the application of all provisions of Protocol I, including article 42, to such armed conflicts. Consequently, the inclusion of a reference to wars of national liberation in article 42, as proposed by the ICRC, no longer seems necessary. On the one hand it is conceivable that a national liberation movement may have a regular army using traditional means of combat and, on the other, it would be preferable to avoid giving the impression that the scope of article 42 is more or less restricted to wars of national liberation.

4. In glancing at the wording of article 42 as proposed by the ICRC, we would prefer the words "organized resistance movements" in paragraphs 1 and 2 to be replaced by the words "organized armed groups", first because we are interested here in armed forces or groups rather than in movements from which they derive the lawfulness of their struggle, and also because it seems to us that the expression "resistance movements" restricts the scope of the article in a way which is neither necessary nor indeed desirable.

5. With regard to the conditions to be fulfilled, my delegation would prefer to speak of "combat operations" rather than "military operations", since such operations are not always military in the traditional sense of the term, and then to add words similar to those used in amendment CDDH/III/257, paragraph 1 (b) which reads as follows: "by carrying arms openly or by a distinctive sign recognizable at a distance or by any other equally effective means ...".

6. The Austrian delegation wishes to emphasize that one of our concerns must always be the clear and incontestable distinction between civilian persons not taking part in hostilities and other persons, even if that distinction is limited to the actual time when the fighting in question is taking place. We share in that connexion the concern of the Swedish delegation that there should be a precise definition of the beginning and the end of the period during which it is compulsory to make such a distinction. The Working Group should find a satisfactory solution to that question which would guarantee the complete protection of the civilian population.

7. Referring to the condition set out in paragraph 1 (c), my delegation considers that it is advisable to use the wording of Article 4.A (2) (d) of the third Geneva Convention of 1949 which refers in more general terms to "the laws and customs of war". My delegation sees no imperative reason for not mentioning The Hague law here. The text proposed in that connexion in amendment CDDH/III/257 would also be acceptable to my delegation.

8. We are of the opinion that the text of article 42 as proposed by the ICRC is an excellent starting point for discussions in the Working Group. It could be further improved and, indeed, the amendments submitted to it contain a number of good ideas. It is impossible to go into details here. I wish only to mention that I congratulate in particular the co-sponsors of amendment CDDH/III/260 which proposes an article 42 bis. Although my delegation can support the ideas behind that amendment, it thinks that paragraph 1 of that draft article should be based on Article 5 of the third Geneva Convention of 1949.



9. As regards the distinction to be made between regular forces and irregular forces as proposed in some amendments, my delegation supports those delegations which have expressed reservations in that connexion. We also think that the adjective "irregular" has a pejorative meaning which should be avoided in that context.

10. Lastly, the Austrian delegation wishes once more to emphasise its interest in article 42 and its readiness to co-operate actively in the Working Group in order to assist in improving the text of this important provision.

STATEMENT MADE AT THE THIRTY-SIXTH MEETING, 24 MARCH 1975,

BY MR. ZAFERA (MADAGASCAR)

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Original: French

1. The series of amendments submitted and the number of speakers clearly shows that the Committee is at present considering one of the most important articles of draft Protocol I.
2. Madagascar is among the countries that have submitted amendments and, at the present stage of the discussions, and in the light of the statements made since last Wednesday, my delegation wishes to clarify its amendment and to express its opinion on other amendments before the Committee.
3. The Malagasy amendment to article 42 (CDDH/III/73), as was emphasized by the ICRC representative at the time he introduced the article, differs from the ICRC text in that it omits the condition mentioned in paragraph 1 (b). The serious reasons for this omission have already been mentioned by several delegations, among them the delegation of the Democratic Republic of Viet-Nam. Peoples struggling for their freedom and self-determination are in a permanent state of war against the colonial Powers, foreign domination and racist régimes. It is not an army in the traditional sense of that term, but a people's conscience that is engaged in the struggle.
4. The retention by my delegation of conditions 1 (a) and (c) set out in the ICRC draft, especially condition 1 (a), should not, however, lead to an interpretation different from that which we have given it. Our amendment mentions in paragraph 1 the persons who should enjoy prisoner-of-war status, and it is obvious that according to our delegation any person and any movement not included, mercenaries among others, are to be excluded from the scope of article 42. My country condemns the criminal acts of mercenaries and considers that they should not be given the same status as members of national liberation and resistance movements, and in any case should not be accorded prisoner-of-war status.
5. My delegation wishes to clarify its amendment in order to remove any ambiguity.
6. The arguments in favour of the deletion of the condition in paragraph 1 (b) of the ICRC draft, mentioned earlier, although widely shared by many delegations, do not seem to have been accepted by the sponsors of certain amendments. Among those amendments documents CDDH/III/256 and CDDH/III/257 should be mentioned which, apart from the vagueness of the expression "irregular forces", of

which my delegation neither understands the meaning nor the exact scope, and which is open to a series of interpretations, retain the unrealistic condition of the wearing of a distinctive sign and the carrying of arms openly, the violation of which would, moreover, entail the forfeiture of prisoner-of-war status. The aims of these amendments are not shared by my delegation because they seem to us to be contrary to article 1, paragraph 2 of draft Protocol I, adopted by Committee I last year, and appear to encourage a certain category of criminals to the detriment of members of national liberation movements.

7. For the same reasons my delegation reserves its position with regard to amendment CDDH/III/95.

8. Another amendment (CDDH/III/209) excludes national liberation movements and reintroduces not only the condition we denounced earlier, but an idea which appears inadequate to us - the idea of effective territorial jurisdiction. On the other hand, a certain method of approach concerning the problems posed by article 42 adopted by some delegations, among them those of Norway and the Democratic Republic of Viet-Nam, seems to us to be a better one, since generally speaking it meets the concern of my delegation.

9. Referring to the amendments suggesting new articles 42 bis and 42 ter, my delegation reserves its right to state its point of view in detail later on the drafts which have been submitted, but it would like forthwith to indicate that it does not find the wording of certain amendments satisfactory, for example amendment CDDH/III/260. On the other hand we express a certain amount of support for amendment CDDH/III/254 and Corr.1, which seems to us to be a useful addition to article 42.

10. My delegation wishes to thank those countries which have expressed support for its amendment and also the South West African People's Organization which has become a co-sponsor.

STATEMENT MADE AT THE THIRTY-SIXTH MEETING, 24 MARCH 1975,

BY MR. LONGVA (NORWAY)

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Original: English

1. My delegation has followed with the utmost attention the introductions of the various amendments to the ICRC draft and the general debate on article 42. It is the purpose of the present intervention to make some further observations of a general nature, to comment upon some of the proposals submitted by other delegations and to answer some of the questions relating to our own proposals which have been put forward during the general debate.
2. My delegation shares the view expressed by the representative of Algeria that the adoption at the first session of our Conference by Committee I of new article 1 of draft Protocol I, has created a new situation, and that both article 42 as contained in the ICRC draft, and many of the amendments thereto submitted prior to the adoption of article 1, have therefore to a large extent been overtaken by events. In the present situation we are, therefore, not convinced that article 42 as contained in the ICRC draft provides the most adequate basis for discussion of the important problems it purports to regulate.
3. An important aspect of the task ahead of us, as we conceive it, is to find an adequate reflection in article 42 of the adoption of the new article 1. This task can only be seen in the broader context of drafting a consistent international instrument where the adoption of the new article 1 is taken fully into account. In this respect I should like to join the United Kingdom and Algerian representatives in drawing the attention of this Committee to the amendments to articles 84 and 88 submitted to Committee I by thirty delegations and contained in document CDDH/I/233. Although these amendments have not yet been discussed in Committee I, we do not hesitate to join the United Kingdom representative in describing them as consensus texts.
4. If I have put so much emphasis on articles 1 and 84, it is because, in the view of my delegation, these two articles provide the framework within which the problems raised in article 42 must be discussed. We also venture to submit that certain elements contained in some of the amendments before us, as well as certain questions raised in the general debate, have already been solved in the new article 1 and in the above-mentioned amendments to articles 84 and 88. To reopen these questions in the context of article 42 can only create confusion, a confusion which may easily prove to be counter-productive as far as article 1 is concerned.

5. I should like to recall that Norway voted in favour of the new article 1 and that we are co-sponsoring the above-mentioned amendments to articles 84 and 88.
6. We regard our proposals relating to articles 33, 35, 41 and 42 as a logical consequence of these key articles.
7. This leads me to the comments we wish to make on the amendments to article 42 submitted by Madagascar (CDDH/III/73) and Pakistan (CDDH/III/11) as well as the oral amendment to article 41 made by Ghana at the thirtieth meeting (CDDH/III/SR.30).
8. My Government fully shares the concern which has led these delegations to submit their respective amendments. We feel that these amendments contain important and valuable elements which should be retained by the Working Group. We have noted, however, that all these amendments were submitted before the adoption of the new article 1. We do believe that the interests these amendments purport to protect are fully covered by our own amendment. We hope and believe that our respective amendments will provide a good basis for fruitful collaboration in the Working Group between the delegations I have just mentioned and my own delegation. Furthermore, I should like to indicate that the views expressed in the general debate by the representative of Lesotho conform fully to our own views.
9. Before I comment further on the different amendments before us, as well as on certain of the observations which have been made in the course of the general debate, I should like to recall the material field of application of article 42 as laid down in the new article 1. In accordance with article 1, article 42 will apply in two situations: first, in inter-state conflicts; and, second, in armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination. It follows that article 42 will never apply to armed conflicts not of an international character, and that the concern expressed by some representatives, namely that article 42 may provide protection for rebels against the legitimate government of a High Contracting Party, is quite unfounded.
10. I have quoted the material field of application of article 42 as laid down in article 1, and also have in mind another proposal I wish to make, namely that article 42 should be given equal application within the whole material field of application of draft Protocol I as laid down in article 1. While we fully recognize the urgent need to provide members of regular armies and members of guerrilla units equal protection under the third Geneva Convention of 1949 in armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes

in the exercise of their right to self-determination, we cannot admit that this need is limited to such conflicts, as certain of the amendments before us seem to presuppose. Guerrilla combat situations may equally well occur in inter-State conflicts, and notably in situations where inter-State conflicts lead to the military occupation of the territory of one State by another. In this respect I should like to refer to the brilliant intervention made in the general debate by the representative of Belgium. As far as a description of guerrilla combat situations is concerned, my delegation has nothing to add to what has already been said in the Belgian statement. As far as clandestine resistance movements are concerned, my delegation would like to emphasize and to endorse the remarks made this morning at the thirty-fifth meeting (CDDH/III/SR.35) by the representative of France in his brilliant statement. My country has the same historical experience as Belgium and France, an experience which has motivated our engagement in the issue under discussion. We have noted with satisfaction the positive attitude towards our approach expressed by the representatives of Belgium and France, and we feel convinced that we will be able to take into account the drafting suggestions relating to our proposal which they may wish to put forward.

11. I shall now turn for a moment to a point made by the United Kingdom representative in his intervention. If I understood him correctly, he was afraid that our attempt in article 41 to make a global definition of the armed forces of a Party to the conflict, may in some cases lead to a more narrow definition than that already provided for in existing international law. I can assure him that this is not our intention, and that we would welcome any drafting proposal he may wish to suggest to us in order to improve our text.

12. In commenting on some other remarks made during the general debate, I should like to use as a starting point some elements contained in the amendment to article 84 to which I have already referred in my intervention.

13. According to this amendment the Conventions and Protocol I, and hence article 42, will apply in the relations between a High Contracting Party and an authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in paragraph 2 of article 1 of draft Protocol I, only to the extent that such an authority undertakes "to apply the Conventions and the present Protocol in relation to that conflict by means of an unilateral declaration addressed to the depositary of the Conventions." And I hasten to add that a resistance movement in occupied territory in accordance with the structure of the Conventions and the Protocol will be able to claim protection under article 42 only to the extent that the Party to the conflict to which it belongs has ratified the Conventions and the Protocol. A claim for prisoner-of-war status under article 42 will therefore

always have to be based on a commitment to apply the Conventions and the Protocol. We cannot accept the view put forward during the general debate that such a commitment would create an assumption that the commitment will be honoured in relation to a certain category of combatants, while the quite opposite assumption must be maintained if the commitment relates to other categories of combatants. We are compelled to consider the incorporation into the Protocol of such discriminatory assumptions as a reappearance of the mediaval "just war" doctrine.

14. Another important element of the said amendment to article 84 reads as follows: "The Conventions and the present Protocol are equally binding upon all Parties to the conflict." This principle is a reflection of the very basis of the implementation of international humanitarian law applicable in armed conflicts, namely the equality of the Parties to the conflict as far as humanitarian protection is concerned, and hence their reciprocal interest in the implementation of humanitarian rules. The discrimination between the Parties to the conflict in guerrilla combat situations as laid down in ICRC draft article 42, as well as in several of the amendments submitted to this article, does in our view amount to an erosion of this fundamental principle of equality in humanitarian protection, and hence, to an erosion of the very basis for the implementation of humanitarian rules in armed conflicts. Such a development will not only affect captured combatants, but even more the civilian population. In our view the proposal which repeatedly has been put forward during the general debate, namely that such discriminatory treatment against members of guerrilla units is necessary as a special sanction in order to compel them to distinguish themselves from the civilian population in their military operations, and hence to guarantee the civilian population immunity against attack, is based on an incomplete and, hence, inadequate analysis of the problem at hand. Since in guerrilla combat situations, as in other situations of armed conflict, only a reciprocal interest in the implementation of the rules can guarantee their application, what is at stake is in the final analysis not whether or not a given category of combatants shall have prisoner-of-war status if captured and on **what** conditions, but rather whether or not one wishes humanitarian rules to apply at all in guerrilla combat situations. The application of international humanitarian law applicable in armed conflicts is based on a very fragile equilibrium of interests. To disturb this equilibrium amounts to a negation of the very application of humanitarian law. We submit that any discriminatory treatment of any category of combatants would destroy this equilibrium and, hence, entail an escalation of violence and counter-violence which in the past has far too often been a characteristic feature of guerrilla combat situations, and the final victim of which has always been the civilian population. Our proposals relating to articles 33, 35, 41 and 42 should therefore not primarily be considered as proposals

for a widening of the group of combatants that should be entitled to prisoner-of-war status in case of capture and for a redefinition of the concept of perfidy, but rather as proposals put forward in order to ensure the application of humanitarian law in guerrilla combat situations, and hence to protect all war victims, and first and foremost the civilian population.

15. We realize that the issue at hand is a difficult one, and we do not claim to have found the perfect solution to it. We do, however, hope to have put forward some thoughts which may prove useful in the continued discussion of the problem. We are, therefore, grateful to all those who have commented upon our proposals whether they have expressed support or criticism. It is with special satisfaction that we have noted the positive comments on our proposal made by the representatives of Algeria, Belgium, Finland and Sweden, and this morning by France, Mongolia and Madagascar. We have also noted with considerable satisfaction that the representative of the Union of Soviet Socialist Republics considers that our proposals may constitute a compromise solution between the many proposals and amendments before us.

16. Lastly I should like to reply to a question directed to me at the thirty-fifth meeting by the representative of Nigeria. It follows from our proposal relating to article 41 that in case our proposals are adopted, protection would only be extended to members of the armed forces of a Party to the conflict. While our proposal contains several provisions relating to the organization and discipline of such armed forces, it leaves the question of the recruitment of their members open. I should like to recall that the third Geneva Convention of 1949 provides for the prosecution and punishment, and even for death sentences against prisoners of war for crimes committed before capture, provided certain minimum guarantees relating to penal procedure are safeguarded. If some delegations wish to submit proposals for the prohibition of certain means of recruitment of military personnel and for penal sanctions against military personnel recruited in such manner, there would not be any necessary contradiction between such proposals and our own proposals. We shall, of course, have to reserve our own position regarding such proposals until they have been submitted and we have had the occasion to study them. I should like, however, already at the present stage to indicate that we share the concern relating to the problem of mercenaries which has been expressed by many delegations during the general debate. We consider that the activities of mercenaries may amount to a threat to international peace and security, and we are aware that the problem is especially serious in developing countries, and notably in Africa. My Government would therefore lend its support to any constructive effort to eliminate such threats to international peace and security.



STATEMENT MADE AT THE THIRTY-SIXTH MEETING, 24 MARCH 1975,

BY MR. BIDI (OBSERVER, PAN-AFRICANIST CONGRESS)

Original: English

1. Liberation movements are naturally very grateful that the world has finally agreed to discuss them when examining the laws of war. For, as experience shows, they have lived and fought in a situation where they have suffered extreme inequality and discrimination vis-à-vis their enemies on the battlefield. It is precisely because the world has now stopped turning a blind eye and a deaf ear to that most unsatisfactory and therefore unacceptable situation, that liberation movements gratefully welcome their inclusion in humanitarian law relating to armed conflicts. It is our firm belief and hope that the final outcome of these discussions, particularly of article 42 of draft Protocol I, will be one that will bring these inequalities between national liberation movements and their adversaries to an end.

2. The position of all national liberation movements on article 42 is that international humanitarian law must explicitly express the principle when it comes to the matter of prisoner-of-war status for all armed forces on the battlefield; it should not give the feeling or impression that it still seeks to perpetuate the inequality and discrimination that invariably attend any war of national liberation. For, while all available evidence points to the fact that national liberation movements have not only respectfully observed the 1949 Geneva Conventions in general, but have all observed the letter and spirit of the provision on prisoner-of-war status in particular, even in situations where there has been an adamant refusal to reciprocate on the part of their adversaries. Very often, the colonial and racist régimes that enjoy the respect for international law by national liberation movements while they inflexibly refuse to do likewise as regards national liberation movements, have cited the fact that no laws of war, the Geneva Conventions in particular, include one word about such movements. It is because of this old and continuing situation that national liberation movements demand a clear-cut and categorical inclusion in the Geneva Conventions and the Protocols. They should be clearly mentioned by their internationally accepted designation so as to preclude all and any possibility of confusion or misinterpretation on the part of the other Parties to the colonial conflicts. It is with these considerations in mind that my delegation views with serious apprehension such phrases as "irregular forces". For, while the explanations of that phrase are so articulate and lucid, yet the full extent of its actual meaning still remains unclear and threatens us with dangers in situations of combat.

3. The rigidity and strictness of the conditions laid down in article 42 and the various amendments, particularly in paragraph 1 (b) of amendment CDDH/III/257 and other similar arguments have dangerous implications. The whole world knows only too well the difficulties and limitations facing national liberation movements in this regard, and this Committee has heard all the extremely fine arguments made by various delegation in this connexion. These delegations cited the hard concrete problems of logistics which are part and parcel of the life and struggle of a national liberation movement; and, invariably, these logistic difficulties in turn naturally dictate such a movement's tactics and pattern of fighting. Ultimately, it is our experience that the proper conduct by a national liberation movement of either individual battles or the entire war does not necessarily prejudice the special situation of the civilian population. On the contrary, it is invariably the opposition that resorts to cruel and indiscriminate actions against the civilian population when it fails to achieve its objectives of pinning down and crushing its national liberation movement adversary. At any rate, even political science has gone a long way in admitting the fact that no national liberation movement could exist, much less go on fighting, were it not for the demonstrable concern of such movements for the civilian population.

4. As for organization and discipline, as demanded in condition (a) of article 42 and respect for the Geneva Conventions and international law generally, we state emphatically here that we would otherwise not be bothering ourselves with this Conference at all.

STATEMENT MADE AT THE THIRTY-SIXTH MEETING, 24 MARCH 1975,

BY MR. NYATHI (OBSERVER, ZIMBABWE AFRICAN PEOPLE'S UNION)

Original: English

1. My delegation, like most representatives who have spoken before it, attaches great importance to the provisions contained in draft Protocol I, article 42.
2. I speak on behalf of the 6 million African people of Zimbabwe, whose country was and still is a victim of the most barbarous colonial war and morbid racism. To us, therefore, the provisions of this article are not only a remote theoretical exercise. This article has a practical meaning to us in terms of innocent lives of our brothers and sisters lost in the struggle for self-determination and national liberation against colonial domination and racial discrimination.
3. Our delegation, therefore, sincerely hopes that the final version of this article will provide the much needed protection for those captured by the adversary in international armed conflicts, at the same time reflecting a true compromise of the divergent views and wishes expressed by all representatives here.
4. From the day our country was occupied by the colonial régime, the administration unleashed a systematic campaign of land expropriation. Under the Land Apportionment Act of 1930, the colonial régime began grabbing land from the African population, demarcating certain areas (the richest, the best agricultural land, mining areas, all urban centres) as European land, where the African people have no right to own, purchase or use land.
5. Under the Land Tenure Act of 1969 5 per cent of the population (Europeans) owns 55 per cent of all the land, and 95 per cent (Africans) owns only 40 per cent of land - while the rest is reserved for wild life and forests.
6. Land is a fundamental requirement for the lives of the peasants. Yet a colonial régime has taken this basic requirement from the African population of Zimbabwe.
7. When the whole African population in the cities and in villages rose in the 1960s to demand their land back from those who had grabbed it and continued to occupy it by force of arms, the colonial régime replied by massive bombardment of villages, destruction of crops and confiscation of livestock.

8. Army officers assumed the role of magistrates sitting at the place of arrest; indiscriminate arrests and detention without trial took place; collective punishment of whole communities was carried out. Condemnation to forced labour camps, the so-called protected villages - where persons are forced to dig dams, construct roads and bridges without any pay - have become the order of the day.

9. This indiscriminate and senseless violence against the whole population of Zimbabwe by the colonial régime has forced the people against the wall. Facing intolerable brutal force, the African people had no alternative but to defend themselves against a régime that was bent on the extermination of a whole people. The people of Zimbabwe, the whole African population took up arms to defend themselves against tyranny, and in order to achieve their inalienable right to self-determination, national independence, freedom and peace.

10. In such a struggle, the unity of the national liberation movements and the African population is indivisible.

11. We have some reservations on conditions contained in the ICRC draft of article 42, paragraphs 1 and 2. The purpose of this article is to extend the category of persons, who, in the event of capture, are entitled to benefit from prisoner-of-war status as laid down in the third Geneva Convention of 1949. This article should, therefore, be taken, besides those at present mentioned in Article 4 of the third Convention, to refer to the category of peoples struggling for self-determination against colonial domination, alien occupation and racist régimes. Any other interpretation of this article is bound to produce the opposite of what we all sincerely wish to achieve. We would go a long way with the idea expressed in the foot-note to ICRC draft Protocol I, article 42, paragraph 3, and also the amendment by the Democratic Republic of Viet-Nam contained in document CDDH/III/253.

12. We can also support and are indeed impressed by the interesting ideas contained in the Norwegian and Malagasy amendment (CDDH/III/259 and CDDH/III/73).

13. We should like to endorse the constructive arguments of some delegations, especially those of Algeria, the Union of Soviet Socialist Republics and the Ukrainian SSR. Their position is more or less in line with our own views. I have nothing to add to the brilliant statement made by the Norwegian representative except to say that we fully agree with his position.

14. On the other hand, our delegation will find it very difficult to agree with amendments that tend to be vague or discriminatory. For example, we do not understand what is meant by "irregular forces". Does it mean those who are occasionally mobilized and

demobilized? Does it mean that a group of mercenaries under a commander could claim protection as prisoners of war? But, as we all know, mercenaries are mere soldiers of fortune, fighting for the ignoble cause of selfishness and greed. They deserve arrest and punishment as ordinary criminals.

15. We cannot, furthermore, agree with the conditions that are discriminatory. Document CDDH/III/257, paragraph 3, speaks of offenders as not being entitled to prisoner-of-war status as part of the conditions of article 42. In an armed conflict, where the Parties to the conflict are equal, who is the offender? This surely defeats the very purpose of the present Protocols and in particular article 42. Such references to armed groups without specifically mentioning which, is fraught with danger of misinterpretation and abuse.

16. We reserve our right to intervene on specific aspects of amendments in the Working Group.

17. We sincerely hope that the sponsors of some of these amendments will not insist on their amendments being taken further.

STATEMENT MADE AT THE THIRTY-SIXTH MEETING, 24 MARCH 1975,  
BY MR. MASANGOMAI (OBSERVER, ZIMBABWE AFRICAN NATIONAL UNION)

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Original: English

1. My delegation attaches great importance to the issues under discussion in articles 42, 42 bis and 42 ter.
2. As you all know my organization is engaged in an armed struggle against colonialism and racism in my country, in the exercise of our right to self-determination as enshrined in the Charter of the United Nations. It has been my organization's outcry, ever since we declared war on the racists, that captured freedom fighters should be treated as prisoners of war. We have called on our adversary to respect the principle that a prisoner of war is not a criminal, but merely an enemy no longer able to bear arms, who should be freed at the end of hostilities and while in captivity should be respected and humanely treated. We have not been alone in this appeal.
3. Only last year, the United Nations approved a resolution calling upon the white racist minority Governments to treat captured freedom fighters as prisoners of war, but as recently as January 29, this year, a court in Salisbury sentenced a freedom fighter to death, and about three weeks ago three freedom fighters were hanged. Since 1967, the régime has hanged over twenty freedom fighters.
4. It is because of this total disregard of United Nations regulations by the racist régime, and the régime's confirmed violation of all norms of conventional international law that my delegation feels that the status of captured freedom fighters should clearly be defined in such an important Additional Protocol to the Geneva Conventions of 1949. As you know, the racist régime's argument in defence of the brutal atrocities it has committed on captured freedom fighters has always been that liberation movements are not covered by the Geneva Conventions or by customary international law. The racist régimes have not even paid heed to the well-known principle that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.
5. It is our feeling, therefore, that this important Protocol should include, in clear, specific and unambiguous terms, the position and status of captured freedom fighters, if the spirit of the United Nations resolutions and the principle embodied in the United Nations Charter are to be translated into meaningful and practical actions.

6. The articles under discussion should be clearly formulated so as to avoid misinterpretation. These articles should avoid a construction which might be taken to give protection to such armed groups as mercenary forces, who may belong to a Party to the conflict.
7. My delegation regards mercenaries as a group of hired assassins and murderers whose only reason for killing is their avaricious greed for money and adventure. These people cannot be protected by international law. They should be treated as criminals and enemies of all humanity.
8. It is in line with this thinking that we are in disagreement with the amendment co-sponsored by the United Kingdom and the United States delegations (CDDH/III/257) and that sponsored by the Netherlands (CDDH/III/256). We construe the use of the phrase "irregular forces" in paragraph 1 as a design to cover, and to give prisoner-of-war status to the mercenary forces.
9. My delegation feels that the amendment by Madagascar (CDDH/III/73), that by the Democratic Republic of Viet-Nam (CDDH/III/254) and by Norway (CDDH/III/259) to article 42 are nearer to a satisfactory formulation of the article under discussion.
10. These amendments also attempt to put the captured freedom fighters of national liberation movements on the same footing as captured members of regular forces. We feel that there should not be a difference in status between captured members of regular forces and captured members of national liberation movements.
11. Referring to paragraph 1 (b) of article 42 of the ICRC text, which requires freedom fighters to distinguish themselves from the civilian population in military operations, we regard this as most unrealistic and total failure to understand the true nature of wars of national liberation. A war of national liberation is a war in which the oppressed and exploited people have taken up arms against the oppressors - in our case against the colonial and racist minority régime. It is a people's war - all the oppressed people fighting against foreign domination and oppression. The liberation movement is only a vanguard organization of the people. Members of this vanguard organization cannot be distinguishable from the masses of the people. A guerrilla fighter depends for his whole survival on his reliance on, and close co-operation with, the masses of the people. He has to depend on the people for his food and sometimes his shelter.
12. This aspect of guerrilla warfare, therefore, makes a guerrilla combat situation very different from the conventional combat situation. A characteristic of conventional warfare is the clear and distinct separation between the activities of armed forces and the life of the civilian population. But that clear distinction and separation is hard to come by in guerrilla warfare.

13. Even if one was able miraculously to separate a guerrilla fighter from the civilian population, the fact remains that the liberation movements are far inferior as compared with the armies of the racist régimes - armed to the teeth with modern and sophisticated weaponry and armaments - and cannot afford the luxury of uniforms and emblems. It is not uncommon for a guerrilla fighter to go into battle wearing only a ragged pair of short trousers. Characteristic of guerrilla warfare is the great inequality of the two sides - the national liberation movement on one side and the armies of the colonial and racist régimes on the other.

14. It is my delegation's view that the present Diplomatic Conference should, when formulating these important articles of the Protocols, consider the concrete situation and realities that exist today.

15. My delegation would, therefore, support the deletion of paragraph 1 (b), because it fails to take into account the concrete realities that exist in guerrilla warfare.

16. As regards article 42 bis - the amendment in document CDDH/III/260, submitted by twelve delegations, does offer protection to persons who take part in hostilities and fall into the hands of the adverse Party. However, my delegation has misgivings about the second sentence in paragraph 1 which reads, "such protection shall cease only if a competent tribunal determines that such person is not entitled to the status of prisoner of war". This seems to leave the competence of the tribunal to the subjective assessment of the enemy. As you know, in the racist régimes' courts and judicial tribunals have been used and are being used to further the interests of the régimes. Fair trials are a thing unheard of in these régimes. And yet these régimes have always claimed and continue to claim that their courts and tribunals are competent. It is therefore my delegation's view that such persons who have fallen into the hands of the enemy should not be left at the mercy of the adversary. They should be protected by international law. My delegation, therefore, proposes the deletion of that sentence.

17. As regards article 42 ter in document CDDH/III/254 and Corr.1, sponsored by the Democratic Republic of Viet-Nam, my delegation fully agrees with the principle embodied in it.