

OFFICIAL RECORDS

OF THE

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

GENEVA (1974 -1977)

VOLUME XV

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.

*Document circulated in French only.

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OF THE

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

**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
OF INTERNATIONAL ARMED CONFLICTS
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

VOLUME XV

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SUMMARY RECORDS OF COMMITTEE III

THIRD SESSION

(Geneva, 21 April - 11 June 1976)

COMMITTEE III

SUMMARY RECORDS OF THE FORTY-FIRST TO FIFTY-THIRD MEETINGS

held at the International Conference Centre, Geneva,

from 22 April to 10 June 1976

Chairman: Mr. H. SULTAN (Egypt)

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

The list of participants appears in document CDDH/Inf.223/Rev.1 and
Corr.1.

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Article 23 - Recognition signs (concluded)

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SUMMARY RECORD OF THE FORTY-FIRST (OPENING) MEETING

held on Thursday, 22 April 1976, at 10.45 a.m.

Chairman: Mr. SULTAN (Egypt)

ORGANIZATION OF WORK

1. The CHAIRMAN said that at its thirty-first plenary meeting (CDDH/SR.31) on the previous day the Conference had decided to refer articles 63, 64, 64 bis, 65, 67, 68 and 69 of draft Protocol I and article 32 of draft Protocol II to Committee III. The amendments relevant to those articles which had been submitted before 15 December 1975 were to be found on pages 123-131 and pages 215 and 216 of the synoptic table (CDDH/226 and Corr.2).

2. Mr. ALDRICH (United States of America), Rapporteur, suggested that the Working Group should continue its discussion of articles 38 and 39 of draft Protocol I on the basis of the new proposals by the Rapporteur in documents CDDH/III/GT/66 and 67, submitted on 8 April 1975. Having concluded its discussion of the two articles, the Working Group should go on to discuss the related articles: 35, 40, 41, 42 and 42 bis. The International Committee of the Red Cross (ICRC) had requested that, in view of the absence of the ICRC expert on article 42, discussion of that article should if possible be postponed until his return. While everything possible should be done to accommodate the ICRC, it was probable that some aspects of article 42 would be referred to during the discussions of the preceding articles and, if the Working Group finished its work on the other articles quickly, it should not delay its consideration of article 42 until the return of the ICRC expert.

3. The CHAIRMAN suggested that the Committee should adopt the Rapporteur's proposals for the work of the Working Group.

It was so agreed.

4. The CHAIRMAN announced that the Committee had two new Legal Secretaries: Mr. Pierre Gasser, who would be Legal Secretary to the Committee itself, and Mr. Jean Combe, who would be Legal Secretary to the Working Group.

The meeting rose at 11 a.m.

SUMMARY RECORD OF THE FORTY-SECOND MEETING

held on Thursday, 29 April 1976, at 10 a.m.

Chairman: Mr. SULTAN (Egypt)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1)

Articles 63, 64 and 64 bis

1. The CHAIRMAN invited the Committee to consider articles 63, 64 and 64 bis of draft Protocol I article by article.

Article 63 - Field of application (CDDH/1, CDDH/226 and Corr.2; CDDH/III/313)

2. Mr. SURBECK (International Committee of the Red Cross) said that article 63 of draft Protocol I was designed to determine the field of application of Protocol I, Part IV, Section III. Part IV, entitled "Civilian population", was divided into three sections: Section I - "General protection against the effects of hostilities" - by far the most important on account of the fundamental and original nature of its provisions - comprising articles 43 to 59, of which articles 43 to 53 had already been adopted by Committee III; Section II - "Relief in favour of the civilian population", containing articles 60 to 62, which had been referred to Committee II but not considered during the second session; and Section III - "Treatment of persons in the power of a Party to the conflict", comprising articles 63 to 69, which had just been referred to Committee III, and, except for article 66 taken up at the second session, had not yet been considered by it.

3. Contemporary international humanitarian law afforded protection to many categories of persons in a certain number of clearly defined situations. For several decades, legislators in the matter had done their utmost to draw up rules of law protecting all categories of persons closely or remotely affected by conflict situations. At the present time, in view of the tendency of most contemporary armed conflicts to spread, that meant trying to protect without exception all the constituent elements of the population of a geographical area affected by a conflict situation.

4. Unremitting as those efforts had been, they had none the less encountered a number of obstacles, and that highly humanitarian aim had not as yet been wholly realized. There were still gaps in international law as a whole, and in international humanitarian law in particular.

5. The fourth Geneva Convention of 12 August 1949, relative to the protection of civilian persons in time of war, had been a big step forward in the extension of the protection of humanitarian law to entire population categories which were known to have paid a heavy toll in most conflicts since the Second World War.

6. Nevertheless, that Convention did not afford civilians full protection. Apart from the fact that it did not defend them against the effects of certain methods of war and the use of weapons of mass destruction, it did not give the protection of its Parts I and III to all civilian nationals of a State vis-à-vis that same State. That having been said, it was of course important to note the exception constituted by Part II of the Convention, ("General protection of populations against certain consequences of war"), which did afford protection to all civilians, including nationals vis-à-vis their own State.

7. That difference of treatment in the fourth Geneva Convention of 1949 had its origin in article 4, which adopted nationality as the criterion for defining the persons protected.

8. Article 43 and the subsequent articles of draft Protocol I, adopted at the second session by Committee III, had disregarded that criterion so as to enlarge the protection afforded by the Protocol (article 44, para. 2), expressly referring for that purpose to Part II of the fourth Geneva Convention of 1949, which took no account of that very criterion of nationality in extending its protection.

9. Draft Protocol I must therefore include rules that would supplement Parts I and III of the fourth Convention just as article 43 and the following articles of draft Protocol I supplemented Part II of that Convention, so that protection would be afforded specifically to persons who, although theoretically protected by Parts I or III, would nevertheless be at a disadvantage solely because of their nationality.

10. The dual nature of the whole of Section III of Part IV of draft Protocol I was thus clear. On the one hand, it laid down rules which reaffirmed and supplemented the existing rules relating to the rights and obligations of an Occupying Power towards the civilians on the territory under its occupation. On the other hand, and that was the original feature of the whole Section and the one which made it so important, it laid down rules governing the relations that should obtain between each Party to the conflict and, respectively, the civilian population under its own jurisdiction and on its own national territory not occupied by the enemy.

11. The CHAIRMAN stated that the only amendment submitted to article 63 was one proposed by the United States of America (CDDH/III/313). He invited the United States representative to introduce his amendment.

12. Mr. MAZZA (United States of America) said that the articles of Section III, entitled "Treatment of persons in the power of a Party to the conflict" were very important. He also thought it should be made perfectly clear that those articles, with the exception of provisions that were obviously intended to apply to a State's own people, did not apply to a State's own nationals.

13. Every State should retain the right to regulate its actions with regard to its own nationals in situations which had no direct relationship with the armed conflict. States always had the right to regulate the conduct of their own nationals. For example, if during an armed conflict a child who was a national of a party to the conflict was indecently assaulted by another of that State's nationals, in a place outside the actual area of combat, could it be said that such an act constituted a violation of the Protocol? In his opinion, that would be an offence solely of a domestic character. Different situations could arise during an armed conflict, however, and the purpose of the United States amendment was in the first place to ensure the application of international humanitarian law to a country's own nationals in situations which had a direct relationship to the armed conflict.

14. The CHAIRMAN opened the general debate on article 63.

15. Mr. TODORIĆ (Yugoslavia) said that he readily accepted the wording of the text proposed by the ICRC, which seemed to him reasonable. Nevertheless, it could be improved, and he thought that if the reference to Parts I and III of the fourth Convention were omitted, the protection provided for by that article would be better assured.

16. Furthermore, to avoid any possible divergence of views, he asked that the expression "in the power of a Party to the conflict" be more clearly defined.

17. The CHAIRMAN proposed that article 63 and the text of the United States amendment (CDDH/III/313) should be referred back to the Working Group, which should be informed of the comments to which the article had given rise.

It was so agreed.

Article 64 - Refugees and stateless persons (CDDH/1, CDDH/226 and Corr.2; CDDH/III/306)

18. Mr. SURBECK (International Committee of the Red Cross) said that the two categories of persons which article 64 aimed to protect were already covered to varying degrees by some of the provisions of the Geneva Conventions of 1949 and by other instruments of positive international law.

19. For the sake of clarity, he would deal with each category separately.

20. As to refugees, the protection expressly afforded them in the fourth Geneva Convention of 1949 was inadequate. Article 44 in Part III placed all Parties to a conflict under the obligation not to treat as enemy aliens, exclusively on the basis of their nationality de jure of an enemy State, refugees who were on their territory. Consequently, any person protected by the Convention who belonged de jure to an enemy State, and did not in fact enjoy any diplomatic protection, should benefit from that provision. No definition of a refugee was given, however, in the fourth Geneva Convention of 1949, which merely applied the criterion of protection by a Government. In the sphere of human rights, on the other hand, a clear definition was given in Article 1, paragraph 2, of the Protocol relating to the Status of Refugees, which came into force on 4 October 1967 - a definition itself based essentially on Article 1, paragraph A, of the Convention relating to the Status of Refugees of 28 July 1951. Those were the two main relevant instruments in international law.

21. The fourth Geneva Convention of 1949 contained another provision concerning refugees, namely, the second paragraph of Article 70, entitled "Offences committed before occupation". As the ICRC Commentary on the fourth Geneva Convention of 1949 stated on page 350, "The clause is absolutely exceptional in character; for Part III, like the whole Convention except for Part II, is concerned

only with non-nationals of the Occupying Power", i.e. only nationals of an enemy State who were in occupied national territory. That exceptional provision prohibited the Occupying Power from arresting, prosecuting, convicting or deporting from the occupied territory its own nationals who, before the outbreak of hostilities, had sought refuge in that territory and who, as a result of the occupation, had again fallen into the hands of the Power of which they were nationals.

22. Paragraph 2 of Article 70 was so worded, however, that the emphasis was laid more on the two exceptions to the prohibition which came afterwards than on the prohibition itself. The two exceptions mentioned, which consequently empowered the Occupying Power to arrest, prosecute, convict or deport from the occupied territory its own nationals who had sought refuge there, were on the one hand offences committed by them after the outbreak of hostilities, or offences under common law committed by the said nationals before the outbreak of hostilities which, according to the law of the occupied State, would have justified, on the other hand, extradition in time of peace.

23. In short, Articles 44 and 70, paragraph 2 of the fourth Geneva Convention of 1949 dealt only with some aspects of the relations existing between refugees and the host country and the Occupying Power of which they were nationals, respectively. He then quoted the following passage from page 80 of the Commentary on the draft Protocols, published by the ICRC in 1973: "In the opinion of the United Nations High Commissioner for Refugees - an opinion shared by the ICRC - these two provisions of the fourth Convention are insufficient, and refugees should be granted a status valid equally with respect to all Parties to the conflict".

24. Article 64 of draft Protocol I was intended to make good those deficiencies. Application of that provision was, however, subject to two conditions: the persons concerned must have been refugees before the beginning of hostilities and have been recognized as refugees under the relevant international instruments or the national legislation of the State of refuge. In other words, such persons must have been duly granted the status of refugees before the beginning of hostilities. Refugees who met those two conditions would benefit from the specific protection, in all circumstances and everywhere, of all the provisions in Parts I and III of the fourth Geneva Convention of 1949, in addition to the various forms of protection granted them under the relevant international instruments.

25. Refugees recognized as such during hostilities - again under the relevant international instruments or the national legislation of the State of refuge - would be covered only by the legislation in force, in other words by the relevant international instruments and by Articles 44 and 70 (second paragraph) of the fourth Geneva Convention of 1949.

26. The case of stateless persons was less complicated because, although they were not specifically protected by the 1949 Geneva Conventions, they were implicitly entitled to benefit from all the provisions of the fourth Geneva Convention of 1949 under the first paragraph of Article 4 of that Convention, which stated that "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". Reference to Article 1, paragraph 1, of the Convention of 28 September 1954 relating to the Status of Stateless Persons showed that the definition of a "stateless person" as "... a person who is not considered as a national by any State under the operation of its law" was in line with the definition in the final clause quoted above. In addition to the 1954 Convention which gave that definition, reference might also be made to the Convention of 28 August 1961 on the Reduction of Statelessness, which had come into force on 13 December 1975. Nevertheless, although stateless persons were already covered implicitly by the provisions of the fourth Convention, the ICRC had felt that it might be useful to state that specifically and more clearly in the draft Protocol, thus reaffirming and strengthening the protection already afforded.

27. The CHAIRMAN observed that the only amendment (CDDH/III/306) to article 64 had been submitted by the Union of Soviet Socialist Republics. It provided for the addition of a new paragraph. He asked the representative of the Soviet Union to introduce his amendment.

28. Mr. SOKIRKIN (Union of Soviet Socialist Republics) said that his delegation's amendment was a simple one. It provided for the addition of a new paragraph reading: "The provisions of international instruments relating to stateless persons and refugees shall be valid only for States which are Parties to those instruments or recognize them as binding."

29. The need for that amendment arose from the fact that article 64 compelled countries to consider as stateless persons or refugees persons who, before the beginning of hostilities, had been considered as being stateless persons or refugees under the relevant

international instruments or the national legislation of the State of refuge or State of residence. Thus, it was only under the relevant international instruments that States would be bound to accept that rule. That would be contrary to the generally-accepted rules of international law. In his delegation's view, the likelihood of reservations being entered when the article was adopted should be reduced as much as possible. To adopt article 64 without the change proposed by the Soviet Union would be to invite a State not a Party to the international instruments to refrain from meeting its obligation towards stateless persons and refugees by entering reservations when the Protocol was signed.

30. The CHAIRMAN declared open the general debate on article 64.

31. Mr. DADZIE (Office of the United Nations High Commissioner for Refugees), speaking at the invitation of the Chairman, said that he would like first to convey the sincere wishes of the United Nations High Commissioner for Refugees for the success of the Diplomatic Conference and his hope that the humanitarian problems would find in the two additional Protocols to the 1949 Geneva Conventions appropriate and just solutions for the benefit of all victims of armed conflicts. He wished also to congratulate the ICRC on its valuable contribution in the field of international humanitarian law and human rights.

32. Before commenting on article 64, he wished briefly to mention the functions of the Office as a humanitarian institution within the framework of the Statute of the Office adopted by the General Assembly in 1950. The High Commissioner for Refugees acted under the authority of the United Nations General Assembly and provided international protection to refugees. The work of the High Commissioner was of an entirely non-political character and was exclusively humanitarian and social. The High Commissioner sought advice from his Executive Committee on problems facing the Office and followed policy directives given him by the United Nations General Assembly or the Economic and Social Council.

33. In seeking humanitarian solutions for the problem of refugees, the High Commissioner co-operated with Governments. As a rule the activities of the High Commissioner's Office were related to peace-time conditions. Nevertheless, the High Commissioner was also interested in the protection of refugees during all kinds of armed conflicts and maintained direct contact with the ICRC regarding the application of the fundamental rules of the four Geneva Conventions of 1949 and the various conventions on human rights concerning refugees.

34. Turning to article 64 on refugees and stateless persons, he congratulated the ICRC representative on his clear introduction of the article and expressed great appreciation to the ICRC for the noble humanitarian task of protection of all refugees without any discrimination. The vast experience of the ICRC and of the Office of the United Nations High Commissioner for Refugees had encouraged the two institutions to propose a special article on the protection of refugees.

35. Article 44 of the fourth Geneva Convention of 1949 covered only measures of control that might be adopted against enemy aliens "exclusively on the basis of their nationality de jure of an enemy State." Since a refugee who was technically an enemy alien did not enjoy the assistance of a Protecting Power, or perhaps that of a belligerent country of asylum, his position was a special one.

36. Article 44 seemed to mitigate a refugee's difficulty in that respect by placing an obligation on a detaining Power not to treat him as an enemy alien exclusively on the basis of de jure enemy nationality.

37. Article 44 of the fourth Geneva Convention of 1949 did not, however, apply to the other matters dealt with in Parts I and III of the same Convention, which laid down the fundamental principles of the protection of civilian persons who were "protected persons" under the Convention.

38. The proposed article 64 of draft Protocol I recognized the status of a protected person in the sense of the fourth Geneva Convention of 1949. The United Nations High Commissioner for Refugees strongly endorsed that provision and expressed his gratitude to all representatives who supported it.

39. He had listened attentively to the statement by the USSR representative and reserved the right to speak later on the amendment (CDDH/III/306) that that representative had submitted.

40. Mr. GENOT (Belgium) said that the provisions of Section III on the treatment of persons in the power of a Party to the conflict were among the most important provisions of draft Protocol I. They were designed to fill certain gaps in the Geneva Conventions of 1949.

41. Article 64 of draft Protocol I dealt with two specific categories of person: refugees and stateless persons.

42. Concerning stateless persons the article was merely a clear restatement of what was laid down in Article 4, first paragraph, of the fourth Geneva Convention. Concerning refugees, it went far beyond Articles 44 and 70 of the fourth Convention, whose provisions, being based partly on experience in the Second World War, were no longer fully in accord with existing conditions.

43. Indeed, the refugee problem had now attained a scale hitherto unknown. His delegation took the opportunity to pay a tribute to the United Nations, and above all to the United Nations High Commissioner for Refugees, for what had been done to solve the problem.

44. At the present time all too many people were obliged to suffer the difficulties of life abroad for having opposed the views of their Government, even if only by their speeches or writings. That Government might be tempted, through victories won in the territory concerned, to persecute those who had disapproved of its régime and fled from it. The ICRC had therefore done useful work in taking account of the development of human rights that had taken place since 1949 and in extending the application of the fourth Convention as a whole to persons who, before the beginning of hostilities, were considered as being refugees under the relevant international instruments or the legislation of the State of refuge.

45. In Belgium, where the status of refugees and stateless persons was recognized and their protection provided by law, the amendment submitted by the USSR delegation would have no effect, but the Belgian delegation would nevertheless like to have the opportunity of discussing with the USSR delegation, in the Working Group, the effect that that amendment might have, in respect of an Occupying Power, on the situation of refugees in a country of refuge.

46. Mr. REIMANN (Switzerland) said that his delegation felt obliged, for several reasons, to give preference to the ICRC text.

47. Firstly, in the case of stateless persons, the ICRC had indicated that the provision was a reaffirmation and had added that a reaffirmation must be without reservations.

48. Secondly, as far as refugees were concerned, there was confusion in the USSR amendment between the aims of two very different international instruments: the Convention relating to the Status of Refugees, and draft Protocol I which was intended to extend a basic protection to refugees.

49. Furthermore, article 64 embodied so essential a provision that it would not permit of the inclusion of any text that would in fact have the effect of introducing a reservation.

50. Lastly, the problem of reservations as such was being studied elsewhere in the Conference.

51. His delegation was therefore unable to support the USSR proposal.

52. Mrs. MANEVA (Bulgaria) said that her delegation shared the concern expressed by the Soviet Union and supported its amendment. Article 64 as it stood, imposed an obligation on States to comply with instruments to which they had not acceded. In fact, the term "international instruments" also covered resolutions of international organizations that were merely recommendations.

53. The Revd. Father ROCH (Holy See) said that his delegation was in agreement with the representative of the Office of the United Nations High Commissioner for Refugees where refugees and stateless persons were concerned. It took the greatest interest in the fate and protection of such persons at all times, not least in time of war, and it believed that their rights should be reaffirmed and clearly stated. It welcomed the collaboration between the Office of the High Commissioner and the ICRC in that field.

54. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) said that his delegation supported the amendment submitted by the USSR delegation, which it regarded as being chiefly technical in character and in complete conformity with international law. His delegation was convinced that, once draft Protocol I had been adopted, a large number of States would accede to it. At the same time it was worth noting that there were some international instruments whose application was not mandatory for some States. A text which took that into account would encourage such States to become Parties to the Protocol and open the way for the largest possible number of accessions.

55. Mr. FELBER (German Democratic Republic) expressed full support for the amendment submitted by the USSR delegation.

56. The CHAIRMAN suggested referring both draft article 64 and the amendment submitted by the USSR delegation to the Working Group, together with the comments to which the amendment had given rise.

It was so agreed.

New article 64 bis - Reunion of dispersed families (CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/329)

57. Mr. ABU-GOURA (Jordan) said that developments made it desirable for the rules of humanitarian law to be examined afresh, particularly in regard to the reunion of dispersed families.

58. Draft article 64 bis (CDDH/III/329) constituted an advance on Article 26 of the fourth Geneva Convention in regard to dispersed families, in that the latter only provided that each Party to the conflict should facilitate inquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting if possible.

59. The family was the basis of all society, and everyone knew what upheavals it underwent in time of war.

60. The reunion of dispersed families had been tackled at several international conferences, which had stated principles and adopted resolutions on the subject. Those that stood out among them were the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948 (resolution 217 A (III)), the resolution adopted by the Board of Governors of the League of Red Cross Societies at The Hague in 1967; resolution X adopted by the International Conference of the Red Cross at Istanbul in 1969; the XXIst resolution adopted by the Board of Governors of the League of Red Cross Societies at Mexico City in 1971; resolution III adopted by the XXIInd International Conference of the Red Cross at Teheran in 1973; the resolution adopted by the Inter-Parliamentary Conference on European Co-operation and Security, held at Helsinki in 1973, and the resolutions adopted by the Conference of Experts on the Reuniting of Families dispersed by Armed Conflicts or as a Consequence of Migration, held at Florence in 1974 under the auspices of the International Institute of Humanitarian Law of San Remo.

61. His delegation stressed the importance of draft article 64 bis (CDDH/III/329), which had been submitted by twenty-six countries. He supported it whole-heartedly and urged the Conference to consider it.

62. Mr. SURBECK (International Committee of the Red Cross) thanked the sponsors of draft article 64 bis on behalf of his Committee. The question of reuniting dispersed families was by no means new; it was one, moreover, which the ICRC had had to deal with virtually since its inception. The International Red Cross as a whole was also concerned about the fate of dispersed families, as was shown by the many resolutions adopted by its conferences to which the representative of Jordan had referred.

63. On the other hand, Article 26 of the fourth Geneva Convention laid upon Parties to the conflict a duty to facilitate inquiries made by members of dispersed families themselves with the object of renewing contact with one another and of meeting. The main stress was not placed on the reunion of dispersed families, aided to the best of their ability by the Parties. The prime actors were members of the families and the bodies authorized to carry out inquiries. In draft article 64 bis, however, the emphasis lay elsewhere, the principal actors being the High Contracting Parties and the Parties to the conflict, together with humanitarian organizations engaged in bringing about family reunions. The draft article thus reaffirmed and strengthened Article 26 of the fourth Convention.

64. Backed by the wealth of experience in searching for missing persons that its Central Tracing Agency had acquired, the ICRC was prepared to assume the responsibilities which would devolve upon the humanitarian organizations under the draft article. It ventured to recommend that the article should be adopted and it expressed its warmest thanks to the delegations which would support it.

65. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) expressed his delegations's thanks to the sponsors of draft article 64 bis. The article concerned a most important problem, and one which deserved the fullest attention of the Conference. His delegation fully supported it, noting its complete conformity with humanitarian law and with the spirit of the documents signed at Helsinki, in another context, on the reuniting of dispersed families. His delegation hoped that the draft would win the approval of all delegations.

66. Mr. DADZIE (Office of the United Nations High Commissioner for Refugees), speaking at the invitation of the Chairman, thanked, on behalf of the High Commissioner's Office, the twenty-six delegations which had submitted the new draft article 64 bis. He pointed out that the new text, which lent strength and precision to Article 26 of the fourth Geneva Convention of 1949, introduced the idea of the family as a unit for the first time into an international instrument with a humanitarian object. It should be noted that, although Article 26 of the fourth Convention provided for the establishment of contacts between the members of a single family - a stage which often preceded the reunion of the family - it did not include any provisions dealing specifically with the reunion of dispersed families. The ICRC and the national Red Cross Societies had gained wide experience in the course of two world wars and other armed conflicts, and nobody disputed the competence of the Red Cross and the UNHCR in the field of humanitarian activities.

67. A special rule, along the lines of that set forth in draft article 64 bis, was needed in order to give those activities a more precise legal basis. It would be the first time that a provision of that kind would be embodied in an international convention. It would be advisable to state first a general rule relating to the reunion of dispersed families and then to lay down precise rules of a mandatory nature. The UNHCR recommended the adoption of draft article 64 bis.

68. Mr. AKRAM (Afghanistan) and Mr. Kun PAK (Republic of Korea) said that they were joining the sponsors of article 64 bis, whose adoption they recommended to all the members of Committee III.

69. Mr. Kun PAK (Republic of Korea) said that in the Republic of Korea there were five million refugees and persons separated from their families as a consequence of the Korean War. They had no contact of any kind with their families, who had remained in the North. For the past quarter of a century the Republic of Korea had been redoubling its efforts and taking action to reunite dispersed families, as had been demonstrated in particular by the meetings between the national Red Cross Societies which had been proposed in 1971.

70. Mr. AJAYI (Nigeria) said that his delegation associated itself with all those who supported the initiative taken by the twenty-six countries, and it approved both the letter and the spirit of the text (CDDH/III/329). He recalled the way in which his Government had co-operated with the representatives of the ICRC and the UNHCR during the Nigerian civil war and the efforts subsequently exerted by his Government to reunite dispersed families.

71. Mr. BUKHARI (Pakistan) spoke of the untiring efforts made since 1964 by Mr. Abu-Goura, the representative of Jordan, to reunite dispersed families, and of the work of the ICRC and the UNHCR.

72. Mr. AL RAHMA (United Arab Emirates), Mr. BAYARTE (Mongolia) and Mr. AL-MOUSSA (Kuwait) expressed their support for draft article 64 bis and said that they hoped it would be approved by all members of the Committee.

73. Mr. REIMANN (Switzerland) said that he thought that the proposed text of article 64 bis could be made more forceful if the words "in every possible way" were deleted. He found encouragement for that in the fact that the representative of the Ukrainian Soviet Socialist Republic had referred to the possibility of making the draft article more precise.

74. Mr. MENCER (Czechoslovakia) said that he supported the proposed text of article 64 bis wholeheartedly and suggested that the end of the text might be redrafted to read "in conformity with their respective national legislative systems and security regulations".

75. Mr. GRIESZLER (Austria) said that his delegation was a sponsor of draft article 64 bis and that the text represented a considerable improvement in the matter of reuniting dispersed families. He hoped that it would be adopted unanimously.

76. Mr. MEURANT (League of Red Cross Societies) said that the initiative taken by the twenty-six delegations in producing draft article 64 bis relating to the reunion of dispersed families met the concern felt by the League. It hoped that the article would be approved by the Committee.

77. Mr. ABU-GOURA (Jordan), speaking on behalf of the principal sponsors of article 64 bis, thanked the speakers who had supported the text. With regard to the proposal made by the representative of Czechoslovakia, he explained that the wording chosen had been used in the 1949 Geneva Conventions. His delegation considered it preferable to retain the phraseology that had already been adopted, thus avoiding any possibility of the texts conflicting. He called upon all members of Committee III to adopt draft article 64 bis by consensus, without prior reference to the Working Group.

78. Mr. SOKIRKIN (Union of Soviet Socialist Republics) pointed out that draft article 64 bis was a well-balanced text. If the Swiss proposal was adopted, that balance might be impaired and the text would no longer coincide with the wishes of the majority of members of Committee III. He proposed that the text should be referred to the Working Group, which, after considering it, might either adopt it as it stood or improve the wording, for example along the lines proposed by the representative of Czechoslovakia. That would naturally mean only improvements in style, since the substance of the text had received the unqualified approval of all the previous speakers.

79. Mr. Kun PAK (Republic of Korea), referring to the remarks made by the Czechoslovak and USSR representatives, said that if allusion was made to national legislative systems, that would introduce an element of reservation which would threaten to reduce the scope of the article under review to nothing. The sponsors had endeavoured to leave the sovereignty of States intact. The text represented considerable progress in the development of humanitarian law. The benefit of earlier efforts should not be wasted.

80. The draft article should certainly be examined very carefully. Without wishing to oppose the USSR representative's proposal outright, he would urge the Committee to adopt the draft article without substantive change.

81. Mr. CONDORELLI (Italy) said that he supported the draft article as a whole and would not oppose its immediate adoption by consensus, but that if other delegations felt that the text should be referred to the Working Group, his delegation thought there were other improvements to the wording that might be considered, such as those proposed by the representative of Switzerland, for example.

82. Mr. HERCZEGH (Hungary), while supporting draft article 64 bis, thought that any wording, however good, could always be improved upon and that consideration by the Working Group would be worth while if it enabled the Committee to adopt the article unanimously.

83. Mr. WOLFE (Canada) said that he would have preferred draft article 64 bis to be adopted immediately, but would not oppose the suggestion to refer it to the Working Group. He hoped that the text would be adopted by consensus.

84. Mr. ABU-GOURA (Jordan) said that his delegation would not press for the immediate adoption of draft article 64 bis by the Committee.

85. The CHAIRMAN suggested that the text should be referred to the Working Group together with the amendments and the comments put forward by delegations.

It was so agreed.

The meeting rose at 12.35 p.m.

SUMMARY RECORD OF THE FORTY-THIRD MEETING

held on Friday, 30 April, 1976, at 10.25 a.m.

Chairman: Mr. SULTAN (Egypt)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 65 - Fundamental guarantees (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/305, CDDH/III/307, CDDH/III/308, CDDH/III/310, CDDH/III/311, CDDH/III/312, CDDH/III/314 to CDDH/III/320)

1. Mr. SURBECK (International Committee of the Red Cross) said that because of its fundamentally humanitarian character article 65 was of great importance to draft Protocol I as a whole.

2. It was designed first of all to fill the gaps in treaty law in respect of persons not covered by such law, in other words any nationals of States not Parties to the Conventions who fell into the power of a Party to the conflict and nationals of the Parties to the conflict to whom those Parties accorded the same or less favourable treatment as that extended to nationals of the adverse Party. Mention should also be made of those persons temporarily excluded from the complete protection afforded by Article 5 of the fourth Geneva Convention of 1949, an exclusion which was compensated for in the third paragraph of Article 5 by an injunction whereby the persons referred to in the first two paragraphs "shall be treated with humanity". Those words appeared in other parts of the Geneva Conventions, but their scope and precise meaning were not always made as clear as they might be. Lastly, there was a category of persons which article 65 intended should receive the minimal protection for which it provided - a category whose importance would be obvious to everyone. Indeed, without prejudging in any way the results of the work of Committee III on article 42, it could be established that on the basis of article 65 as it had been drafted by the ICRC: "... Persons who would have participated in the fighting without fulfilling the conditions for the status of prisoner of war would be entitled in any case to the guarantee of this article even should they not be covered by the fourth Convention in the event of capture or arrest." (Quotation from ICRC Commentary of 1973, page 82). Article 65 envisaged covering above all the grey area which would always exist whatever might be done, between combatants in the strict sense, as defined in Article 4 of the third Geneva Convention of 1949 and article 42 of draft Protocol I, and the peaceful civilian population, as

defined by the fourth Convention and article 45 of draft Protocol I. An important detail should be emphasized here, namely that the new categories of persons thus protected would be protected within the framework of article 65 only. That factor alone would suffice to emphasize the importance of such an article.

3. Second, article 65 was intended to reaffirm clearly the minimum level of humane treatment under the Conventions and draft Protocol I, regardless of the circumstances. The ICRC felt that it was unnecessary to recall that such a reinforcement, expressed with the emphasis and determination necessary would not constitute a superfluous luxury having regard to the inhumane treatment all too often meted out to persons who, in present-day conflicts, fell into the power of the adverse Party, not to mention the arbitrary manner in which a Party to the conflict might easily treat its own nationals should they pose a threat to its security. Members of the armed forces falling into the power of the adverse Party had an **unambiguous** status whereby they often enjoyed a greater number of more important guarantees than civilians in a similar situation. The question was therefore to guarantee minimum protection to all persons who, for one reason or another, might be denied protection of the provisions of the fourth Geneva Convention of 1949 and who, although not participating directly or no longer participating in the hostilities, might be threatened by abuses of power and inhumane or cruel treatment which the military or civilian authorities of the Party to the conflict within whose power they were might be tempted to inflict upon them.

4. Article 65 of draft Protocol I formed a homogeneous whole consisting of three complementary elements: paragraph 1 defined the personal field of application of the provision, paragraphs 2 and 4 its material field of application and paragraph 5 its temporal field of application.

5. Paragraph 1 had already been briefly discussed. The heart of the article lay in paragraphs 2 and 3. Paragraph 2 set out a list of acts which it was forbidden for anyone to commit against protected persons, while paragraph 3 established legal guarantees which should be afforded to any person accused of having committed offences relating to a situation referred to in Article 2 common to the Geneva Conventions of 1949. Paragraph 4 gave special protection to women whose liberty was restricted. Paragraph 5 provided for the application of article 65 to be extended, if necessary, in order to ensure that the cessation of hostilities did not cause the treatment given to deteriorate suddenly and sink below the minimum level provided for in the article.

6. Paragraph 2 made the definition of humane treatment fuller and more precise. Besides some of the guarantees contained in Article 3 common to the Geneva Conventions of 1949, it embodied the ideas expressed in Articles 31 to 34 of the fourth Convention. The guarantees so defined should be regarded as fundamental and justified the fact that no exception should be made to the categories to which they applied.

7. Paragraph 3 reaffirmed some of the ideas formulated in Articles 64 to 75 of the fourth Convention, together with the main principles of law and the most essential procedure covered by the expression "legal guarantees".

8. Some of the principles stated in the article were also contained in instruments relating to human rights, particularly the International Covenant on Civil and Political Rights (United Nations General Assembly resolution 2200 (XXI)), which had come into force on 23 March 1976. However, the inclusion in draft Protocol I of the principles which were already contained in an instrument of the United Nations would not lead to any subsequent new adaptations of national laws, which for the most part already contained the same principles.

9. When improving the wording of article 65 the ICRC hoped that Committee III would not overlook the aim of that article, namely to protect in as clear and as complete a way as possible categories of persons who at the present time did not benefit from any provision of international humanitarian law to improve their fate. He recalled that article 6 of draft Protocol II, adopted by Committee I at the second session of the Conference, already contained the major part of the principles laid down in paragraph 2 of article 65 which he had just introduced.

10. Mr. CASTREN (Finland), introducing his delegation's amendment (CDDH/III/319), said that in general his delegation supported the text proposed by the ICRC, and some of the amendments submitted by other delegations, which completed the relevant provisions of the fourth Geneva Convention and made them more precise.

11. The Finnish amendment followed the same line. Its aim was simply to extend the application of the fundamental guarantees set out in article 65 to another category of persons, namely, nationals of neutral or co-belligerent States having normal diplomatic representation with the Party in whose power they were. In practice, such persons would in most cases enjoy sufficient protection; but their position would be improved if they were granted legal status.

12. The fact that within the last few months two international covenants on human rights had come into force was an added reason for granting the same treatment to different groups of people in time of war.

13. Mr. KAZANA (Poland), introducing the amendment submitted by his delegation (CDDH/III/320) said that its sole aim was to give greater precision to paragraph 3 (b) of article 65 and to make it absolutely clear that no one could be tried twice for the same offence in the same country.

14. Mr. VINAL (Spain), introducing the amendment submitted by his delegation (CDDH/III/316), said that its essential purpose was to make the first part of paragraph 3 of article 65 clearer, both as to form and as to substance. In regard to substance, the amendment was intended to spell out the exact intention behind the article, namely, to defend the principle of a legally constituted tribunal, in order to ensure that the judicial proceedings afforded all the necessary guarantees. In regard to form, the amendment aimed at improving the text drafted by the ICRC (at least in the Spanish version).

15. Mr. SCHUTTE (Netherlands), introducing the amendment submitted by the Swiss delegation and his own (CDDH/III/317), said that it related solely to paragraph 3 of article 65.

16. The amendment was chiefly based on the 1966 International Covenant on Civil and Political Rights, which had recently come into force. Both the Covenant and article 65 of draft Protocol I in fact dealt with the same legal situation and set out the fundamental guarantees which nationals of any State might enjoy in relation to their own national authorities. True, the Covenant was not mainly concerned with guarantees to be granted or enjoyed in time of conflict. In accordance with Article 4 of the Covenant, exceptions could be made to most of the provisions in time of public emergency or war. At the same time, paragraph 2 expressly precluded any derogation in respect of a number of fundamental rights: in particular, Article 15 expressly forbade the retrospective application of criminal legislation. Furthermore, paragraph 1 of article 4 stipulated that derogations were only permissible to the extent strictly required by the exigencies of the situation.

17. The amendment had a bearing on the provisions of other articles of the Covenant, especially Articles 9 and 14 which should remain in force even in time of war.

18. The sponsors of the amendment regarded it as a basis for discussion with a view to reaching a consensus on the whole of article 6⁵ and more especially on paragraph 3.

19. The text differed from the ICRC text on the following points: first, the word "criminal" had been inserted before the word "offence" in order to make it quite clear that the article was not concerned with administrative or disciplinary offences or proceedings.

20. Secondly, the phrase "essential judicial guarantees" had been replaced by "generally recognized principles of a judicial procedure". Systems and traditions differed appreciably between one country and another in respect of criminal law and criminal procedure; but there was none the less a general idea of the minimum required in any judicial procedure worthy of the name.

21. Thirdly, sub-paragraphs (a) to (e) contained examples of some important rules which States regarded as commonly accepted principles. Sub-paragraph (a) was identical with paragraph 3 (a) of the ICRC text. Sub-paragraph (b) followed the wording of paragraph 3 (d) of the ICRC text, but also took into account Article 15 of the International Covenant on Civil and Political Rights. Paragraph 3 (c) of the ICRC text had been regarded as decidedly inadequate. The sponsors considered it necessary for anyone charged with an offence to know the nature and cause of the accusation against him. Accordingly, the new sub-paragraph (c) they proposed, which was largely derived from Article 14, paragraph 3, of the Covenant provided that any person accused should have the right to defend himself in person or through legal assistance and have assistance of an interpreter. In proposing that "judgement should be pronounced publicly", as provided in the last sentence of sub-paragraph (c), the sponsors were not suggesting that cases should always be held in public but that the public should be admitted when judgement was pronounced. In regard to sub-paragraph (d) of the amendment, the sponsors had adopted a distinctly more cautious attitude than that adopted in the Covenant. The rule non bis in idem was applicable to two quite different situations: on the one hand it could be merely a rule of domestic law; on the other it could be extended to the international level, but it was far from being generally accepted that States had to recognize the validity of judgements made outside their own territories. It had therefore seemed more realistic to keep to the first meaning of the phrase and insert the words "under the same law". Finally, sub-paragraph (e) of the amendment introduced a new point not included in the ICRC draft; it was based on Article 14, paragraph 3(c), and Article 9 of the Covenant.

22. He then briefly indicated certain provisions of Article 14 of the Covenant which the sponsors of the amendment had not included, because in their opinion such provisions could not be respected in time of conflict.

23. A Working Group of Committee I was studying articles 9 and 10 of draft Protocol I, which to a large extent dealt with the same question as article 65, paragraph 3. That relationship should be borne in mind, but it was not necessary to arrive at identical provisions or texts at all costs.

24. Mr. VAN LUU (Democratic Republic of Viet-Nam), introducing amendment CDDH/III/305, said that the delegations of the Republic of South Viet-Nam and the Democratic Republic of Viet-Nam wished to thank the ICRC for taking into consideration the various conflicts that had arisen since the Second World War in the preparation of texts aimed at increasing the protection afforded to persons or objects in the power of a Party to the conflict, a protection already laid down in Parts I and III of the fourth Geneva Convention of 1949, which itself had been a milestone in the development of humanitarian law.

25. Nevertheless, the ICRC draft did not fully take into account what the population of South Viet-Nam had undergone during the foreign occupation - namely the "three alls" of the foreign occupying army and the puppet army ("burn all - kill all - destroy all") and the system of "strategic hamlets". Such practices, whose object was to subjugate a people who refused to submit, still persisted in certain African countries. For that reason, his country's amendment would ban "violence to love of country, to the right to freedom and to the other democratic rights".

26. In the same way, it was the memory of the barbarous penal system of "tiger cages" in South Viet-Nam which had led the sponsors of amendment CDDH/III/305 to add to the present text of article 65, paragraph 2 (b), the words "or to force the renunciation of political or religious convictions".

27. Lastly, in order to take account of the situations created by neo-colonial wars, the Vietnamese amendment proposed the insertion of a new paragraph 3 reading "If, in the course of military operations, a civilian is arrested, he must be released as soon as possible. During the period of his detention, he shall be entitled to treatment at least equal to that accorded to prisoners of war under the third Convention". The amendment did not seek prisoner-of-war status for the civilian population, but merely treatment equal to that enjoyed by prisoners of war.

28. Indeed, Article 2 of The Hague Regulations respecting the Laws and Customs of War on Land, annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land, recognized that the inhabitants of a territory had the right to take up arms to resist invading troops. Under certain very limited conditions, those captured became prisoners of war. At the second session, the French representative, Mr. Girard, had asked why recognition of the legitimacy of that reaction by any people loving independence and freedom had never gone so far as to include recognition of the fact that such a reaction could occur during an occupation and could be the act of isolated patriots. Mr. Genot, the Belgian representative, had made a similar comment.

29. It was high time that humanitarian law, an expression of the conscience of mankind, took account of the awakening of weak and poorly armed peoples who took up the fight against colonialism and neo-colonialism and that it confirmed the legitimacy of such a mass uprising, treating as prisoners of war any civilian patriots arrested during the operations of the foreign army of occupation.

30. Mr. de BREUCKER (Belgium) paid a tribute to the ICRC which, in its article 65, had produced a summary of the development of human rights since 1949. The article represented a concise and complete system of guarantees for the protection of persons, a system not unlike that set out in Article 3 common to the Geneva Conventions of 1949. It was in effect a "mini-convention" concerned with respect and protection of the human person, in so far as that element had been omitted from the scope of the Geneva Conventions of 1949, or, at any rate, inadequately covered in the fourth Convention.

31. His delegation was encouraged by the fact that the fundamental guarantees in article 65 had been taken almost entirely from the fourth Geneva Convention of 1949, and that the International Covenant on Civil and Political Rights also referred to them. His delegation hoped that the article would be adopted, rendered more precise and, if possible, developed further, particularly in regard to sentences and the protection and guarantees of the rights of the defence.

32. For that reason, his delegation had submitted a new paragraph 3 (CDDH/III/318) to be inserted between the present paragraphs 2 and 3 of the ICRC text of article 65. The first part of the text laid down that any person deprived of his freedom must be informed of the reasons for his arrest. The proposal echoed Article 9, paragraph 2 of the International Covenant on Civil and Political Rights. The second part laid down that the detaining Power must release the arrested person as soon as the circumstances justifying the arrest had ceased to exist.

33. Turning to amendment CDDH/III/307, which his delegation was submitting together with the Austrian delegation, he said that its object was to render more precise the second paragraph of Article 5 of the third Geneva Convention of 1949, which stipulated that should any doubt arise as to the status of persons having committed a belligerent act and having fallen into the hands of the enemy, their status must be determined by a competent tribunal. His delegation had already had occasion to speak at length on that matter, in connexion with article 42 bis (CDDH/III/260 and Add.1), submitted by fifteen countries, including Belgium, and entitled "Protection of persons taking part in hostilities".

34. The competent tribunal would in fact have a radical choice to make under the system of the Geneva Conventions: if the captured person was considered to be a civilian, he would incur the full rigour of the law; if a combatant, he would enjoy total impunity, save for breaches of the laws of war.

35. The de jure reply to the question of status was to be found in Article 4 of the third Geneva Convention of 1949, as supplemented by article 42 of draft Protocol I. But would the de facto reply be provided by the enemy captor on the field of battle, or by the enemy Occupying Power? Either way, it would be the enemy and the enemy alone.

36. Thus, there was a twofold need: to establish legal criteria and to ensure, so far as possible, that the facts concerning a captured person were duly weighed before he was sentenced for illegal hostile activities. Some guarantees of that kind were already provided in article 42 bis.

37. His delegation considered that the legal guarantees proposed in paragraph 3 of article 65 should include a specific guarantee on that point, since the article related to fundamental guarantees and was applicable inter alia to people in the critical situations specified by Article 5 of the fourth Convention. Under such a guarantee, no court should pass a sentence for deeds relating to the armed conflict having assumed, at the start of the proceedings that the accused was a civilian on the feeble basis of an earlier de facto selection or decision. Should a person be captured for taking part in activities prejudicial to the enemy Power, it was clear that if the court were to consider only the facts, e.g. the killing of enemy soldiers or the destruction of military objects, and were thus to ignore the preliminary question of status, taking it that the matter had been decided upon arrest or capture on a purely administrative basis, the practical application of Article 4 of the third Geneva Convention of 1949 and of article 42 of draft Protocol I could easily be evaded.

38. Similarly, his delegation considered that a court of first instance was not necessarily competent to give a conclusive judgement on the status of a captured person. There should be provision for appeal against a decision which was of such vital importance to the person concerned. That was a second guarantee.

39. In any case, the court must automatically, and depending on the circumstances, either give a decision on the status of the accused or confirm that his status had already been properly determined even if the accused had not invoked the provisions of Article 4 of the third Convention and the provisions of article 42 of draft Protocol I.

40. That would remedy an existing shortcoming and give the accused a last chance, in relation to the application of Article 68 of the fourth Geneva Convention of 1949, when he was faced with judges who would, of course, be under pressure to give a judgement based on the nature of the offence.

41. The Austrian and Belgian delegations were prepared to discuss in the Working Group the difficulties arising from the text because of the different legal systems in force in the countries attending the Conference.

42. Mr. GILL (Ireland) said that a mistake in the English version of the amendment submitted by his delegation (CDDH/III/308) needed correcting; the words "for any reason whatsoever" should be inserted after "military agents".

43. The aim of the Irish amendment was to have the crime of torture mentioned separately. The intention was neither to attempt a definition of torture nor to establish degrees of severity - a repugnant task for which only a torturer would have the expertise; rather, the object of his delegation's proposal was to avoid the possibility that through being lumped together with murder and other acts of violence, torture might escape the revulsion with which it should be treated.

44. By inserting the words "for any reason whatsoever" his delegation hoped to avoid all possible loopholes. It proposed deleting the term "physical coercion", which it considered to be a euphemism for torture and acts of violence. Similarly, the term "moral coercion" really meant mental torture.

45. With regard to the other draft amendments to article 65, his delegation supported paragraph 1 of the joint Australian and United States amendment (CDDH/III/314).

46. His delegation was one of the nine countries sponsoring amendment CDDH/III/311 to paragraph 4 of article 65. It also supported the joint Australian and Egyptian amendment (CDDH/III/312).

47. The Revd. Father ROCH (Holy See), introducing amendment CDDH/III/310 by the Holy See and Austria to article 65, paragraph 1, said that its sponsors had found in the ICRC Commentary (CDDH/3, p.81) the dual purpose which the ICRC gave to article 65, namely, "first, to impose a limit on the arbitrary authority of the Parties to the conflict with respect to persons not protected by the Conventions and, secondly, to specify the humane treatment which, according to the third paragraph of Article 5 of the fourth Convention, must be given to protected persons 'definitely suspected'".

48. The Commentary also stated on p.81 that: "The fundamental guarantees provided by this article are, in fact, almost all taken from the fourth Convention."

49. Paragraph 1 of article 65 of the ICRC draft, in its statement that the Parties' own nationals should be treated humanely "without any adverse distinction", raised the important problem of discrimination in humane treatment. Since the matter at stake was "fundamental guarantees", that being the title of article 65, the sponsors of amendment CDDH/III/310 considered that it was not enough to make general statements and just state a "minimum level", as the ICRC representative had said. Stricter provisions were needed in an area where arbitrary action might only too often lead to serious shortcomings in the observance of human rights. Those provisions were intended to avoid possible discrimination in the treatment of persons in the power of a Party to the conflict as defined in Article 3, paragraph (1) of the fourth Geneva Convention. In connexion with conflicts not of an international character, the list of categories of persons entitled to humane treatment was followed by the words: "without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth or any other similar criteria".

50. Article 4, paragraph 1, of the International Covenant on Civil and Political Rights, contained the stipulation that: "... provided that such measures ... do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

51. Those stricter definitions of non-discrimination against protected persons had also found a more general reaffirmation in Article 27 of the fourth Geneva Convention.

52. Mr. de STOOP (Australia) speaking on behalf of the nine sponsors of amendment CDDH/III/311 to article 65, paragraph 4, of draft Protocol I, said that its purpose was to impose on parties to an armed conflict a positive legal obligation to accommodate as a family unit families held in the same place of internment. The purpose of the proposed amendment was to ensure that families were not separated in circumstances where that was not normally required.

53. The Australian delegation had proposed, in conjunction with the Egyptian delegation, an amendment (CDDH/III/312), to article 65, paragraph 5, designed to extend as much as possible the fundamental guarantees provided for under that article. That paragraph provided that persons detained by reason of a situation referred to in Article 2 common to the Geneva Conventions of 1949 should enjoy the protection of article 65 until such time as they were released, repatriated or established after the general cessation of hostilities. His delegation had some doubts as to the meaning of the word "established" in that paragraph but, whatever its meaning, his delegation had taken the view that it was essential to ensure that persons who for any reason remained in detention after the general cessation of hostilities should continue to enjoy the benefits of article 65, where such detention resulted from a situation referred to in Article 2 common to the Geneva Conventions of 1949.

54. His delegation was willing to co-operate with other delegations in making article 65 as clear, humane and workable as possible. It reserved the right to submit further comments on the subject at a later date.

55. Mr. MAZZA (United States of America), introducing amendment CDDH/III/314 on behalf of the Australian delegation and his own, pointed out that article 65 related to nationals of the Parties to an armed conflict. That being the case, it was important to limit the scope of the article to situations where nationals of one party were captured, interned or detained for activity in relation to the armed conflict. The proposed amendment to paragraph 1 would therefore limit the scope of the article. While the sponsors of the amendment by no means intended to disregard humanitarian considerations, they believed that situations not related to the armed conflict in question should be dealt with by each of the Parties to the conflict in accordance with its national legislation, and not under an international instrument applicable in cases of armed conflict. Any State had the right to regulate the conduct of its nationals in situations which came within its jurisdiction and which clearly had no connexion with an international armed conflict.

56. The amendment also proposed the deletion of paragraph 2 (b) concerning physical or moral coercion, in particular to obtain information. Nationals of a State Party to an armed conflict could use that provision to avoid having to give evidence during an inquiry or trial. Under all national legislations, however, courts could insist on persons within their jurisdiction supplying the information necessary for the application of the law. The right to demand such information was accompanied by penal provisions including imprisonment, and that might be equated with physical coercion. Under United States law, there were, however, exceptions to that general rule. An individual was not obliged to incriminate himself in a penal case. Moreover, there were certain established privileges, such as the professional secrecy binding on lawyers and priests. The third Geneva Convention of 1949 prohibited the use of coercion of any type to obtain information of any kind from prisoners of war, and Article 31 of the fourth Geneva Convention contained provisions similar to those which it was proposed to delete from article 65. Those provisions did not of course apply to a Party's own nationals.

57. Paragraph 1 of article 65 dealt mainly with nationals of a Party to the conflict and that meant unacceptable interference in the domestic affairs of that Party.

58. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) said that his delegation attached the greatest importance to the question of prosecution and punishment. In the light of experience gained during many armed conflicts and particularly the Second World War, the principles of the Nürnberg tribunal had been accepted by world public opinion. They had been reiterated and developed in a great number of international instruments, like the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (United Nations General Assembly resolution 2391 (XXIII)), the International Convention on the Suppression and Punishment of the Crime of Apartheid (United Nations General Assembly resolution 3068 (XXVIII)) and many others.

59. It was incumbent on the Diplomatic Conference not to overlook such aspects of international law, and that was why eleven delegations had submitted an amendment (CDDH/III/315) to article 65 which sought to reaffirm the principle whereby persons accused of war crimes and crimes against humanity could be prosecuted and punished in any circumstances. That legal principle applied to draft Protocol I as a whole, i.e. to all categories of persons mentioned in it. The sponsors of the amendment believed that it should be included in article 65 of draft protocol I.

60. Legal prosecutions were still going on against war criminals in the Union of Soviet Socialist Republics and many other countries. It was essential to ensure that no provision of the draft Protocol could be invoked by those criminals in order to escape the punishment they deserved. In fact, some of them had tried to evade that punishment by putting forward interpretations of existing legal principles that were there casuistry. It should not be possible for the principles laid down in additional Protocols to be used in that way.

61. The CHAIRMAN opened the general debate on article 65 and the relevant amendments.

62. Mrs. RODRIGUEZ-LARRETA de PESARESI (Uruguay) said that she had carefully followed the introduction of the amendments to article 65, which was of vital importance in the humanitarian field. Her delegation could accept the wording proposed by the ICRC, but was particularly interested in the amendment submitted by Spain (CDDH/III/316) paragraph 3 of which gave a more complete picture of the situation, especially in the last three lines, which read: "... in pursuance of a judgement of a court constituted in accordance with the law, which affords the following essential guarantees:". The rest of the article called for no change.

63. Her delegation was ready to accept the amendment submitted by Austria and the Holy See (CDDH/III/310), which in article 65, paragraph 1, would add after the words "without any adverse distinction", the words "based on race, colour, religion or creed, sex, birth or wealth, or any similar criterion".

64. Mr. DJANG Moun Seun (Democratic People's Republic of Korea) said that before discussing article 65 he would like to refer briefly to the problem which had arisen at the forty-second meeting (CDDH/III/SR.42). It had never been his delegation's intention in the course of the Conference to discuss the internal problem of the Korean nation, the solution of which rested with that nation itself. However, since the representative of South Korea had spoken of the matter in unrealistic terms, he felt obliged to offer some clarifications.

65. More than 130 times, his delegation had submitted fair and reasonable proposals bearing on the negotiations between North and South, in order to put an end to the sufferings of the nation which were inherent in the division of the country. The South Koreans owed it to themselves to accept that proposal to negotiate, in view of the desires of the people of South Korea concerning

peaceful reunification of the motherland and a modification of the international situation. Nevertheless, negotiations led by the Red Cross of North and South were making no progress and encountered constant obstacles. That was due solely to the ambiguous attitude towards negotiation adopted by the South Korean side.

66. He noted that the legal conditions and social situation in South Korea were obstacles to humanitarian work aimed at alleviating the sufferings of dispersed Korean families.

67. His delegation had carefully studied article 65 of draft Protocol I. In his view, the article did not sufficiently mirror the demands of reality and the aspirations of the people towards social democracy and the protection of human rights. The struggle now being carried on by the South Korean people was a patriotic one, its purpose being to recover the land and people captured by foreign troops and at the same time to democratize society.

68. The political and religious convictions of individuals struggling for social democracy and the safeguarding of human rights were targets for serious repression.

69. For that reason, his delegation supported the amendment submitted by the Democratic Republic of Viet-Nam (CDDH/III/305).

70. Mr. BRETTON (France) wished to stress the importance of recognizing prisoner-of-war status in doubtful cases; that had already been fully emphasized and needed no further argument. He wished to call the Committee's attention to some technical juridical aspects designed to ensure legal protection for an individual of doubtful status falling into the hands of a Party to a conflict. Three points seemed to be vital in that respect:

71. First of all, proceedings should not open with the presumption of non-recognition of prisoner-of-war status, unless a definitive legal decision had already been arrived at, in conditions complying with the general principles of penal law recognized by the various legal systems; secondly, it was indispensable that the accused be in a position to present his defence effectively, in other words be able to employ all de jure and de facto means to establish his status as a prisoner of war; and thirdly, such a situation should be regarded as a genuine process of public order i.e., an exception which the court would automatically invoke, even if the accused remained silent.

72. For the reasons which had just been cited, his delegation endorsed in its broad lines the extremely pertinent amendment (CDDH/III/307) submitted by Austria and Belgium and so ably presented by the representative of Belgium. Its spirit was fully approved by his delegation. The text, however, would doubtless have to be reviewed and given a more synthetic form; that task should be entrusted to the Committee's Working Group.

73. Mr. CONDORELLI (Italy) considered that article 65 was one of the most important developments of international humanitarian law. The wording submitted by the ICRC provided an excellent working basis, but could probably be improved upon, as the numerous amendments before Committee III attested. His delegation proposed to endorse most of those amendments and to take an active part in the discussion which would take place in the Working Group.

74. So far as paragraph 1 of article 65 was concerned, its scope should be made clearer to avoid any confusion with Articles 4 and 5 of the fourth Geneva Convention of 1949. He therefore supported the Finnish amendment (CDDH/III/319) and the amendment submitted by Austria and the Holy See (CDDH/III/310), which provided an excellent basis for discussion. As to the amendment submitted by Australia and the United States of America (CDDH/III/314), he was much perplexed about the scope of article 65 being limited to persons who were captured, interned or detained for activity in relation to the armed conflict, and who would not receive more favourable treatment under the conventions or the present Protocol (including persons mentioned in Article 5 of the fourth Convention). He shared the view expressed by the ICRC, which laid down in paragraph 2 rules from which all persons could benefit.

75. With regard to paragraph 2, he supported the Irish amendment (CDDH/III/308), which aimed at emphasizing the prohibition of torture, but he could not agree to the deletion of paragraph 2 (b) as proposed by Australia and the United States of America in amendment CDDH/III/314.

76. As to paragraph 3, the proposals before the Committee were important. The text of that paragraph could certainly be improved, and he supported, in particular, the amendments submitted by the Netherlands and Switzerland (CDDH/III/317), Belgium (CDDH/III/318) and Austria and Belgium (CDDH/III/307). His delegation would participate actively in the discussions of the Working Group, thus co-operating in ensuring that those important proposals would find their place in the draft Protocols.

77. Concerning paragraph 4, he supported the amendment submitted by Australia, Canada, Egypt, Ireland, Jordan, Saudi Arabia, Thailand, the United States of America and Yugoslavia (CDDH/III/311), but had certain reservations regarding the amendment submitted by Bulgaria, Byelorussian SSR, Czechoslovakia, Democratic Republic of Viet-Nam, the German Democratic Republic, Hungary, Mongolia, Poland, the Republic of South Viet-Nam, the Ukrainian SSR and the Union of Soviet Socialist Republics (CDDH/III/315) relating to the addition of a new paragraph 6. His delegation considered that article 65 was not the ideal place for that new proposal which, as regards its substance, might be misunderstood. It was obvious that the prosecution of war criminals must not be hindered by the Protocol, but such prosecution must respect the rules of the Protocol especially those concerning judicial guarantees.

78. Mr. de STOOP (Australia) said that he would like to add to what the United States representative had said in introducing their joint amendment to article 65 (CDDH/III/314).

79. As the United States representative had explained, the amendment to paragraph 1 restricted the application of article 65 to a certain extent. However, that amendment also had the effect of broadening the categories of persons who would be entitled to the safeguards under that article.

80. The original text extended those provisions to two categories of people: namely, persons who were nationals of States not Parties to the Conventions and persons who were nationals of the Parties to the conflict. The paragraph proposed in amendment CDDH/III/314 stipulated, however, that the article applied not only to persons who were nationals of States not Parties to the Conventions and to persons who were a Party's own nationals but also to any other persons who would not receive more favourable treatment under the Conventions or draft Protocol I who were captured, interned or detained for activity in relation to the armed conflict. That amendment would have the effect of making that provision clearer and broader in scope.

81. The second part of the amendment proposed the deletion of paragraph 2 (b). Paragraph 2 (b) of the ICRC text prohibited "physical or moral coercion, in particular to obtain information". The Australian delegation thought that such a provision was far too general and quite unrealistic, especially when read in conjunction with paragraph 2 (f). In any event, the evils which paragraph 2 (b) sought to avoid were already largely covered by the prohibition under paragraph 2 (a). The Australian delegation

would also like to see the words "whether committed by civilian or military agents" at the end of the first sentence of paragraph 2 deleted, for they seemed to it to be too restrictive.

82. His delegation supported the amendment to paragraph 3 of article 65 submitted by the Netherlands and Switzerland (CDDH/III/317). That proposal was comprehensive and conformed more closely to the provisions in the International Covenant on Civil and Political Rights than to the corresponding provisions in the ICRC text. His delegation also supported the amendment submitted by Austria and the Holy See (CDDH/III/310).

83. Lastly, his delegation supported the inclusion of a provision of the kind under discussion in draft Protocol I, and aimed, in general, to steer a course between the Scylla of under-protection and the Charybdis of over-enthusiasm for basic guarantees in draft Protocol I.

84. Mr. TODORIĆ (Yugoslavia) said that, in his opinion, the text of article 65 concerning fundamental guarantees was of the greatest importance but dealt with three different questions, namely, the categories and status of the persons protected, humane treatment and judicial safeguards.

85. Moreover, paragraph 4 of article 65 concerning women whose liberty was restricted, would be better placed as a separate paragraph of article 67, since that article dealt with the protection of women.

86. The amendment submitted by Finland (CDDH/III/319) provided an acceptable wording for article 65, subject to a few changes in the title - "The status of protected persons".

87. Paragraphs 2 and 3 of the ICRC text of article 65 should be presented in the form of separate articles - 65 bis and 65 ter - whose titles would be the following: "Humane treatment" and "Judicial guarantees".

88. For the reasons already mentioned, he thought that article 65 should be divided up into three separate articles, since three different legal categories were involved.

89. Mr. CLARKE (United Kingdom) said he welcomed the text of article 65 proposed by the ICRC, which clearly set forth basic human rights closing, as it were, loopholes in Articles 4 and 5 of the fourth Geneva Convention of 1949.

90. The greater part of the difficulties inherent in some of the amendments that had been submitted to the Committee would certainly be resolved within the Working Group.

91. Some of the ICRC's proposals, however, were causing concern to his delegation, as, for example, the fact that article 65 applied to nationals of States which were not Parties to the Conventions and to the nationals of Parties to the conflict. It would also seem necessary to make certain changes to paragraph 3.

92. His delegation doubted the need for paragraph 2 of the ICRC draft unless it was for the purpose of emphasis. In his view paragraph 2 (a) and (b) merely repeated what was said in Articles 31 and 32 of the fourth Geneva Convention of 1949. His delegation considered that paragraph 2 (b), in particular, presented difficulties for the reasons which the representatives of Australia and the United States of America had already pointed out.

93. So far as paragraph 2 (c) was concerned, the Committee should insert a provision which would enable a patient to agree to surgery for the removal or transplant of organs.

94. Paragraph 3 of article 65 was of fundamental importance. His delegation considered that the text should be made more precise, and considered the amendments submitted by the Netherlands and Switzerland (CDDH/III/317) and Austria and Belgium (CDDH/III/307) to be of great importance.

95. Mr. de BREUCKER (Belgium) said that article 65 was one of the key articles in draft Protocol I.

96. His delegation thought that the amendment submitted by the Netherlands and Switzerland (CDDH/III/317) was valuable and agreed to it in principle. Nevertheless, he believed that Committee III would be well-advised to take cognizance of the work done by Committee I on the repression of penal breaches of the Conventions or of draft Protocol I. The matter could be referred to the Working Group.

97. Turning to the amendment submitted by the Democratic Republic of Viet-Nam (CDDH/III/305), he said that some passages were worthy of consideration, as, for example, the words "to force the denunciation of political or religious convictions".

98. The amendment submitted by Ireland (CDDH/III/308) would highlight the question of torture, which was an interesting idea and one that merited attention.

99. The amendment submitted by Austria and the Holy See (CDDH/III/310) was acceptable to the Belgian delegation.

100. The amendment submitted by Australia, Canada, Egypt, Ireland, Jordan, Saudi Arabia, Thailand, the United States of America and Yugoslavia (CDDH/III/311) was likewise acceptable. On the other hand, he found the one submitted by Australia and the United States of America (CDDH/III/314) somewhat puzzling.

101. His delegation found the amendment submitted by Finland (CDDH/III/319) quite interesting.

102. As regards the amendment submitted by Bulgaria, the Byelorussian SSR, Czechoslovakia, the Democratic Republic of Viet-Nam, the German Democratic Republic, Hungary, Mongolia, Poland, the Republic of South Viet-Nam, the Ukrainian SSR and the Union of Soviet Socialist Republics (CDDH/III/315), he could only endorse what the representative of Italy had just said. The Diplomatic Conference was not the best place to consider provisions of that nature.

103. Mr. KUSSBACH (Austria), speaking as one of the sponsors of two amendments, said that he would like to make a few brief remarks.

104. As regards the amendment submitted jointly by his delegation and the Holy See (CDDH/III/310), which related to paragraph 1 of article 65, its wording was identical with the text of Article 3 common to the four Geneva Conventions of 1949, and of article 2 of draft Protocol II. The amendment had thus been submitted purely for the sake of uniformity.

105. Referring to the amendment submitted jointly by Austria and Belgium (CDDH/III/307), he said that his delegation deemed it particularly important. The representative of Belgium had introduced the amendment with great brilliance. He wished to emphasize, however, that a distinction could be drawn between two very different situations. Firstly, there were cases in which prisoner-of-war status was not clearly defined. If, for example, someone had the benefit of prisoner-of-war status, that person might, if he committed a crime, be declared innocent; but if, on the contrary, his prisoner-of-war status was not recognized, he would be considered guilty. Secondly, there was the case in which a person who had committed an offence and had been charged claimed prisoner-of-war status. That involved a pre-judicial question.

106. A de facto difference was involved, and it would be for an impartial court to decide the issue.

The meeting rose at 12.35 p.m.

SUMMARY RECORD OF THE FORTY-FOURTH MEETING

held on Monday, 3 May 1976, at 10.35 a.m.

Chairman: Mr. SULTAN (Egypt)

ORGANIZATION OF WORK

1. The CHAIRMAN read out a note concerning the new time-table for the current week.

The time-table was approved.

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 65 - Fundamental guarantees (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/305, CDDH/III/307, CDDH/III/308, CDDH/III/310, CDDH/III/311, CDDH/III/312, CDDH/III/314 to CDDH/III/320) (continued)

2. Mr. REIMANN (Switzerland) said that article 65 was a key provision in draft Protocol I, since fundamental guarantees in favour of human beings played a determining role in the situations to which the Protocol applied.

3. The Swiss delegation was in general agreement with the ICRC text not only in its broad outlines but also in many of its details. The ICRC had had a difficult task. In fact, in preparing its text, it had had to combine human rights with the rights of war; and further, not only to find a replacement for domestic law in the field of human rights but also to ensure respect for fundamental guarantees in times of conflict. In the same context he would stress the importance of the choice of criteria on the basis of which the beneficiaries were defined. By adding a few categories of persons, the ICRC had succeeded in doing away with the criterion of nationality. That would follow from the new rules, and it was a welcome result. An open mind should also be kept with respect to other criteria. The Swiss delegation agreed with the statement made by the Italian representative at the forty-third meeting (CDDH/III/SR.43) that amendment CDDH/III/314 contained inappropriate wording.

4. There was need for realism in the formulation of article 65. A common denominator would have to be found for different legal systems. Systems of penal legislation could, moreover, easily overlap, for example in the cases covered by Article 64 of the fourth Geneva Convention of 1949. The common denominator was a

minimum standard. It was therefore possible to go too far. It might be pointed out that even in peace-time the denominator was not easy to find, a case in point being the right of appeal. That was certainly not a field in which the minimum standard could be broadened.

5. While the Conference must indeed develop law it should not lose itself in a plethora of details, as in amendment CDDH/III/310. On the other hand, it should not go as far as amendment CDDH/III/307. Moreover, in view of some of the amendments presented, it should be recalled that reaffirmation and development should not be used as an excuse to adopt solutions which would be a retrograde step in relation to article 65. Finally, it should be borne in mind that article 65 represented a minimum step and that States should go beyond it in their national legislation.

6. The Swiss delegation wished to ask one question in connexion with amendment CDDH/III/315. If the proposed addition to article 65 was to take the form of a reference to the provisions of Articles 102 to 107 and Article 119, fifth and sixth paragraphs, of the third Geneva Convention of 1949, the amendment was not acceptable. If, on the other hand, it had a different meaning, then that should be made clear. The aim of the amendment might be thought to be the qualification of actions by domestic legislation. Even if that were so, it did not seem that article 65 was the proper place for the new paragraph 6.

7. He thanked those delegations which had expressed interest in amendment CDDH/III/317 submitted by the Netherlands and Switzerland.

8. Mr. JADKARIM (Sudan) paid a tribute to the ICRC for its efforts in drafting article 65. He had listened carefully to the various delegations which had presented amendments and he hoped that the Working Group would draw on their proposals to improve the article.

9. His delegation was particularly in favour of amendment CDDH/III/311 since it safeguarded the unity of the family until such time as it was freed and authorized to return to its country of origin. It was essential that families scattered during armed conflicts should be reunited. The amendment should therefore be adopted.

10. Mr. Kun PAK (Republic of Korea) replied to the remarks made at the forty-third meeting (CDDH/III/SR.43) by the representative of North Korea. They had contained false and slanderous accusations against the Republic of Korea and must be categorically rejected. While convinced that the fundamental difference in the human rights situation between the two parts of Korea had been the principal cause of the breakdown of negotiations, he had refrained in his earlier statement from passing judgement on the suppression of human rights in North Korea.

11. The representative of North Korea had alleged, among other things, that foreign troops were occupying the Republic of Korea. Those foreign troops were there on the invitation of the Government of the Republic in accordance with international law and existing treaties. They had come to help the Government of the Republic of Korea to repel the North Korean aggression of 1950, which had caused over a million deaths and separated several million families. The reason those troops were still there was the threat of renewed aggression.

12. Turning to article 65, he said that his delegation was basically in favour of the ICRC text.

13. It was a most important article because it sought to provide fundamental guarantees for persons who might be arrested or detained because of their participation in a conflict. They were essential guarantees and should be both universal and objective. Any introduction of subjective ideas might cause difficulty in their interpretation and application. Those considerations would determine his delegation's approach to the ICRC text and the various amendments, and it reserved the right to return to the subject later.

14. Mr. CRETU (Romania) said the great interest shown by various delegations, and the large number of amendments submitted, indicated the importance of article 65.

15. Amendment CDDH/III/315, submitted by a group of socialist countries, appeared particularly useful. That proposal belonged within the general framework of the protection of the very different and heterogeneous categories of persons who might find themselves within the power of the parties to armed conflicts. The development of international law over the past three decades had led to many new rules in the field of international crimes. A war of aggression now constituted an international crime, and force should never be used as a means of settling international problems. The non-observance of the rules applicable in armed conflicts was a crime. It was therefore important to make it clear, in connexion with the

protection of persons in the power of one of the parties to a conflict, that such persons should have the benefit of proper treatment provided that they were not war criminals. Obviously, even in that case, the legal safeguards provided should be respected.

16. The amendment by the Democratic Republic of Viet-Nam (CDDH/III/305), proposing the insertion of a new paragraph 3 in article 65 to the effect that during the period of his detention an arrested person should be entitled to treatment at least equal to that accorded to prisoners of war, deserved careful study because it was based on past experience of an unhappy character, and could provide a further safeguard for persons in the power of the parties to the conflict. That text would perhaps be more complete and clearer if the phrase "without thereby acquiring the status of prisoners of war" were added.

17. Mr. SOKIRKIN (Union of Soviet Socialist Republics) said that he approved in general draft article 65 prepared by the ICRC, but felt that the text could be improved, made more generally understandable, and made more responsive to the requirements of the situation envisaged. Many amendments had been submitted. Some were of a purely drafting nature, but others related to the substance and amounted to an almost complete rewording of the text. The Rapporteur and the Working Group would undoubtedly have an arduous task.

18. The Ukrainian delegation, in introducing joint amendment CDDH/III/315, had emphasized the great importance that should be attached to it. War criminals must not be given the opportunity of invoking Protocol I to escape from prosecution and punishment. War crimes and crimes against humanity were abominable, and should be punished. The USSR delegation reserved the right to reply to the comments and objections made concerning that amendment.

19. His delegation welcomed the particularly humane nature of the amendment by the Democratic Republic of Viet-Nam (CDDH/III/305). The efforts of the Democratic People's Republic of Korea to find a solution for the fate of divided families were also deserving of mention.

20. The amendments were not all equally important, and not all had sufficient justification. It was impossible to include in article 65 all the guarantees that should be granted to the victims of international conflicts, but the article should mention the main fundamental safeguards against unlawful prosecution. Account must be taken of national legislations and of national systems of

prosecution, to avoid encroaching upon State sovereignty. The aim must be to find a system that could be acceptable to all those participating in the Conference and that would safeguard the fundamental rights that should be accorded to persons protected by article 65.

21. Mr. WOLFE (Canada) said that he agreed with those delegations which had expressed some concern over the application of article 65 to a State's own nationals. His delegation would have preferred to limit the application of the article to protected persons in occupied territory, including, of course, refugees and stateless persons and any other category of persons requiring such protection, and to concentrate on the nature of the protection to be provided. The purpose of the Conference was not to draft a Convention on Human Rights, and the Canadian delegation in the Working Group would resist adoption of any language or proposal that would inhibit the application of Canadian criminal law and criminal law procedures. The ICRC text appeared to present a reasonable framework for the discussions of the Working Group.

22. The amendment submitted by Austria and Belgium (CDDH/III/307) contained some interesting ideas, but he was not convinced that the problem it raised should be dealt with in article 65.

23. He understood the philosophy behind the amendment submitted by Ireland (CDDH/III/308), and did not object in principle. However, he would prefer to see the words "whether committed by civilian or military agents" deleted, as some other representatives had suggested.

24. He also had no objection in principle to amendment CDDH/III/310, but he considered that the problem was one for the Drafting Committee, since the same criterion should be included in all relevant provisions.

25. As to amendment CDDH/III/312, article 3 of draft Protocol I appeared to indicate the necessity for such a proposal.

26. He supported the proposal in CDDH/III/314, to delete paragraph 2 (b) of article 65. As worded, that sub-paragraph would inhibit normal police work, and to inhibit such action in time of national emergency with respect to possible traitors would be somewhat illogical.

27. Amendment CDDH/III/315, submitted by Bulgaria and other States, was probably unnecessary. In its present form it was also probably incompatible with article 65, paragraph 3 (b), and with the general principles of international law.

28. Mr. FISSENKO (Byelorussian Soviet Socialist Republic) said that the Geneva Conventions had not codified all humanitarian law. There were certain gaps, such, for example, as the absence of clear rules for the protection of persons finding themselves in the power of a party to the conflict. That gap was filled by Part IV, Section III of draft Protocol I, in which the key article was article 65. The ICRC text of article 65 provided an excellent working basis, but it could be improved both in substance and in form. The many amendments put forward contained interesting ideas that should be taken into account by the Working Group.

29. Document CDDH/III/305, submitted by the Democratic Republic of Viet-Nam, contained important amendments of substance, concerning inter alia infringements of the right to liberty and other democratic freedoms.

30. Events connected with the war in Viet-Nam, and the situation obtaining in a number of other countries which carried out repressive measures on a large scale against democratic ideas, in time of peace or in time of war, and resorted to gross coercion in order to force the persons holding such ideas to renounce their convictions, showed that the amendment by the Democratic Republic of Viet-Nam was very timely. That amendment should be included in the final text of article 65. He endorsed the statement made on the amendment by the representative of the Democratic People's Republic of Korea at the forty-third meeting (CDDH/III/SR.43).

31. His delegation supported the amendment submitted by Ireland (CDDH/III/308) concerning torture and violence to life and the Polish amendment to paragraph 3 (b) (CDDH/III/320), which introduced a necessary qualification into article 65.

32. Amendment CDDH/III/315 concerning persons accused of war crimes and crimes against humanity was based on a principle widely recognized in international law, namely, that war crimes and crimes against humanity, whenever and wherever committed, should be subject to investigation and that persons against whom there was evidence that they had committed such crimes should be subject to tracing, arrest, trial and, if found guilty, to punishment. That principle had been reiterated at the twenty-eighth session of the United Nations General Assembly and should be confirmed in the additional Protocols to the 1949 Geneva Conventions.

33. He did not agree with those representatives who considered that the amendment was out of place in article 65. In his view, it was a suitable addition to the article and to draft Protocol I as a whole. However, he noted that no representative had said that he did not approve. In any case, it had been made clear that the persons covered by the amendment should have the benefit of legal safeguards, and had the right to a proper trial by a court.

34. Mr. HERCZEGH (Hungary) said he considered that the carefully prepared ICRC text afforded an excellent working basis, and that the many proposed amendments to it showed the interest it aroused. His delegation supported the amendments submitted by Finland (CDDH/III/319) and Poland (CDDH/III/320). The amendment co-sponsored by the Democratic Republic of Viet-Nam and the Republic of South Viet-Nam and nine other countries (CDDH/III/315) deserved close attention in view of the great suffering undergone by the populations of those countries during the past decades and means should be sought to harmonize the wording of that proposal with the text of the relevant articles of the fourth Convention.

35. His delegation supported the amendment by Ireland (CDDH/III/308), because the prohibition of torture could not be too strongly reinforced. It approved the amendment sponsored by Austria and the Holy See (CDDH/III/310) and viewed with sympathy amendment CDDH/III/311, although it feared that the obligation to accommodate as family units families held in the same place of internment could not always be fulfilled by countries in armed conflict. The insertion of the words "as far as possible" would make it easier to accept the texts proposed for paragraph 4 of article 65. The Yugoslav representative had rightly commented at the forty-third meeting (CDDH/III/SR.43) that a better place for that paragraph would be article 67, which dealt with the protection of women.

36. His delegation associated itself with the efforts made to enlarge the judicial guarantees that were the subject of paragraph 3. That, however, was a question of great complexity, owing to the differences between the criminal law systems of the various countries. His delegation would say which of the proposed solutions it preferred in due course, when the question was taken up by the Working Group.

37. As to amendment CDDH/III/315, of which Hungary was one of the sponsors, he had nothing to add to the remarkable introductory statement by the representative of the Ukrainian SSR at the forty-third meeting (CDDH/III/SR.43); he only wished to clear up a misunderstanding. It had certainly not been the intention of the sponsors in any way to restrict judicial guarantees, which would, of course, be applied to persons accused of war crimes. He nevertheless considered, with the other co-sponsors of the amendment, that trials of war criminals and the affirmation that war crimes were not subject to any statute of limitations had strengthened respect for the international rules applicable in armed conflicts and therefore constituted, in the sphere in question, some measure of guarantee. It was with those considerations in mind that the amendment had been drafted.

38. Mrs. MANTZOULINOS (Greece) said that article 65 was intended to fill certain gaps in the 1949 Geneva Conventions and was a key article for the protection of the victims of international armed conflicts. It was therefore only natural that the ICRC text, prepared in the light of that organization's invaluable experience, should be the subject of many amendments submitted by delegations anxious to improve and complete it, and to incorporate in it appropriate substantive provisions, so that no loopholes would be left. There were undoubtedly good grounds for those amendments, but the body competent to consider them was the Committee's Working Group. It was for the Working Group to decide which of them had their place in article 65. Her delegation supported paragraph 1 of the ICRC text as amended by Finland (CDDH/III/319) and Austria and the Holy See (CDDH/III/310). It drew attention to the fact that the words "without any adverse distinction" in paragraph 1 of the ICRC text appeared also in article 10 of draft Protocol I, on the care of the wounded and the sick. During the debate in Committee II, that text had, however, been altered so that it would better fit the medical context.

39. The amendment by Austria and the Holy See (CDDH/III/310) was useful for the same reason, for it confirmed the prohibition of any discrimination among the civilian population, and was thus in line with Article 13 of the fourth Geneva Convention of 1949 and the international instruments relating to human rights.

40. So far as concerned paragraph 2, her delegation had been favourably impressed by the realism and precision of the amendment by Ireland (CDDH/III/308). It supported sub-paragraph (b) of the Netherlands and Swiss amendment (CDDH/III/317), which was drafted along the lines of Article 15 of the International Covenant on Civil and Political Rights, already in force.

41. The Greek delegation had noted with interest, in the amendment submitted by the Democratic Republic of Viet-Nam (CDDH/III/305), the reference to concepts such as "love of country", "the right to freedom" and "the other democratic rights", which were especially dear to those who in the course of their history had had to defend them. She approved the Spanish amendment (CDDH/III/316), and wholeheartedly supported the amendment submitted by Austria and Belgium (CDDH/III/307) dealing with the guarantees that should be afforded to the accused in view of his combatant capacity. The legal elements in that amendment were new and directly linked to the question of the protection of victims of armed conflicts. As to paragraph 5 of the ICRC draft, her delegation approved the text of the amendment sponsored by Australia and Egypt (CDDH/III/312), which it found succinct, precise and complete.

42. Mr. ALEIXO (Portugal) said that his delegation supported any amendment aimed at ensuring humanitarian treatment and judicial guarantees.

43. With reference to the amendment submitted by Austria and the Holy See (CDDH/III/310), he said that, far from strengthening the text of paragraph 1, the proposed addition would annoyingly weaken it. His delegation had no objection, on the other hand, to the amendments submitted by Finland (CDDH/III/319), and by Australia and the United States of America (CDDH/III/314). As for the amendment submitted by Ireland (CDDH/III/308), praiseworthy though it might be, it seemed to him to reverse the order of values by putting torture before murder. Moreover, he was of the opinion that "physical coercion", which was not covered by the provisions relating to torture should be retained in paragraph 2 (b).

44. The amendment proposed by the Democratic Republic of Viet-Nam (CDDH/III/305) comprised in reality two amendments, one dealing with "violence to love of country, to the right to freedom and to the other democratic rights", and the other with the act of forcing "the renunciation of political or religious convictions". The Portuguese delegation had some reservations regarding the former, but was in favour of the latter.

45. In the matter of judicial guarantees, the Committee had before it several amendments: the amendment by Poland (CDDH/III/320) and the amendment by Spain (CDDH/III/316), especially the latter, appeared to be restrictive, and his delegation would have difficulty in accepting them. The Netherlands and Swiss amendment (CDDH/III/317), particularly sub-paragraphs (c) and (e), was a considerable improvement on the ICRC text. His delegation accepted

the Belgian amendment (CDDH/III/318) and amendment CDDH/III/311, which was an improvement on the ICRC draft. One delegation had suggested that a saving clause should be inserted. That was a possibility which the Working Group might consider. Lastly, his delegation had no objections to amendment CDDH/III/315 either, but its subject matter could perhaps be dealt with somewhere else other than in article 65.

46. Mr. DJANG Moun Seun (Democratic People's Republic of Korea) said he felt obliged to protest, first, at the defamatory remarks made by the representative of the Republic of Korea, who did not really deserve any reply.

47. Secondly, in reply to the statement by the South Korean representative that there were no foreign troops in South Korea, he pointed out that tens of thousands of United States troops were stationed in that country. If these were not foreign, were they South Korean? The United States - South Korean Mutual Defense Treaty was itself in violation of Article IV of the Armistice Agreement of 1953 which had provided for the withdrawal of all foreign forces from Korea. The treaty was aggressive and illegitimate and the occupation of the territory was in violation of the North-South joint statement which rejected the presence of foreign troops in the territory. The so-called threats of aggression were a pure invention used as a pretext for the presence on the territory of South Korea of tens of thousands of soldiers belonging to the United States Army, who were there to maintain a fascist regime in existence.

48. Mr. Kun PAK (Republic of Korea), speaking on a point of order, said that his delegation had come to the Conference in all good faith with the aim of helping in the task of drawing up the additional Protocols, and not of indulging in political propaganda. He deplored the fact that certain persons, through their slanderous remarks and contemptuous insults, had introduced a discordant note into discussions which should be proceeding in an atmosphere of frankness and calm. His delegation hoped that those concerned would refrain from making remarks which would oblige it to exercise its right of reply.

49. The CHAIRMAN, observing that discussions in Committee III had always taken place in an atmosphere of understanding which was conducive to the smooth conduct of its proceedings, appealed to the delegations of the Democratic People's Republic of Korea and of the Republic of Korea to refrain from giving vent in their speeches to views that had nothing to do with the article under consideration - article 65. If they failed to comply, he would be forced to

apply rule 19 of the Conference's rules of procedure, which empowered the Chairman to call a speaker to order if his remarks were not relevant to the subject under discussion and, should occasion arise, to require him to stop speaking.

50. Mr. DJANG Moun Seun (Democratic People's Republic of Korea) alleged that massacres had been committed by the United States army of occupation when the Korean people's army had beaten a temporary retreat.

51. Upon being called to order once again by the CHAIRMAN, he turned to the amendments submitted to the ICRC text of article 65 and said that his delegation could not accept the amendment submitted by Australia and the United States of America (CDDH/III/314). On the other hand, it considered that article 65 as drafted by the ICRC was very constructive and it welcomed the amendment submitted by Bulgaria and other socialist countries (CDDH/III/315).

52. Mr. BOUTROS GHALI (Observer for the Sovereign Order of Malta), speaking at the invitation of the Chairman, said that his delegation fully supported article 65 submitted by the ICRC and the numerous amendments which had been proposed in order to make the article more precise and to extend its field of application. Those amendments, which were almost all designed to strengthen the text, afforded an encouraging demonstration of solidarity and understanding in seeking to safeguard the rights and dignity of human beings caught up in the military and political turmoil of the present day. His delegation hoped that, once the text of article 65 had been finally established, it would be adopted unanimously.

53. The CHAIRMAN suggested that article 65, together with the amendments submitted to it and the comments to which those amendments had given rise, should be referred to the Working Group.

It was so agreed.

Article 67 - Protection of women (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/321, CDDH/III/322, CDDH/III/323)

54. The CHAIRMAN invited the Committee to take up article 67, to which amendments had been submitted by the German Democratic Republic (CDDH/III/321), Poland (CDDH/III/322) and the Democratic Republic of Viet-Nam (CDDH/III/323).

55. Mr. SURBECK (International Committee of the Red Cross), introducing the text drafted by the ICRC, pointed out that at the present state of international humanitarian law women were protected only by a few scattered provisions. That was evident in the Geneva Conventions of 1949, especially in the fourth Convention. Women who were not in a special situation such as pregnant women or those responsible for young children were protected as such only by Article 27, second paragraph which stated that "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault." That wording had been repeated almost completely in article 67 which was before the Committee. In the wider application of Section III of Part IV of draft Protocol I, of which article 67 was a part, paragraph 1 envisaged extending to all women without exception the protection which was granted to them by the second paragraph of Article 27 of the fourth Geneva convention of 1949.

56. Women who, because of their special situation, must be given special protection were pregnant women, maternity cases and women who were in charge of children of less than seven years of age or who accompanied them. In the fourth Convention Article 14 on hospital and safety zones and localities laid down in the first paragraph that "expectant mothers and mothers of children under seven" should be specially protected. Articles 16, 20 and 21 of the fourth Convention, which provided certain types of protection to which the wounded and sick were entitled also mentioned pregnant women and maternity cases among those who should benefit from that general protection. Article 23 of the same Convention on the consignment of medical supplies, food and clothing provided for the free passage of every consignment destined in particular for expectant mothers and maternity cases. Lastly, Article 38 which covered non-repatriated persons placed under its protection "pregnant women and mothers of children under seven years".

57. At the present time, opinions were divided regarding the special protection to be given to women in armed conflicts. Some people considered that the existing provisions of international law, and in particular those of the Conventions and the instruments relating to human rights, were sufficient; others, like the ICRC, held that since the civilian population and especially women were becoming increasingly involved in present-day conflicts, it was necessary to give them greater protection in relation to that enjoyed by men placed in similar situations.

58. Paragraph 1 of the ICRC text accordingly laid down the principle that women should be the object of special respect, and paragraph 2 stipulated that the death penalty for an offence related to a situation referred to in Article 2 common to the Geneva Conventions of 1949 should not be executed on pregnant women.

59. The ICRC would have liked to propose a ban not only on execution, but also on pronouncing the death penalty in that specific instance. But in its concern for realism it had preferred to confine itself to a ban on execution, since the greater part of legislation authorizing the death penalty already contained such a clause but was not ready to admit that the fact of a woman being pregnant should prevent the death sentence being pronounced. It was obvious that the proposal in paragraph 2 was aimed at protecting a mother while she was pregnant and also the unborn child. The ICRC hoped however that such wording, if accepted as such, would not be interpreted literally and that, to speak bluntly, mothers who had just given birth, would not immediately be dragged to execution, but that a long period of time would be granted them in order that they might care for their infant. In that connexion it would perhaps be useful to repeat a proposal made by the ICRC at the second session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law in Armed Conflicts, held in 1972, which unhappily was not adopted, but which referred to the preoccupation mentioned. That proposal, which was then draft article 59, had read: "The death penalty shall not be pronounced on mothers of infants or on women responsible for their care."

60. Lastly, he pointed out that a provision which was similar to the ICRC text of article 67 already existed in paragraph 5 of Article 6 of the International Covenant on Civil and Political Rights.

61. Mr. FELBER (German Democratic Republic) said that his delegation had submitted an amendment (CDDH/III/321) to paragraph 2 of article 67. It thought that, for humanitarian reasons, the protection envisaged for pregnant women should be extended to other categories of women. It had therefore proposed that the death penalty should not be pronounced on mothers of infants and on women or old persons responsible for their care and that it should not be pronounced or carried out on pregnant women. That proposal followed logically from the first sentence of paragraph 1 of article 68, since it was a prerequisite for the privileged treatment of which children were to be the object.

62. Mr. KAZANA (Poland) said that in submitting its amendment (CDDH/III/322) his delegation had been inspired by purely humanitarian motives and had thought it desirable to go still further than the ICRC text, for the mere fact of pronouncing the death penalty would in itself be an inhuman act. In adopting that amendment, therefore, the Committee would be abiding by the spirit of the ICRC text of draft Protocol I.

63. Mr. VAN LUU (Democratic Republic of Viet-Nam), introducing his delegation's amendment (CDDH/III/323), said that his delegation had already explained at the forty-third meeting (CDDH/III/SR.43), in reference to article 65, the reasons why it wanted special treatment to be given to the civilian population. It was for those same reasons that it was now asking, in the case of article 67, that pregnant women arrested for their patriotism or for their political non-submission should be set free as soon as possible and before other civilians.

64. The CHAIRMAN opened the general discussion on article 67.

65. Mrs. MANTZOULINOS (Greece) said that her delegation was in favour of the three amendments.

66. Mr. CONDORELLI (Italy) observed that at the Conference of Government Experts his country's delegations had invariably declared their opposition to the death penalty; his delegation was therefore in favour of the ICRC text of article 67. It found the amendments submitted by the German Democratic Republic (CDDH/III/321) and Poland (CDDH/III/322), which were a welcome addition to the ICRC text, acceptable. On the other hand, the amendment submitted by the Democratic Republic of Viet-Nam (CDDH/III/323) was perplexing and might lead to misunderstanding. It might in fact make possible an interpretation a contrario which would be very dangerous. Not only pregnant women but everyone should be protected from arrest or detention for expressing their patriotism or political non-submission. The proposal in question could, on the contrary, be interpreted as authorizing the arrest or detention for the same reasons of persons other than pregnant women which the Italian delegation found unacceptable.

67. Mr. WULFF (Sweden) considered that article 67 was particularly important for the development of international humanitarian law. Many arguments could be adduced in favour of a more comprehensive protection for pregnant women and women responsible for the care of infants than that afforded by the ICRC text. The question had already been considered in connexion with non-international armed

conflict, and such women should receive at least equal if not better protection in the case of international armed conflicts. For that reason, the Swedish delegation thought that the amendments submitted by the German Democratic Republic (CDDH/III/321) and Poland (CDDH/III/322) should be adopted.

68. Mr. SOKIRKIN (Union of Soviet Socialist Republics) said that he shared the view already expressed that women and children should receive special protection. His delegation therefore supported the three amendments submitted by the German Democratic Republic, Poland and the Democratic Republic of Viet-Nam, and in particular the idea expressed by the Polish delegation that in the case of pregnant women there should be a ban not only on the execution of the death penalty but also on its pronouncement, in view of the psychological effect, both on the pregnant woman herself and on her unborn child, of the pronouncement of such a penalty.

69. Mr. Kun PAK (Republic of Korea) said that his delegation found the ICRC text of article 67 acceptable and that, after studying the three amendments, it was inclined to support the text submitted by the delegation of Poland (CDDH/III/322).

70. Mr. HERCZEGH (Hungary) said that his delegation supported the amendments submitted by the German Democratic Republic, the Democratic Republic of Viet-Nam and Poland, which were designed to afford special protection to pregnant women.

71. Mr. WOLFE (Canada) said that he was reluctant to urge caution on the Committee, since he entirely approved of the principle embodied in the article under discussion. He feared, however, that the provision, if adopted, might run counter to some national legal codes and make it hard for some States to adopt the Protocol. He realized the psychological effect that the pronouncement of the death penalty could have on a pregnant woman or her child, but to establish a provision in that connexion that was to apply to all persons on the basis of equality and without discrimination, would have the effect of compelling some States to change radically their laws and might create technical difficulties for them. While he approved of the underlying principle, he was afraid the proposal might give rise to a number of problems; for example, if in the case of a woman responsible for the care of an infant some other person were to take charge of the child, that woman would no longer be protected. Thus a State could easily avoid the obligations of the provisions in certain cases. He therefore preferred the ICRC text, which seemed to him realistic.

72. Mrs. MANEVA (Bulgaria) said that she supported the three amendments to article 67, which would provide fuller protection for women. Bulgarian penal law prohibited the pronouncement of the death penalty on guilty women during pregnancy.

73. Mr. VAN LUU (Democratic Republic of Viet-Nam) said that he would like to dispel certain doubts that had been expressed with regard to his delegation's amendment (CDDH/III/323). Protection of women was already guaranteed under article 67 of the ICRC text, together with the amendments submitted by Poland and the German Democratic Republic. Pregnant women arrested for reasons other than those set forth in his delegation's amendment were already protected by other provisions of the fourth Geneva Convention of 1949, but his delegation would like to add a special safeguard for pregnant women arrested for patriotism or political non-submission. It was prepared to submit a redrafted text.

74. Mr. BAYARTE (Mongolia) associated himself with the representatives of Greece and Bulgaria in supporting the three amendments.

75. The Revd. Father ROCH (Holy See) congratulated the ICRC on having drawn up a special article specifying the need to provide better protection for women. His delegation supported the amendments submitted by Poland (CDDH/III/322) and the German Democratic Republic (CDDH/III/321); of the two, it preferred the latter proposal, which seemed to go farther since its aim was to protect infants also. The Working Group would have no difficulty in incorporating those two amendments in the text of article 67. The amendment proposed by the Democratic Republic of Viet-Nam (CDDH/III/323), which provided for the release of pregnant women "as soon as possible and before other civilians", was also receiving his delegation's attention.

76. Mrs. RODRIGUEZ-LARRETA de PESARESI (Uruguay) said that, as the representative of a country where the death penalty was unknown and as a woman, she supported article 67 and congratulated the ICRC on having provided for the protection of future mothers. Her delegation was in favour of retaining the ICRC text of article 67, which provided all the necessary guarantees on behalf of pregnant women. She was afraid that the amendment submitted by the Democratic Republic of Viet-Nam raised a number of problems and might not improve the protection afforded to women. Indeed, there would have to be a definition of what was understood by the word "patriotism".

77. Mr. FELBER (German Democratic Republic) thanked all the delegations which had supported his delegation's amendment, in particular the Holy See.

78. Mr. GENOT (Belgium) pointed out that Working Group B of Committee I was studying an article of the same type as article 67 and was about to take a decision. He thought it would be useful if the Working Group of Committee III received information concerning the decision taken.

79. The CHAIRMAN declared the debate on article 67 closed and suggested that the Committee should submit the text of that article, together with the amendments and comments concerning it, to the Working Group.

It was so agreed.

The meeting rose at 12.30 p.m.

SUMMARY RECORD OF THE FORTY-FIFTH MEETING

held on Wednesday, 5 May 1976, at 10.20 a.m.

Chairman: Mr. SULTAN (Egypt)

TRIBUTE TO THE MEMORY OF MR. LOPEZ-HERRARTE, PERMANENT REPRESENTATIVE OF GUATEMALA TO THE INTERNATIONAL ORGANIZATIONS AT GENEVA AND HEAD OF THE DELEGATION OF GUATEMALA

1. The CHAIRMAN said that with great regret he had to inform the Committee of the death of Mr. Lopez-Herrarte, Head of the delegation of Guatemala, which had occurred that morning. He offered his sincere sympathy to the delegation of Guatemala.

2. Mr. MOLINA-LANDAETA (Venezuela), speaking as co-ordinator of the Latin American Group, offered his condolences to the delegation of Guatemala.

On the proposal of the Chairman, the members of the Committee observed a minute of silence in tribute to the memory of Mr. Lopez-Herrarte.

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 68 - Protection of children (CDDH/1, CDDH/226 and Corr.2; CDDH/III/304, CDDH/III/324, CDDH/III/325)

3. Mr. SURBECK (International Committee of the Red Cross), introducing the article, said that children, like the rest of the civilian population, paid a heavy price in international conflicts, but that their situation was even more tragic because of their defencelessness. They could not try to face events by themselves as adults could. Furthermore, the psychological traumas caused by war often left indelible impressions on them. Hence every effort should be made to protect children from the evils of war.

4. There were three aspects to the question. Firstly, as children, they had a special right to general protection. Secondly, the question of their use in military operations had to be settled. Lastly, provision should be made to ensure that proceedings taken against them for having committed offences during a period of armed conflict should take into account their youth and immaturity.

5. The fourth Geneva Convention of 1949 laid down measures for the protection of children in a number of articles. Article 14 referred to children under fifteen years of age; Article 23 on consignment of medical supplies, food and clothing referred to them in the same terms; Article 24 was concerned with the fate of children who were separated from their families as a result of the war, or who were orphaned; Article 38 on non-repatriated persons also referred to children under fifteen years of age; Article 50 laid down the many obligations of an Occupying Power with respect to children in the territory which it occupied, in particular orphans and children separated from their families. Lastly, the fourth paragraph of article 68 laid down a basic rule when it prohibited the death penalty for a protected person under eighteen years of age.

6. Article 68 of draft Protocol I reaffirmed and developed those provisions for the benefit of all children who were in the territory of the Parties to the conflict, whether the territory was occupied or not, and whether or not the children fell within the definition of protected persons in Article 4 of the fourth Geneva Convention of 1949.

7. Paragraph 1 of article 68 of draft Protocol I reiterated a general rule according to which children, without any specification regarding an age limit, should be the object of privileged treatment as compared with the rest of the civilian population. For that reason the Parties to the conflict were bound to give the children for whom they were responsible all the necessary care and assistance they needed in order to prevent physical and moral injury and to ensure that they developed as normally as possible. The explicit provision that children should be protected against any form of indecent assault had been included under general protection because of the serious psychic effects which such attacks on their integrity too often had on children. The Declaration of the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1959 (General Assembly resolution 1386 (XIV)) may be mentioned here: Principle 8 states that "The child shall in all circumstances be among the first to receive protection and relief". Too frequently children were used as fighting or auxiliary troops by a Party to the conflict. Only too happy to make themselves useful, and feeling that by so doing they were behaving like adults, children asked for nothing better. To take advantage of that feeling was particularly odious, for although children taking such action ran precisely the same risks as adult combatants, unlike adults they did not always understand very clearly what awaited them for participating directly or indirectly in hostilities. Warfare was a matter for adults alone, and that was why paragraph 2 of article 68 required the Parties to the conflict to take all

necessary measures in order that children aged under fifteen years should not take any part in hostilities. Paragraph 2 of article 68 was of paramount importance so far as the protection of the child was concerned.

8. Lastly, paragraph 3 of the article repeated the prohibition laid down in the fourth paragraph of Article 68, of the fourth Geneva Convention, which stated: "In any case the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence." It was natural that the ICRC should wish to see a similar provision concerning persons protected by the fourth Convention included in draft Protocol I, and in particular in Section III of Part IV which, as had been seen, protected certain categories of persons not protected by the fourth Geneva Convention of 1949.

9. Mr. AGBEKO (Ghana), introducing his delegation's amendment to article 68, paragraph 1 (CDDH/III/324) said that the words "which they need" expressed the idea contained in the words "their age and situation require" more neatly. Otherwise, his delegation was in full agreement with the ICRC text.

10. Mr. VAN LUU (Democratic Republic of Viet-Nam), introducing his delegation's amendment (CDDH/III/304) said that in general the protection of children in occupied areas could be adequately ensured under the ICRC text of article 68 and that he entirely shared the views expressed by the ICRC representative in his introductory statement. However, a new development had occurred as a result of colonial and neo-colonial wars, for which the ICRC text made no provision. Children or persons under eighteen years of age, without taking part in the hostilities as such, might be capable of acts which were inspired by noble feelings of patriotism or non-submission to a foreign occupying army or puppet army. His delegation therefore proposed the addition of a sentence to paragraph 1 which ensured priority treatment for that category of young persons.

11. Mr. REZEK (Brazil), introducing his delegation's amendment to article 68, paragraph 2 (CDDH/III/325), pointed out that it was proposing the same amendment to article 32 of draft Protocol II (CDDH/III/328). He was aware that the proposal could give rise to practical problems. In the first place, special circumstances might make it difficult to establish the exact age of an adolescent, and then there were special situations that might arise, for example, where persons under eighteen wished to take part in order to defend still younger persons or to assist them when no adults were present. However, it should be noted that the ICRC text did not categorically prohibit the possible presence of minors in

military activities, so that it could be said to allow for such cases. That being so, the age limit might be set at eighteen as a general condemnation of the policy of using minors for military purposes.

12. Introducing his delegation's amendment to paragraph 3 (CDDH/III/325), he pointed out that the ICRC text dealt only with the death penalty. His delegation would like to add a further sentence extending the provision to penal proceedings in general. His country was one of those in which persons attained their majority at the age of eighteen; no penal proceedings could be taken against a person under eighteen years of age who could not be sentenced or punished. However, in the amendment, an age limit of sixteen years was indicated, in the hope that it would prove generally acceptable. If it was not, he would still consider it desirable that some age limit should be specified.

13. Mr. AJAYI (Nigeria) said that with the addition of the Ghanaian amendment (CDDH/III/324), the ICRC text was acceptable to his delegation. Children were not always capable of understanding the implications of their actions and were therefore entitled to privileged treatment. Nigeria had learnt from its own unfortunate experiences in recent years, since during the civil war, the secessionist group had used children as pawns for political purposes. As it stood, the ICRC text might be used by malicious persons as a means of scoring political points. The more specific wording proposed by Ghana was therefore preferable.

14. Mr. FISSENKO (Byelorussian Soviet Socialist Republic) said that he supported the inclusion in draft Protocol I of a special article on the protection of children. Women, children and old persons should be afforded special protection because it was they who suffered most in times of armed conflict.

15. His country had been one of the sponsors of the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, adopted by the General Assembly of the United Nations in its resolution 3318 (XXIX). He drew attention to the provisions of that resolution, which should be taken into account in drafting the final text of articles 67, 68 and 69 of draft Protocol I. His delegation regarded the ICRC text as a good basis for discussion, but supported the amendments proposed by the Democratic Republic of Viet-Nam (CDDH/III/304) and Ghana (CDDH/III/324). It would study the Brazilian amendment (CDDH/III/325) carefully.

16. Mr. PASCHE (Switzerland) said that his delegation supported the ICRC text in principle. However, it felt that the protection of children could be further strengthened by providing in article 68, paragraph 2 that they should also not participate in auxiliary activities such as the collection of information, the transmittal or orders, the carriage of munitions and foodstuffs, and so on.

17. His delegation likewise thought it would be desirable to provide an additional paragraph which would give special protection to children who became prisoners of war or were detained in camps or other prisons.

18. Mr. YAMATO (Japan) said that his delegation shared the view that children, like women, should be protected and treated with special care and therefore fully associated itself with the intent of the ICRC draft.

19. The age up to which children should be protected as such was an important question. The Brazilian amendment (CDDH/III/325) would extend the age limit from fifteen, as in the ICRC draft, to eighteen. While his delegation sympathized with the purpose of the amendment, it was necessary to consider whether such a change was generally acceptable. In many countries, including his own, youths over the age of fifteen either could or had to undergo military or similar service and should an armed conflict break out would almost inevitably be engaged in hostilities. The countries concerned would be unable to take steps to ensure that they did not do so. For those reasons, his delegation preferred to keep the ICRC text of paragraph 2.

20. With regard to the Brazilian amendment to paragraph 3, he wished to draw attention to the fact that in the criminal law of many countries the minimum age of persons against whom penal proceedings could be instituted was fourteen years. Thus, the minimum age in the Brazilian amendment would have to be lowered to fourteen to make it acceptable.

21. Mr. WOLFE (Canada) said that in general he agreed with the ICRC text of article 68, although he was a little doubtful about paragraph 3. Young people aged sixteen or seventeen might be in a country's armed forces and commit an offence of which the military authorities took the most serious view, thus incurring the death penalty. None the less, he supported the principle of the article.

22. He also supported the amendment by Ghana (CDDH/III/324), which made the provision clearer.

23. For the reasons given by the representative of Japan he could not support the Brazilian amendment to paragraph 2. A minimum age of eighteen was too high as far as recruiting for the armed forces was concerned and he considered that the ICRC text struck the right balance. There were occasions which involved almost all the population in the defence of a country. Moreover, young people of sixteen to eighteen were often better equipped physically than their fathers and a State was surely entitled to use them in its defence.

24. He could not support the Brazilian amendment to paragraph 3 either. The fixing of the age of criminal responsibility was a national responsibility which each State would exercise having regard to its own peculiar culture, state of development and requirements. To attempt to formulate a provision in the Protocol impinging on the exercise of that sovereign right would be unacceptable to many States as an unwarranted interference.

25. Mr. TODORIĆ (Yugoslavia) said that article 68 of draft Protocol I, based as it was on a number of United Nations instruments, was a major contribution to the development of international humanitarian law. The provisions contained in that article, together with those of article 69 on the evacuation of children to a foreign country, could help to relieve the tragic sufferings of children resulting from armed conflicts. In his view, the Committee should oppose the death penalty for persons under twenty-one years of age. It should also carefully consider the age below which penal proceedings could not be taken: his delegation supported the Brazilian proposal (CDDH/III/325) to fix it at sixteen. It also supported the amendments proposed by Ghana (CDDH/III/324) and the Democratic Republic of Viet-Nam (CDDH/III/304).

26. Mr. EL GHONEMY (Egypt) expressed his delegation's support for the Ghanaian amendment.

27. Mrs. RODRIGUEZ-LARRETA de PESARESI (Uruguay) said that she fully supported the Brazilian proposal that the age limit in paragraph 2 should be increased from fifteen to eighteen years. She had put forward the same proposal at the second session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts held in 1972. If, however, the age of eighteen was not acceptable, perhaps seventeen might be. Involvement in hostilities might have a highly damaging effect on the children concerned. If the Conference could save children from having to kill, it would

have taken a major step forward. She would suggest only a minor drafting change in the Spanish text of the Brazilian proposal (CDDH/III/325), namely, to replace the words "las personas menores de dieciocho años" by "los menores de dieciocho años".

28. With regard to paragraph 3, she was not able to support the Brazilian amendment since it would be difficult to arrive at a provision that would be universally applicable. She therefore considered that the ICRC text should be kept, with a similar change in the Spanish text to that already mentioned in connexion with paragraph 2.

29. Mr. AKRAM (Afghanistan) said that paragraph 2 of the ICRC text contained two distinct ideas: firstly, that persons less than eighteen years of age should be discouraged from taking part in an armed conflict, e.g., by helping to transport arms or food, carrying out sabotage, or providing information and, secondly, that the recruitment of such persons into the armed forces should be prohibited. In his view, those two ideas should be separated, since that would give greater weight to the prohibition of recruitment. In other words, paragraph 2 should end after the word "hostilities", and a new paragraph 3 should be inserted along the following lines: "It is categorically prohibited for the Parties to the conflict to recruit children into their armed forces or to accept their voluntary enrolment".

30. The Revd. Father ROCH (Holy See) said that his delegation supported the ICRC text, together with the amendment proposed by Ghana (CDDH/III/324). He thought that the first Brazilian amendment was of very great interest. He also endorsed the remarks made by the representative of Uruguay as to the psychological damage done to children as a result of their recruitment into the armed forces during an armed conflict.

31. Mr. MOLINA-LANDAETA (Venezuela) said that while his delegation agreed in principle with the ICRC text, a matter of fundamental importance was the choice of the age below which such protection would have to be provided. In Venezuelan law, as in that of most Latin American countries, a minor was a person less than twenty-one years of age. Biological maturity, however, was more important than purely legal considerations; a person less than fifteen years of age could now be fully developed and entirely capable of understanding the significance of his acts. A balance had to be struck between the legal and biological criteria and for that reason he supported, in principle, the amendments suggested by Brazil (CDDH/III/324). He also considered that the Ghanaian proposal was well founded.

32. Mrs. MANTZOULINOS (Greece) said that her delegation supported, in principle, the ICRC text of article 68, subject to a reservation with regard to the phrase "not take any part in hostilities" in paragraph 2. Recruitment of children into the armed forces was certainly to be avoided; in countries where military service was compulsory, the age of recruitment was fixed by law, and was usually that at which a person was considered as adult. Under extraordinary circumstances, however, a Government could not be denied the right to accept children as volunteers for the performance of auxiliary duties, such as carrying messages. In addition, children under fifteen years of age could hardly be expected to remain passive when confronted by aggression and the invasion of their country.

33. Mr. EATON (United Kingdom) said that the ICRC text was acceptable, in principle, to his delegation, but that the wording might perhaps be improved. Thus the term "privileged treatment" in paragraph 1 might not be appropriate, since "privilege" now implied the unmerited advantages conferred by birth or wealth; something like "special consideration" might be better. Other drafting points, like the helpful suggestion made by the delegation of Ghana, could be discussed in the Working Group.

34. He sympathized with the views of the Brazilian delegation, but feared that there might be difficulties because of differences in national legislation, as already pointed out by the representatives of Japan and Canada. In the United Kingdom, boy soldiers could enlist at the age of sixteen and go on active service at seventeen and a half; as far as penal legislation was concerned, persons under the age of eighteen could be sentenced. In his view, the age limits fixed by the ICRC were just about right.

35. He could not support the amendment proposed by the Democratic Republic of Viet-Nam (CDDH/III/304) or its very similar amendments to articles 65 and 67. Patriotism was an honourable sentiment, though it could never completely justify any and every act, and freedom of political expression was very dear in his country. Nevertheless, patriotism and political non-submission were imprecise and subjective terms, especially under the conditions of armed conflicts; what was heroic patriotism to one Party was a foul crime to the other. The use of such terms could only weaken the Protocol. He also doubted the effectiveness of amendment CDDH/III/304, since no State had laws making patriotism and political non-submission a crime. An Occupying Power would say that a person arrested for what the adversary would consider as patriotism was in fact arrested for something else. The provision would therefore be ignored or

used only as a propaganda weapon. The aims of the amendment would be better achieved by a prohibition of adverse distinction on, inter alia, political grounds. That might already be covered by paragraph 1 of article 65.

36. Mr. IPSEN (Federal Republic of Germany) said that his delegation supported the ICRC draft in principle, and was also in favour of the Ghanaian proposal. It agreed with the aims of the Brazilian amendment, but had the same doubts as the United Kingdom representative. In arriving at a final text, the Committee should also pay attention to Article 6, paragraph 5, and Article 14, paragraph 4, of the International Covenant on Civil and Political Rights.

37. Mr. MENCER (Czechoslovakia) said that he found the ICRC text acceptable both as to content and as to wording. The three amendments that had been submitted (CDDH/III/304, CDDH/III/324 and CDDH/III/325) were all aimed at increasing the protection given to children, but the Brazilian amendment to paragraph 3 (CDDH/III/325) might cause difficulties in some countries. The question of the precise age to be included in that part of the amendment should be carefully considered in the Working Group.

38. Mr. SOKIRKIN (Union of Soviet Socialist Republics) said that the ICRC text was quite acceptable: it would give children the effective protection they needed. He also supported the amendment proposed by Ghana (CDDH/III/324), which would make the text more precise, and that submitted by the Democratic Republic of Viet-Nam (CDDH/III/304); the latter was particularly important as children would react sharply against enemy forces occupying their country.

39. Mr. VAN LUU (Democratic Republic of Viet-Nam) said that he understood the objections made by the United Kingdom representative to his delegation's amendment. In his view, however, patriotism was not connected with politics but was a noble, natural and specifically human sentiment. All men and women would be happy to see a child do something to show his love for his country. Since patriotism could only be demonstrated in war, there could be no question but that humanitarian law should be applicable to it.

40. The CHAIRMAN asked whether the Committee was in agreement that article 68 should be referred to the Working Group.

It was so agreed.

Article 69 - Evacuation of children (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2, CDDH/III/326; CDDH/Inf/224)

41. Mr. SURBECK (International Committee of the Red Cross), introducing article 69, said that it was designed to cover as fully as possible the question of the evacuation of children to a foreign country during armed conflict. The guiding principle was that evacuation must remain the exception. There were two essential conditions. In the first place, evacuation should be justified by the children's state of health. That meant that the medical attention needed to cure the child or help its convalescence could not be provided in the child's own country. As far as possible, children should not be removed unnecessarily from their natural environment, since even though it might be beneficial medically it often had undesirable psychological effects. The second condition was the consent of the parents or guardian - although if the parents or guardian had disappeared or could not be reached, that condition would no longer apply and should not prevent an evacuation that was warranted under the first condition. Paragraph 1 thus restricted the scope of the second paragraph of Article 24 of the fourth Geneva Convention. The first paragraph of Article 24 provided that the Parties to the conflict should take the necessary measures to ensure as far as possible that the children's cultural identity was preserved. That idea was reproduced, though in somewhat different terms, in paragraph 2 of article 69.

42. Paragraph 3 was essentially technical, dealing with the headings on the card to be filled in by the authorities of the receiving country. The ICRC Central Tracing Agency thought that it would be useful to add the following headings to the proposed list: sex, registration number, state of health, death and place of burial.

43. The Revd. Father ROCH (Holy See), introducing his delegation's amendments to article 69 (CDDH/III/326), said that he wished to revise the amendment to paragraph 3.

44. The CHAIRMAN said that the time limit for amendments had passed. He suggested that the new amendment should be submitted to the Working Group.

45. The Revd. Father ROCH (Holy See), referring to his first amendment to paragraph 2, said that the deletion of the words "if possible" was proposed because in Article 24 of the fourth Geneva Convention those words applied to the people who would be responsible for the children's education. There could be no such limitation on the responsibility for providing education as such.

46. With regard to the second amendment to paragraph 2, religion was included in Articles 24 and 50 of the fourth Geneva Convention and was one of children's fundamental rights. It was included in Article 18 of the Universal Declaration of Human Rights (United Nations General Assembly resolution 217 A (III)); in Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and in Article 18, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 (XXI)). Principle 7, first paragraph, of the Declaration of the Rights of the Child (General Assembly resolution 1386 (XIV)) stated that a child "shall be given an education which will promote his general culture". The Holy See regarded religion as an essential contribution to general culture.

47. Mr. GENOT (Belgium) said that he supported the text of article 69 of draft Protocol I proposed by the ICRC but would be in favour of any efforts to improve it. Reference to nation ("country") in paragraph 2 seemed inappropriate, for many countries had a number of languages, religions and even cultures.

48. Paragraph 2 should be so worded as to make allowance for such situations, for instance by referring to individuals rather than to the country (nation) which might itself be composite with respect to the elements of culture mentioned in the article.

49. The Holy See's oral amendment to paragraph 3 concerning the possibility of not mentioning on the card described in that paragraph particulars that might harm the child in certain circumstances should be considered by the Working Group, for tragic experiences in the past had shown what a weapon that card might constitute if it fell into the hands of an enemy who flouted all the principles of non-discrimination in the treatment of civilians.

50. Mr. GRIESZLER (Austria) said that he agreed with the ICRC draft in principle. It was an excellent starting point and could be improved by the amendments submitted by the Holy See.

51. Mr. REZEK (Brazil) said that he supported the ICRC draft. He was also generally in favour of the Holy See amendments; it was obvious that those additional rules would not apply in the case of children without religion, but such rules could not be refused a place as if they were unimportant.

52. Mr. AJAYI (Nigeria) said that he supported the ICRC in principle, but also supported the amendments of the Holy See.

53. Mr. FELBER (German Democratic Republic) said that in principle he supported both the ICRC draft and the Holy See amendments. He had some doubts however, on the need to mention religion in paragraph 3 in the context of facilitating the return of children to their families and country.
54. Mr. CONDORELLI (Italy) said that he supported the ICRC draft, which was an important provision, and also the Holy See amendments. He suggested, however, that the Working Group should endeavour to find a more universally acceptable text for the part concerning religion, since it would not be correct to oblige all countries to provide religious education.
55. Mrs. RODRIGUEZ-LARRETA de PESARESI (Uruguay) said that in principle she agreed with the ICRC text and fully supported the amendments of the Holy See. Where a child had no religion, it should not be mentioned on the card; where the child had a religion, it was essential for it to be mentioned, as of equal importance with the other items.
56. Mr. PASCHE (Switzerland) said that while he supported the ICRC text in principle, it could be improved. Evacuation was very important where it was in the children's interests, but there was a responsibility to ensure that there was no traffic in children, or other abuses. To that end, provision should be made for control by the Protecting Power or by humanitarian organizations concerned with children.
57. In paragraph 2 there seemed to be a contradiction between high-minded aims and the facts. Most present-day wars took place in countries of the third world, but children were normally evacuated to developed countries, many of which could not provide education in the language and culture of the evacuees. A compromise was needed. He agreed with the statement by a group of non-governmental organizations (CDDH/Inf/224, para. 27) that evacuation of children to a foreign country should be contemplated only as a last resort. Children belonged first to their parents, second to their own country and only in the last place to third countries or families. There was also the problem of children being claimed by their parents after a number of years: whether they should return to their country of origin or remain where they had been educated and spent most of their lives.

58. Mrs. MANTZOULINOS (Greece) said that in general the ICRC draft was acceptable, although she had reservations concerning paragraph 2. She supported the amendments of the Holy See and drew attention to the relevant provisions in Article 13 of the International Covenant on Economic, Social and Cultural Rights and Article 18 of the International Covenant on Civil and Political Rights.

59. She welcomed the very pertinent remarks of the Swiss representative and suggested that paragraph 2 of article 69 should be redrafted to take account of present-day requirements.

60. Miss BOA (Ivory Coast) said that she supported the amendments of the Holy See. She categorically opposed the comments of the Swiss representative: she had not heard of any case of children from African zones of conflict being evacuated to developed countries. On the question of subsequent return to the country of origin, it was essential, if children were to return to their own countries that in their countries of evacuation they should not be cut off from their own culture and language.

61. The CHAIRMAN suggested that article 69, together with the amendments and the comments made in the debate, should be referred to the Working Group.

It was so agreed.

The meeting rose at 12.30 p.m.

SUMMARY RECORD OF THE FORTY-SIXTH MEETING

held on Thursday, 6 May 1976, at 10.20 a.m.

Chairman: Mr. SULTAN (Egypt)

CONSIDERATION OF DRAFT PROTOCOL II (CDDH/1)

Article 32 - Privileged treatment (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/309 and Add.1 and 2, CDDH/III/324, CDDH/III/327)

1. The CHAIRMAN invited the Committee to consider article 32 of draft Protocol II and the amendments relating thereto. He asked the representative of the International Committee of the Red Cross to introduce the ICRC text of article 32.
2. Mr. SURBECK (International Committee of the Red Cross) pointed out that what had been said when article 68 of draft Protocol I had been introduced applied largely, mutatis mutandis, to the text of article 32 of draft Protocol II. In point of fact, paragraph 1 of article 32 reproduced, almost verbatim, the general protection measures laid down in paragraph 1 of article 68. In view, however, of the special nature of non-international conflicts and the small number of provisions in draft Protocol II as compared with draft Protocol I, article 32 set forth rules which appeared in articles 67 to 69 of draft Protocol I and in the proposed article 64 bis dealing with the reunion of dispersed families.
3. The ICRC text of paragraph 2 of article 32 supplemented the general rule set forth in paragraph 1. The list of obligations incumbent upon the Parties to a conflict was given by way of example and could be supplemented by the measures which the Parties in question decided they should take in order to ensure better protection for children.
4. Paragraph 2 (a) was based on the third paragraph of Article 24 of the fourth Geneva Convention of 1949, but made it less forceful. Whereas Article 24 stipulated that Parties to a conflict should endeavour to arrange for all children under twelve to be identified, in paragraph 2 (a) of the ICRC text, they were asked merely to endeavour to furnish the means for the identification of children, where necessary, in the area or areas of armed conflict, and no age was mentioned. What was intended was that children in an area of combat should, if possible, be furnished with means of identification and, if the situation made it necessary, be removed from that area. That weakness of the wording as compared with that of Article 24,

paragraph 3 of the fourth Geneva Convention of 1949, was deliberate and motivated by a desire for realism, since circumstances did not always permit of the requirements of Article 24 being completely fulfilled. The same point was dealt with in paragraph 2 (c). Protocol I included no provision on the identification of children, which was already covered in the fourth Geneva Convention of 1949.

5. The same was true of paragraph 2 (b) of article 32, which took up the idea of the first paragraph of Article 24 of the fourth Geneva Convention. It was the duty of the Parties to the conflict to take care that children who were orphaned or separated from their families as a result of armed conflict were not abandoned to their fate.

6. The principle set forth in paragraph 2 (c) of article 32 was that, whenever children were particularly exposed to the dangers resulting from hostilities, the Parties to the conflict should take the necessary measures to remove them from the area of combat, subject to two conditions: firstly, that the removal was dependent on the consent of the persons responsible for their care, and, secondly, that the Party to the conflict deciding on their removal had to ensure that the children were accompanied by persons entrusted to provide for their safety throughout the evacuation operation. The proposed provision had no equivalent elsewhere. The second paragraph of Article 24 of the fourth Convention provided for the reception of such children in a neutral country for the duration of the conflict, but such was not the aim of paragraph 2 (c) of article 32.

7. Paragraph 2 (d) of article 32 raised no problems. The Parties to the conflict had the duty to take all necessary steps to facilitate the reuniting of families. The text was based on Article 26 of the fourth Geneva Convention and gave greater prominence to the idea expressed in article 64 bis of draft Protocol I, which the Committee had had before it at its forty-second meeting (CDDH/III/SR.42).

8. Lastly, paragraph 2 (e) repeated a rule set out in paragraph 2 of article 68 of draft Protocol I, the importance of which had already been stressed but on which further emphasis should be laid because, in the case of a non-international conflict, children were even more made use of than in the case of conflicts between States and consequently ran a far greater risk of falling victim to the hostilities.

9. Mr. CRETU (Romania), introduced his delegation's amendment (CDDH/III/327) to the second part of the first sentence of paragraph 1 of article 32, which concerned the protection of children against any form of indecent assault. That provision had no place among general considerations; it belonged, not in paragraph 1, but in paragraph 2, among the obligations of protection incumbent on the Parties to the conflict.

10. Mr. AGBEKO (Ghana) said that he would not repeat the reasons for his delegation's amendments (CDDH/III/324); he had already stated them at the forty-fifth meeting (CDDH/III/SR.45) and they were equally valid for article 32.

11. The Revd. Father ROCH (Holy See) said that, before introducing the amendment (CDDH/III/309 and Add.1 and 2) to article 32 on behalf of the sponsors, he wished to congratulate the ICRC on having specified in a special article that various measures were needed to protect children in non-international conflicts, which, like international conflicts, could separate children from their families, with the danger that they might be initiated into a culture, religion or moral code not in keeping with their parents' wishes. It might even be feared that in some instances such separation might be deliberately sought. That was why the sponsors of amendment CDDH/III/309 and Add.1 and 2 had sought to introduce that new element into the ICRC text.

12. Similar provisions relating to children's education already existed in various instruments: for instance, the Universal Declaration of Human Rights (Article 26, para. 2), the Declaration of the Rights of the Child (Principle 7, first paragraph), the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 2 of the additional Protocol) and the International Covenant on Economic, Social and Cultural Rights (Article 13, para.3). Moreover, the fourth Geneva Convention of 1949 (Article 24, first paragraph) established a link between the practice of religion and education, and mentioned (Article 50) education and religion in the context of the education which the Occupying Power must provide for children in occupied territories. He added that the sponsors of the amendment, bearing in mind Article 19 of the Universal Declaration of Human Rights, relating to freedom of opinion - a provision repeated in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms - had considered it of the utmost importance to supplement the ICRC text in that way. It should be noted that the words "including religious or moral" simply amounted to a necessary specification of the global content of education, which might, in certain circumstances, be interpreted too narrowly.

13. The CHAIRMAN declared open the general discussion on article 32 and the relevant amendments.

14. Mrs. MANTZOULINOS (Greece) said that, in joining the sponsors of amendment CDDH/III/309, her delegation had wished to secure on behalf of children who, as a result of armed conflict, had had the misfortune to lose their parents or to be separated from their families, the continuity of their national traditions and the maintenance of the cultural and moral link with their homes.

15. The Declaration of the Rights of the Child, adopted by the United Nations General Assembly in 1959 (resolution 1386 (XIV)) and the Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, adopted by the United Nations General Assembly in 1965 (resolution 2037 (XX)), attached great importance in connexion with children's education to the responsibility of parents or, in their absence, of guardians or families. Although they differed in substance, both of the United Nations international covenants on human rights already in force agreed on two points: the right of peoples to self-determination and the right of parents and legal guardians to choose their children's school and to secure for them a religious and moral education in keeping with their own convictions (Article 13 of the International Covenant on Economic, Social and Cultural Rights and Article 18 of the International Covenant on Civil and Political Rights); the High Contracting Parties had the obligation to respect those rights. Article 32, as prepared by the ICRC in the highly humanitarian desire to give privileged treatment to the younger generation of peoples suffering in an internal armed conflict, might usefully be supplemented by amendment CDDH/III/309 and Add.1 and 2, which was born of the same sentiment.

16. Mr. FELBER (German Democratic Republic) said that draft Protocol II was important and necessary in itself and that his delegation therefore supported the ICRC idea of securing, in article 32, special protection for children in non-international conflicts. He supported the ICRC text, as also the amendments submitted by Romania (CDDH/III/327) and Ghana (CDDH/III/324) and that introduced by the representative of the Holy See on behalf of several sponsors.

17. With regard to amendment CDDH/III/309 and Add.1 and 2, he pointed out that, since all education should have a moral basis, it did not seem necessary to refer expressly to "moral" education. He would nevertheless accept the proposal.

18. Mr. SOKIRKIN (Union of Soviet Socialist Republics) said that he had listened with interest to the representative of the German Democratic Republic, who had stressed the importance of draft Protocol II.

19. Although he endorsed the principle of the protection to be accorded to children, he felt that the ICRC text could be improved and made more specific. The amendments by Romania (CDDH/III/327) and Ghana (CDDH/III/324), which specifically mentioned the measures to be provided by the Parties to the conflict, helped to improve and strengthen the text. He therefore supported those amendments. Although he had no objection in principle to the joint amendment in document CDDH/III/309 and Add.1 and 2, he agreed with the remarks of the representative of the German Democratic Republic in that respect.

20. Mr. GRIESZLER (Austria) said that, on the whole, he supported the ICRC text of article 32 of draft Protocol II. As a sponsor of amendment CDDH/III/309 and Add.1 and 2, his delegation would like the Working Group to take that amendment into account in discussing article 32.

21. Mr. EL GHONEMY (Egypt) supported the amendment submitted by Ghana (CDDH/III/324).

22. Mr. GENOT (Belgium) pointed out that while the ICRC text of article 32 was in other respects excellent, it concerned itself only with the material aspect of the question. His delegation had therefore been glad to join the sponsors of amendment CDDH/III/309 and Add.1 and 2, which drew attention to the spiritual aspect, since it was important that the children in question should continue to receive an education. The representative of the German Democratic Republic had questioned the need for the word "moral", but that word reflected the sponsors' desire to ensure complete freedom of opinion. As several delegations had already said, it was possible that some of the children might come from an environment where no specific religion was practised, but their parents might wish them to be brought up according to a certain philosophy. The amendment in document CDDH/III/309 and Add.1 and 2 would ensure complete freedom of ideas and opinions by permitting a choice between a religious doctrine or a system of philosophy. It would be the duty of the Working Group to find the wording that best interpreted that intention.

23. Mr. WOLFE (Canada) said that in general he was in favour of article 32 but he had misgivings about paragraph 2 (c), concerning the removal of children from the area of combat. It might happen that in an emergency a Government would have to take steps to protect the population from the dangers of war and would have to give orders, for example, for a massive evacuation, in which case it was hard to see how that Government could be expected to ask the parents' consent to evacuate the children. States should be free to take whatever steps they considered necessary in an emergency.

24. With regard to amendment CDDH/III/309 and Add.1 and 2, the proposed new paragraph 2 (d) must not create an obligation for States. It was possible that a State might not provide religious education even in peacetime and it would be unreasonable to expect that State to provide, in wartime, facilities that it did not normally provide.

25. His delegation supported the Ghanaian amendment (CDDH/III/324) and the Romanian amendment (CDDH/III/327).

26. Mrs. RODRIGUEZ-LARRETA de PESARESI (Uruguay) spoke in favour of amendment CDDH/III/309 and Add.1 and 2, of which her delegation was a sponsor. The point was to ensure that children received an education in keeping with the wishes of their parents or those responsible for their care. It was a significant amendment in that it dealt with the religious or moral aspect of education, which was not covered by the ICRC text. As the representative of a country where freedom of thought and religion was respected, she hoped that the amendment would be adopted, since it safeguarded such freedom. If a child did not receive religious education, he would at least have the benefit of moral education.

27. Mr. de STOOP (Australia) said that, while he supported the text of article 32, he thought that it raised a difficulty. It was hard to determine at what point a child became an adult. In some countries it was at the age of twelve, in others at sixteen, seventeen or eighteen years of age. It would be a pity to adopt a provision open to different interpretations. It was difficult to fix an age-limit but it would be even more dangerous to leave that entirely to the discretion of the Occupying Power. In article 68 of draft Protocol I the limit was fixed at fifteen years of age for paragraph 2 and eighteen years of age for paragraph 3. The Working Group would have to endeavour to agree upon a suitable age-limit for article 32 of draft Protocol II.

28. Mr. AJAYI (Nigeria) said that he supported the Ghanaian amendment (CDDH/III/324). Paragraph 2 (c) of article 32, concerning the evacuation of children, was of particular importance. It must at all costs be made impossible for the Occupying Power to use children for political ends.

29. The CHAIRMAN suggested that the amendments and the comments of delegations should be referred to the Working Group for consideration.

It was so agreed.

The meeting rose at 11.15 a.m.

SUMMARY RECORD OF THE FORTY-SEVENTH MEETING

held on Monday, 31 May 1976, at 10.30 a.m.

Chairman: Mr. SULTAN (Egypt)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)*

Proposals by the Rapporteur concerning articles 35, 38, 38 bis, 39, 40, 41 and 42 bis (CDDH/III/330 to CDDH/III/335, CDDH/III/337, CDDH/III/338)

1. The CHAIRMAN invited the Committee to consider the draft articles submitted by the Rapporteur (CDDH/III/330 to CDDH/III/335, CDDH/III/337). He drew the Committee's attention to the report by the Rapporteur on the work of the Working Group (CDDH/III/338).
2. Mr. ALDRICH (United States of America), Rapporteur, said that, while he would have liked the Working Group to produce a greater number of articles at its meetings from 23 April to 27 May 1976, he thought that the texts drafted for articles 35, 38, 38 bis, 39, 40, 41 and 42 bis represented positive contributions to the development of humanitarian law. Document CDDH/III/338 merely expressed his personal views on the questions considered and would be replaced at the end of the session by the Committee's report.
3. The CHAIRMAN stated that the Committee would proceed to consider, article by article, the texts proposed by the Rapporteur for each of the articles in question, and that a decision or vote would be taken on each article. Delegations could then make statements to explain their respective votes.

Article 35 - Prohibition of perfidy (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/330, CDDH/III/338) (concluded)

4. Mr. ALDRICH (United States of America), Rapporteur, said that in article 35 the sentence in brackets constituting paragraph 1 (c), on which the Working Group had been unable to reach agreement, did not reflect real disagreement so much as the fear expressed by some delegations that the provision might be misused to punish combatants who would be entitled to prisoner-of-war status. The unofficial talks he had had with

* Resumed from the forty-fifth meeting.

some delegations had led him to believe that it would be preferable to deal with the question as part of article 42 and he had suggested the insertion in draft article 42 of a sentence worded: "Acts which comply with the requirements of article 42, paragraph 3, shall not be considered to constitute perfidy, within the meaning of article 35, paragraph 1 (c)." He thought that those delegations would consider that the protection thus afforded would be satisfactory, in fact even better than that afforded by the deletion of paragraph 1 (c).

5. Mr. VAN LUU (Democratic Republic of Viet-Nam), supported by the representative of Algeria, stated that, in the light of the unofficial talks which had taken place between the Rapporteur and the delegations sharing the same opinion with regard to paragraph 1 (c), he would agree to the removal of the brackets round that provision, provided that the sentence suggested by the Rapporteur was inserted in article 42, paragraph 3.

Subject to that reservation, article 35 was adopted by consensus.^{1/}

Article 38 - Quarter (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/331, CDDH/III/338) (concluded)

6. Mr. ALDRICH (United States of America), Rapporteur, said that the article proposed by the ICRC, which concerned two questions, giving quarter and the safeguard of an enemy hors de combat, had been divided into two articles. The wording of article 38 had not given rise to any problems in the Working Group.

Article 38 was adopted by consensus.^{2/}

New article 38 bis - Safeguard of an enemy hors de combat (CDDH/III/332, CDDH/III/338) (concluded)

7. Mr. ALDRICH (United States of America), Rapporteur, said that the drafting of article 38 bis had required considerable effort owing to the difficulty of defining the concept of a person hors de combat. It had finally been possible to draft a text which commanded general approval and on the subject of which no reservation had been made.

^{1/} For the text of article 35 as adopted, see the report of Committee III (CDDH/236/Rev.1, annex I).

^{2/} For the text of article 38, as adopted, see the report of Committee III (CDDH/236/Rev.1, annex I).

8. Mr. MOLINA-LANDAETA (Venezuela) pointed out that the phrase "he abstains from any hostile act and does not attempt to escape" in the last sentence of paragraph 2 should read "he abstains from any hostile act or does not attempt to escape". Perhaps the point was merely a question of form affecting only the Spanish text.

9. Mr. ALDRICH (United States of America), Rapporteur, said that the text was the same in all the languages, for the intention was precisely to make the criteria for the definition of a person hors de combat, given in paragraph 2 (a), (b) and (c), dependent on two conditions. It was in fact a question of substance.

10. Mr. MOLINA-LANDAETA (Venezuela) said that he accepted the Rapporteur's explanations, although in his opinion either one or the other of the two conditions should be enough to meet the criteria laid down in the three sub-paragraphs for defining a person hors de combat. He would make a statement on that point in the plenary.

Article 38 bis was adopted by consensus.^{3/}

Article 39 - Aircraft occupants (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/333, CDDH/III/338) (concluded)

11. Mr. ALDRICH (United States of America), Rapporteur, said that the text prepared as a result of the deliberations of the Working Group was of narrower scope than the ICRC text of article 39. A difference of opinion had appeared in the Working Group with regard to the second phrase of paragraph 1, which had consequently been placed between square brackets. He had reason to believe, however, that the authors of that phrase, which would modify the general obligation not to attack during his descent a person parachuting from an aircraft in distress, did not intend to press for its retention.

12. Mr. EL GHONEMY (Egypt) said that his delegation, which was the author of the phrase in square brackets, was ready, in a spirit of chivalry and compromise, to withdraw its proposal, provided that its statement and that proposal appeared in toto in the Committee's final report and that the general attitude of the Committee was in line with the sense of his proposal, namely, that the airman who attempted to escape capture should not be protected.

^{3/} For the text of article 38 bis, as adopted, see the report of Committee III (CDDH/236/Rev.1, annex I).

13. Mr. SIDKY (Observer for the Organization of African Unity), speaking at the invitation of the Chairman, said that in his delegation's opinion the phrase in question was important, for it had a bearing on certain situations of special concern to the African region, where independent countries such as the United Republic of Tanzania, Mozambique and Angola had been subjected to bombardment on the pretext of reprisals against members of liberation movements. That was why his organization would have liked the phrase to be retained in article 39. He did not altogether understand the reservation which the Egyptian delegation had made in connexion with the withdrawal of its proposal and wondered what was the legal force of the reservation.

14. Mr. ALDRICH (United States of America), Rapporteur, explained that the representative of Egypt had asked that his proposal should be noted in the Committee's report, together with a statement of the reasons that had led some delegations to give it their support; the Egyptian delegation was not pressing for that particular provision to be included, provided the general principle underlying it was recognized by the Committee.

15. Mr. AKKERMAN (Netherlands) said that he would not wish to show less chivalry than the Egyptian delegation. He would therefore accept the deletion of the sentence in square brackets on the understanding that the reservation made by the Egyptian delegation would be reflected in the report of Committee III.

16. Mr. AL-KARAGOLI (Iraq) said that he deemed it essential that the phrase between square brackets in article 39 should be retained, because without it the article would be pointless. It was obvious to his delegation and to any lover of fair play that by directing his descent in the direction of territories controlled by the party to which he belonged, or by an ally of that party, a parachutist was in effect deliberately making his escape.

17. It was difficult to imagine that a combatant on the battlefield could be content to stand idly by while a parachutist directed his descent towards other territories, and to wait to become himself a target for the same parachutist returning in another aircraft. The combatant's position would be such that he could not apply a humanitarian law obliging him to act in that way. It must be made impossible for a combatant to be placed in such a situation, for it would be pointless to formulate a law whose non-observance appeared to be a foregone conclusion.

18. The CHAIRMAN asked whether the Committee was ready to vote on the retention, in article 39, of the phrase in square brackets.

19. Mr. AL-KARAGOLI (Iraq) proposed that the vote on that question should be deferred.

20. The CHAIRMAN put the proposal of the representative of Iraq to the vote.

The proposal of Iraq was rejected by 28 votes to one, with 29 abstentions.

21. Mr. ABDINE (Syrian Arab Republic) said that he would have preferred the vote on the retention, in article 39, of the phrase in question to be deferred. He pointed out that the rules of procedure did not prohibit members from explaining their position with regard to proposals, and he considered that the vote which had intervened had prevented him, contrary to the rules of procedure, from speaking on a point of order.

22. He associated himself with the point of view of the observer for the OAU and the representative of Iraq. It seemed essential to retain the words placed in square brackets in order to align article 39 with article 38, which provided that a person hors de combat must in any case abstain from any hostile act and make no attempt to escape. Contradictory provisions should be avoided.

23. Mr. KABUAYE (United Republic of Tanzania), referring to article 39, said that his delegation considered that the words placed in square brackets in paragraph 1 were of vital importance. He supported the view expressed on the subject by the observer for the OAU and the representatives of Iraq and Syria, and would have liked the article to be considered later. He wished to make a serious reservation and would be unable to join in a consensus on the article.

24. Mr. AL SUGAIR (Saudi Arabia) and Mr. MBAGIRA (Zaire) said that they, too, thought that the words placed in square brackets in article 39, paragraph 1, were extremely important and that there was no justification for deleting them. They endorsed what had been said on the point by the observer for the OAU and the representatives of Iraq and Syria, and hoped that the Committee would try to retain the words in question.

25. The CHAIRMAN put to the vote the proposal to delete the words placed in square brackets in article 39.

The proposal was rejected by 28 votes to 21, with 21 abstentions.

26. The CHAIRMAN asked if the Committee was ready to adopt article 39 as a whole by consensus.

27. Mr. CLARKE (United Kingdom), supported by the representatives of Belgium and Canada, said they would be unable to adopt article 39 in that way, with the words on which the Committee had just voted.

28. The CHAIRMAN put article 39 as a whole to the vote.

Article 39 as a whole was adopted by 47 votes to 6, with 15 abstentions.^{4/}

Article 40 - Independent missions (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/334, CDDH/III/338) (concluded)

29. Mr. ALDRICH (United States of America), Rapporteur, pointed out that the article in fact dealt with espionage. The titles of some of the articles should perhaps be altered. An important change was being introduced. The intention was not to alter the law so far as classical cases of espionage were concerned, but to afford wider protection against accusations of espionage for residents of occupied territories.

30. The CHAIRMAN pointed out that the words "faux prétextes" in the French text of paragraph 3 should read "prétextes fallacieux".

31. Mr. WOLFE (Canada) said it would be necessary to ensure that the report made it clear that the word "uniform" used in article 40, paragraph 2, was being used in a broad sense.

32. Mr. WULFF (Sweden) pointed out that the rules in paragraphs 1 and 2 were linked to The Hague Regulations respecting the Laws and Customs of War on Land annexed to The Hague Convention no. IV of 1907 concerning the Laws and Customs of War on Land. In modern times, however, spies could be used in war at sea and that should be mentioned in the report as an important point.

^{4/} For the text of article 39, as adopted, see the report of Committee III (CDDH/236/Rev.1, annex I).

33. Mr. ALDRICH (United States of America), Rapporteur, said that he had noted that point and would be glad to receive any written suggestions for improving the text of the report.

Article 40 was adopted by consensus.^{5/}

Article 41 - Organization and discipline (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/335, CDDH/III/338) (concluded)

34. Mr. ALDRICH (United States of America), Rapporteur, pointed out that article 41, which included definitions of the armed forces of a Party to a conflict and of persons entitled to combatant status, was of some importance in that it was relevant to the structure of a series of articles and fixed the minimal rules for organization and internal discipline.

35. He drew the Committee's attention to paragraph 3, which provided for a simple procedural condition: the obligation for a Party to a conflict incorporating a para-military or armed law enforcement agency into its armed forces so to notify the other Parties to the conflict.

Article 41 was adopted by consensus.^{6/}

New article 42 bis - Protection of persons taking part in hostilities (CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/337, CDDH/III/338) (concluded)

36. Mr. ALDRICH (United States of America), Rapporteur, said that article 42 bis related to the treatment of persons taking part in hostilities and comprised a number of protective measures concerning determination of prisoner-of-war status under Article 5 of the third Geneva Convention of 1949 and providing, in the case of a person who was not held as a prisoner of war and was to be tried for an offence arising out of the hostilities, the right to assert his entitlement to prisoner-of-war status before a judicial tribunal. The article also stipulated that any person who, having taken part in hostilities, was not entitled to prisoner-of-war status and did not benefit from more favourable treatment, should have the right at all times to the protection of article 65 of Protocol I.

^{5/} For the text of article 40, as adopted, see the report of Committee III (CDDH/236/Rev.1, annex I).

^{6/} For the text of article 41, as adopted, see the report of Committee III (CDDH/236/Rev.1, annex I).

37. It had not been easy to draft the article, but it had finally been given wide support in the Working Group. He hoped that it would be adopted by consensus.

Article 42 bis was adopted by consensus.^{7/}

Explanations of vote

38. The CHAIRMAN invited any representatives wishing to do so to explain their position on the articles just adopted.

39. Mr. TODORIĆ (Yugoslavia) said that he had favoured the adoption of article 35 but would like paragraph 1 (c) of that article to be deleted, since the definition of perfidy was precise and acceptable and prisoner-of-war status could not be denied to members of resistance movements who, under article 1 of draft Protocol I, had the same rights as combatants engaged in international conflicts.

40. The Committee should beware of adopting vague provisions which would tend to be detrimental to the situation of freedom fighters and members of resistance movements. The peoples to whom such combatants belonged were entitled to support under the Charter of the United Nations. With regard to paragraph 1 (c) and 1 (d), he pointed out that it was impossible to establish rules of international law on the feigning of status.

41. Referring to paragraph 2 of article 1 of draft Protocol I, he said that it was vital that combatant and prisoner-of-war status should be preserved intact in respect of members of liberation or resistance movements, who were not seeking privileges but were upholding national freedom, sovereignty and independence. His delegation would spare no effort to find precise and equitable compromise solutions.

42. Mr. REZEK (Brazil) said that he had voted in favour of the deletion of the phrase in square brackets in paragraph 1 of article 39 but had abstained in the vote on the article as a whole because the pilot of an aircraft in distress could not choose the spot at which his aircraft fell.

^{7/} For the text of article 42 bis, as adopted, see the report of Committee III (CDDH/236/Rev.1, annex I).

43. Mr. EL GHONEMY (Egypt) pointed out that, although differently worded, the definition of perfidy in paragraph 2 of article 35 should be interpreted as a repetition of that given in paragraph 1. Moreover, the expression "international law" used in article 35 should be held to refer solely to such international rules as were binding on the party concerned. Lastly, in no circumstances should paragraph 1 (d) be interpreted in a way prejudicial to the status of members of liberation movements who did not distinguish themselves during their operations by wearing a uniform or a distinctive emblem.

44. With regard to article 38 bis, there was bound to be an element of subjectivity in deciding whether an adversary was or was not hors de combat, and the words "should be recognized to be hors de combat" did not preclude that element.

45. Since the question of sabotage was to be dealt with in article 42 and not in article 40, he reserved the right to speak on that subject again if he was dissatisfied with the wording of article 42.

46. The term "resident" in paragraph 3 of article 40 should be understood to include persons who had had to leave the territory as a result of excesses on the part of the Occupying Power as well as persons evacuated by the occupying authorities. Lastly, a member of a liberation or resistance movement would not be considered to be acting under false pretences simply because he was wearing civilian clothing or was not wearing a distinctive emblem.

47. With regard to article 41, his delegation considered that, in order to be valid, the notification provided for in paragraph 3 should be subject to certain conditions: it should be made in an effective manner and the adverse Party should be given sufficient time to inform its forces of the notification.

48. Sir David HUGHES-MORGAN (United Kingdom) said that his delegation had been happy to join the consensus expressed on the various articles adopted.

49. With regard to article 35, he had joined the consensus regarding the retention of paragraph 1 (c), but that did not mean that his delegation would necessarily accept the terms which the Rapporteur had proposed for article 42; it would judge of the suitability of those terms when the Committee considered that article, but would not commit itself at present.

He regretted that the Committee considered it necessary to amend the provisions of article 39 so as to change existing law. According to the British Manual of Military Law, while it was permissible to fire on persons engaged in hostile missions who were descending from an aircraft, it was unlawful to fire on other persons parachuting from an aircraft in distress. That was a humanitarian rule and he was sorry to see the Committee departing from a humanitarian principle which it was the Conference's duty to reaffirm. He found it very hard to accept that the law in force should be amended in that respect.

50. Mr. IPSEN (Federal Republic of Germany) explained that he had voted against article 39 because, without the phrase in square brackets, paragraph 1 would have codified a practice which had been well-established in armed conflicts for half a century. Article 20 of the 1922/1923 Hague Rules of Air Warfare stipulated that persons endeavouring to escape by parachute from a disabled aircraft must not be attacked in the course of their descent. Although those draft Rules had not come into force, Article 20 had been adopted unanimously at The Hague; its text made no distinction according to whether or not it was apparent that a pilot would land in territory controlled by his own Party. There had been no doubts in the minds of the authors of Article 20 that the article should cover such situations.

51. On the other hand, everybody was well aware that the pilot of a modern combat aircraft, who had usually attained a high standard of training, was in consequence a valuable combatant for his own party and a most dangerous combatant for the adverse Party. The serious interest of the adverse Party in ensuring that a combatant of that kind would be unable to take part in further combat activities could not be gainsaid. There were, however, examples which showed that the mere possibility that he might resume combat activities did not deprive a person of the protection to which he was entitled. If, for instance, a pilot was captured and placed in a prisoner-of-war camp, he would undoubtedly continue to be protected by the third Geneva Convention of 1949, even if it was apparent that he would be set free very soon by his own forces. In such a case, it was certain that nobody would demand that the pilot concerned should be forcibly prevented from taking part once again in aerial combat. A person parachuting from an aircraft in distress was reduced to helplessness in the true sense of the word during his descent and an attack on him would be tantamount to an execution. That was why he had opposed the clause in square brackets and article 39 as a whole.

52. Mr. GENOT (Belgium) said he had voted against maintaining the clause in square brackets in paragraph 1 of article 39. That clause might cause difficulties because a person parachuting from an aircraft in distress was seldom able to know where he was going, even if he could control his descent. It thus conflicted with article 38 bis on the safeguard of an enemy hors de combat. It was also doubtful whether a combatant on the ground would be able to judge whether the parachutist was making for his own lines. There was a tradition among fighter pilots that a pilot who had been shot down should be considered to be in a similar situation to that of a rider unhorsed in battle. The text adopted was therefore difficult to apply and against that rule of chivalry.

53. The Belgian delegation was pleased that article 42 bis, which was largely based on an amendment submitted jointly by Belgium and some other countries, had been adopted. Belgium was especially interested in a widening of the concept of prisoner of war to include new categories of persons.

54. The solution to that problem, if found de jure, would not prevent the captor from asking himself numerous questions de facto about the person captured. But, under article 42 bis, he would thenceforth no longer be able to resolve them in an arbitrary manner.

55. Indeed, under paragraph 1 the decision as to the status of the captured person no longer lay with the captor alone: that paragraph thereby widened the scope of Article 5 of the third Geneva Convention of 1949.

56. Paragraph 2 obliged the tribunal seized with an offence arising out of the hostilities to admit any objections by the accused to the effect that he had been entitled to participate in combat. Such plea must be examined in accordance with judicial, not administrative, procedures, and, if possible, on a preliminary basis.

57. That important paragraph also extended the application of Article 105 of the third Geneva Convention of 1949 to that procedure. It was to be regretted that some had opposed the idea of explicitly stipulating that the ICRC should be present at that procedure, independently of the presence of the Protecting Powers. At the present stage of the discussions, that possibility was nevertheless extant in the general framework of the activities of the ICRC, as laid down in particular by Article 9 of the third Geneva Convention.

58. Lastly, paragraph 3, which contained a reference to article 65, imparted greater flexibility to Article 5 of the fourth Geneva Convention, in respect of occupied territories.

59. To sum up, those provisions were an essential extension, in the practical field, of the body of laws pertaining to prisoners of war.

60. Mr. GILL (Ireland) said he was pleased that the Committee had adopted article 35 proposed by the Rapporteur, based largely on a text submitted by the Canadian, Irish and United Kingdom delegations. A special tribute was due to the United Kingdom delegation for its efforts in preparing the article. He supported the reservation already made by some delegations on the subject of the passage - referring to paragraph 1 - which the Rapporteur proposed should be inserted in article 42. His delegation might have something to say about the text which the Rapporteur proposed. He congratulated the Rapporteur, who had helped delegations to overcome the procedural problems raised by the new provisions for protecting the markings, emblems and uniforms of United Nations forces.

61. His delegation had signified its assent to a decision by consensus on article 38 bis. He recalled that in submitting, at the forty-third meeting (CDDH/III/SR.43) an amendment to article 65 (CDDH/III/308) which would prohibit torture, it had agreed that no reference to torture should be made in article 38 bis. Several delegations considered, however, that the provisions concerning the prohibition of torture needed strengthening.

62. He associated himself with the delegations that had entered reservations regarding the word "uniform" in paragraph 2 of article 40, and he requested the Rapporteur to mention that point in the final report.

63. Mr. MOLINA-LANDAETA (Venezuela) paid a tribute to the work of the Working Group and Rapporteur; he said that his delegation had in general supported the majority decision of the Committee and considered that the work accomplished had been positive and marked an advance in humanitarian law.

64. His delegation had therefore joined the consensus in favour of adopting article 38 bis. It would have preferred, however, to see the final provision of paragraph 2 amended, for it considered that, in the interests of humanitarian law, it would have been better to lay down only one condition, instead of the two that were mentioned.

65. His delegation had abstained from the vote on maintaining the clause in square brackets in paragraph 1 of article 39, for it had very grave doubts on legal grounds concerning its validity and scope; it was difficult to assume at law that a pilot parachuting from an aircraft in distress would not be covered by the exception indicated at the beginning of the paragraph. The political implications had to be borne in mind, however, and so his delegation had abstained from voting. It might reconsider its position in the final vote.

66. If article 40 had been voted on, his delegation would have abstained on paragraphs 3 and 4, which in its view needed more careful study from the point of view of the possible consequences of their application.

67. Mr. BARILE (Italy) said he had abstained in the vote on retention of the clause in square brackets in article 39, paragraph 1, for the humanitarian reasons already taken into consideration in the 1922/1923 Hague Rules on Air Warfare.

68. Mr. AKKERMAN (Netherlands) said he had voted for retention of the clause in square brackets, and had spoken in favour of article 39 as a whole. The Working Group's discussions showed clearly that the definition of the term "hors de combat" in article 38 bis was not valid for a very short period of time, and at any rate applied to a longer period than that required for a descent by parachute. Article 39, paragraph 1, was apparently based on the fiction that a parachutist would be hors de combat. That fiction would be acceptable if it appeared certain that a parachutist would land in territory where he would be subject to be rendered hors de combat stricto sensu. But if it were admitted that he could land on territory controlled by the party to which he belonged, and that he could consequently resume his military activities, the rule no longer corresponded to the realities of modern warfare. Moreover, the addition of the passage in square brackets did not completely rule out chivalrous conduct. It was to be hoped that all States would carry chivalry beyond the limits imposed by the legal rule as now adopted.

69. Mr. WOLFE (Canada) said he had accepted all the decisions that the Committee had taken by consensus, but had voted against article 39. Addition of the words in square brackets would run counter to the entire tradition of chivalry, for the very idea of shooting in cold blood at a human being descending by parachute in distress and probably already wounded was monstrous. He hoped

that those delegations which had insisted on the retention of those words would concur and withdraw their proposal. He expressed his appreciation to the representative of Egypt for his generous offer to do so. While he appreciated the pragmatic reasons put forth by some representatives in support of the bracketed language, he deplored the emotionalism which had marked some of the statements that had been made, and which was out of place in the drafting of a text where humanitarian considerations should prevail.

70. Mr. SABEL (Israel) said that with respect to article 35 Israel considered that the feigning of civilian, non-combatant status, referred to in paragraph 1 (c), was a point of primary importance, and was clearly within the definition of paragraph 1. He wished to emphasize that the only decision the Committee had taken on the question had been on the text before it.

71. Turning to article 39, he said that Israel had voted for the deletion of the clause in square brackets, and once that clause had been adopted, had voted against article 39 as a whole. The article without that clause had been a clear statement of existing international law, as reflected inter alia in military manuals and in the 1922/1923 Hagué Rules of Air Warfare. The article as adopted, with the inclusion of that clause might be misinterpreted as changing the law so as in certain circumstances to allow shooting of airmen in distress in the air, which would clearly be in contradiction with existing international law.

72. His delegation wished to reserve its position on a number of elements in article 40, and would also be considering further its position on paragraph 3 of article 41.

73. Regarding article 42 bis, he said that Israel understood paragraph 1 as requiring that in all circumstances an element of objective doubt must arise to justify the application of the procedure referred to in the second sentence.

74. Mr. ABADA (Algeria) said that his delegation had voted for retention of the clause in square brackets in article 39, but deplored that the Committee had been unable to reach a consensus on an acceptable formula. The Chairman, in collaboration with the Rapporteur, should seek a way of avoiding certain difficulties within the Committee. Since it had the same composition as the Committee, the Working Group should be able to present the Committee with acceptable texts which it could pass upon without having to vote, for that always left a bad impression.

75. The CHAIRMAN said he had always tried to show an understanding attitude. He reminded the Committee that the Working Group had been sitting for six weeks, that the Committee had received the report of the Rapporteur, and that the Rapporteur had taken the floor to give an account of the work done on the articles which had just been considered. He hoped that, in future, delegations would be able to reach agreement at Working Group level.

76. Mr. ABADA (Algeria) said he had no intention of questioning the Chairman's authority, but would merely ask him to do all in his power to organize the work in such a way as to avoid the type of discussions to which article 39 had given rise.

77. The CHAIRMAN said he would do his best to prevent the occurrence of discussions which might divide delegations. That was no easy task, but he hoped to be equal to it.

78. Mr. REED (United States of America) said that article 35, paragraph 1, was a reaffirmation and development of Article 23 b) of The Hague Regulations respecting the Laws and Customs of War on Land annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land. The word "treacherously" in Article 23 b) was synonymous with "perfidy" in article 35 of draft Protocol I.

79. On article 39, his delegation had voted against the retention of the clause in square brackets, and had abstained in the vote on the article as a whole. Insertion of the clause in question would deprive the parachutist of all protection when descending on friendly territory, on the grounds that he might resume combat. That would be incompatible with the other provisions of humanitarian law, in particular paragraph 3 of article 38 bis, which provided that persons that had fallen into the power of an adverse Party under unusual conditions of combat, which prevented their evacuation, must be released. Those prisoners, too, could resume combat, but it was inadmissible that they should all be shot. By the same token, it was inadmissible that a parachutist hors de combat could be shot down, on the pretext that he might resume his military activities.

80. His delegation had been among those accepting the consensus on article 40. In its view, that article in no way modified the provisions on espionage in The Hague Regulations of 1907. The word "uniform" in paragraph 2 might lead to confusion. For his delegation, a "uniform" covered all distinctive emblems or combat garb authorized for a specific mission by the armed forces organizing that mission.

The meeting rose at 12.25 p.m.

SUMMARY RECORD OF THE FORTY-EIGHTH MEETING

held on Tuesday, 1 June 1976, at 10.30 a.m.

Chairman: Mr. SULTAN (Egypt)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Proposals by the Rapporteur concerning articles 35, 38, 38 bis, 39, 40, 41 and 42 bis (CDDH/III/330 to CDDH/III/335, CDDH/III/337, CDDH/III/338) (concluded)

Explanations of vote (concluded)

1. Mr. ALEIXO (Portugal) said that his delegation had voted against article 39 because, in its view, a person parachuting from an aircraft in distress was hors de combat and should be protected in all circumstances, since he could neither defend himself nor attack nor escape. It was therefore impossible to endorse the provision whereby such protection would be refused in certain instances, for then protection would become a matter of luck. The fate of two persons leaping from the same aircraft within a few seconds of each other might be very different: one might land in enemy territory and the other in territory controlled by an ally or by the Party to which he belonged. According to article 39 the former would be saved and the latter killed. Moreover, it was hard to see how people on the ground could predict where an airman parachuting from an aircraft in distress would land.
2. With regard to article 41, paragraph 3, his delegation shared the view expressed by the Rapporteur in his report (CDDH/III/338), namely, that where a State had a law providing for the automatic incorporation of police forces into its armed forces in time of war, the notice requirement might be satisfied by notification to all Parties to the Protocol, through the depositary.
3. Mr. KABUAYE (United Republic of Tanzania) said that his delegation had accepted the adoption of article 35 by consensus on condition that article 42 would extend to members of liberation movements the benefit of the protection of the Geneva Conventions and Protocol I denied them in article 35, paragraph 1 (c). Since the Conference had acknowledged the right of those gallant nationalists to enjoy humanitarian benefits recognized by international law, every effort should be made to extend those benefits to them in situations where they were the victims of discrimination. Given

the fact that liberation struggles were of a type not covered by paragraph 1 (c), it should be remembered that the Rapporteur himself had said at the forty-seventh meeting (CDDH/III/SR.47) that the consensus on article 35 was conditional upon the insertion, in paragraph 3 of article 42, of a provision stating that acts which complied with the requirements of that paragraph would not be considered to be perfidious within the meaning of article 35, paragraph 1 (c). His delegation regarded that as a test case for African participation in the Conference and respect for Protocol I. It had always maintained that the development of international law and humanitarian law must reflect international realities.

4. With regard to article 39, his delegation had voted in favour of the phrase in square brackets because it involved a point of principle. As a member of the Organization of African Unity (OAU) which had experienced Portuguese atrocities on its border, Tanzania shared the views expressed on the matter by the OAU observer at the forty-seventh meeting (CDDH/III/SR.47).

5. His delegation would prefer the method of adoption by consensus to be limited to articles that had been carefully worked out in the Working Group. In that respect, it endorsed the views of the Algerian delegation (CDDH/III/SR.47). Texts submitted by the Working Groups reflected the seriousness which delegations attached to them. The confusion which had marked the discussions at the forty-seventh meeting should be treated as an exception. None the less, the text of article 39 should have been improved in order to reduce the possibility of abuses in its application, since the purpose of the Diplomatic Conference was to extend humanitarian benefits to those who deserved them.

6. Finally, the Conference should not become obsessed with the word "humanitarian" since that concept should be regarded simply as part of the greater effort to discourage and finally abolish wars.

7. Mr. ALDRICH (United States of America), Rapporteur, assured the Tanzanian representative that the sentence he had mentioned would be included in the new draft of article 42, which was to be referred to the Working Group.

8. Mr. ABDINE (Syrian Arab Republic) said that, generally speaking, the particulars and explanations in the Rapporteur's report (CDDH/III/338) filled in the details of the articles which had been adopted at the forty-seventh meeting. The report should be referred to if difficulties arose in the interpretation of those articles.

9. With regard to article 35, he would have preferred the text between square brackets in paragraph 1 (c) to be deleted. His preference was prompted solely by a spirit of logic and not by any lack of humanitarian spirit. In the case of perfidy it was preferable to take indisputable examples such as those of Article 23 f) of The Hague Regulations respecting the Laws and Customs of War on Land annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land forbidding improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy. There was also a gap in the text, since wars of resistance were not covered. The Syrian delegation, noting that the Committee was considering making amendments to article 42, reserved the right to revert to the subject when those amendments were being considered.
10. With regard to article 39, his delegation had supported the retention of the words placed in square brackets at the end of paragraph 1, for two reasons. In the first place, it was impossible to have different rules for identical situations: the situation covered by article 39 was similar to the situation described in article 38 bis, except that it was very difficult to know whether a person parachuting from an aircraft had hostile intentions. In the second place, the technical development of aviation gave air crews advantages out of all proportion to the damage they could inflict, and so protection could not possibly be given to operations which might turn into surprise attacks.
11. With regard to article 42 bis, there was first a point of drafting. The word "défini" in the last sentence of paragraph 1 of the French text should be changed to "décidé de", words better suited to the duties of a court. As far as the substance of the article was concerned, the second sentence of paragraph 2 should be deleted because it merely expressed a wish, although the Rapporteur interpreted it as an obligation. Moreover, if it was an obligation, it must be recognized that it would not be the same for all the Parties. Finally, the exception at the end of paragraph 2 deprived the guarantee given of all value, for "interest of State security" might be wrongly invoked to refuse the Protecting Power the right to attend the discussions on the question of prisoner-of-war status. The exception should therefore be discarded.
12. Mr. SHAABAN (Egypt), referring to article 39, said that his delegation was the author of the last sentence of paragraph 1 which had originally been placed between square brackets and which at the forty-seventh meeting had been adopted by the majority of the Committee without the brackets.

13. In their explanations of vote, some delegations had criticized the text as running counter both to humanitarian considerations and to existing international law. His delegation considered that no humanitarian considerations would appear in that connexion. The only considerations to be weighed one against the other were military interest, on the one hand, and chivalry on the other. As far as military interests were concerned, a pilot was of great value and worth hundreds of ordinary combatants; in many cases of combat, the number of pilots would determine the outcome of hostilities. A combatant of such military value was therefore, in terms of law, a legitimate target of attack, the only exception being if he had been disabled by wounds or sickness or was in a position to surrender as a prisoner of war.

14. In other situations, however, he was a combatant of great military value, both able and willing to resume fighting; there would thus be no grounds of humanity on which to require belligerent States to give instructions to their soldiers to spare his life. It would be both humanitarian and realistic to give instructions to these soldiers not to shoot at a man descending from an aircraft in distress but, instead, to capture him. But would it be humane to order soldiers to spare the life of such a dangerous enemy in order to give him the opportunity to return shortly to plunge them into a hell of shell-fire? Humanity would be out of place in such cases.

15. One could look at the situation from the standpoint of chivalry, but that would be rather strained and exaggerated, because chivalry presupposed equality of opportunity in fighting, it implied giving the adversary the opportunity to fight for his life, to kill or be killed. To adopt that concept of chivalry in the situation under discussion would be pushing it too far, because infantrymen were by no means equal in armament to a pilot. If they were ordered to let him go, he would return and fight them, not with a simple rifle - the same weapon that they had - but with a fighter aircraft equipped with all the means of destruction which the human mind had been able to devise and put into use. He therefore shared the view already expressed by the Netherlands representative in the Working Group that considerable military interests must not be sacrificed to mere considerations of chivalry.

16. Turning to the argument relative to international law that had already been put forward, he quoted from Oppenheim's International Law, where it was stated that: "As war is a contention between States for the purpose of overpowering each other, violence consisting of different sorts of force applied against enemy persons is the chief and decisive means of warfare. The purpose of the application

of violence against combatants is their disablement so that they can no longer take part in the fighting. This purpose may be realised through killing or wounding them or making them prisoners" (op.cit., seventh edition, ed. Lauterpacht, vol.2, p.338). That was the general and basic rule. In the case of pilots, the following was said: "In air combat it is not prohibited to attack the enemy in an apparently disabled machine, seeing that he is not in a position to surrender at discretion. Neither is it forbidden to fire on the enemy whose machine has crashed on enemy ground or who, after having crashed on his opponent's ground, commits a hostile act...." (idem, p.521).

17. With regard to the practice of States, he quoted from The Second World War, by Sir Winston Churchill: "German transport planes, marked with the Red Cross, began to appear in some numbers over the Channel in July and August 1940 whenever there was an air fight. We did not recognize this means of rescuing enemy pilots who had been shot down in action, in order that they may come and bomb our civil population again. We rescued them ourselves whenever it was possible and made them prisoners of war. But all German air ambulances were forced or shot down by our fighters on definite orders approved by the War Cabinet.". He referred to those precedents, not to support the shooting down of air ambulances bearing Red Cross marks, but only to stress the rule of law which had been, he was sure, in the minds of the British decision makers, namely, that a belligerent State had the right to prevent by armed force any attempt of the adversary to evade capture.

18. Mr. OKA (Japan) said that, like many other representatives, he was glad the Committee had adopted by consensus the various articles drafted by the Working Group (CDDH/III/338), a fact which augured well for the universal application of their provisions. His delegation noted with satisfaction that article 35, paragraph 1 (c) had been adopted without the square brackets, on the understanding that when the Committee came to discuss article 42 it would duly consider, and take a decision on, the Rapporteur's proposal.

19. Article 39 was the only one which had not been adopted by consensus. Now that the square brackets round the second clause of paragraph 1 had been deleted, it was to be feared that the degree of protection extended to the crew of an aircraft in distress would be substantially reduced; it was very difficult to surmise what future practice would be. The clause had been recognized to be a departure from the existing rules, and even if it was admitted that the idea was fair and reasonable, it might be doubted whether in practice and in the present state of the world the judgement of

those deciding on the fate of persons parachuting from an aircraft would be entirely faultless. Concern on that account had been repeatedly expressed in the Working Group. Since it was not sure that the provisions of paragraph 1 were in proper accordance with the objective, his delegation had abstained from voting on article 39.

20. Mr. OEBIT (Indonesia) noted with satisfaction that the text of article 35 (CDDH/III/330) had retained a number of ideas contained in the amendment submitted by his delegation (CDDH/III/232) at the second session of the Conference. Nevertheless, he thought that the article could still be improved, in particular paragraph 1 (c).

21. He welcomed the adoption of article 39 (CDDH/III/333), which also reflected the views expressed by his delegation in the Working Group. His delegation had supported the deletion of the brackets in paragraph 1 for that paragraph was of very great importance in modern armed conflicts.

22. His delegation had tried to make a modest contribution to the drafting of article 41, which had been the subject of close scrutiny in the Working Group. Since its amendment concerning the status of law enforcement agencies, especially police forces, had not been generally accepted, his delegation's only alternative had been to support the text submitted by the Rapporteur (CDDH/III/335).

The meeting rose at 11.15 a.m.

SUMMARY RECORD OF THE FORTY-NINTH MEETING

held on Friday, 4 June 1976, at 10.25 a.m.

Chairman: Mr. SULTAN (Egypt)

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

Draft Protocol II*

Report of the Working Group on articles 20, 20 bis, 21, 22, 22 bis, 23, 27 (CDDH/1; CDDH/III/346 to CDDH/III/352, CDDH/III/353)

1. Mr. BAXTER (United States of America), Rapporteur, introduced the report of the Working Group (CDDH/III/353). The Working Group had reached a consensus on all the proposed articles except article 21.

Article 20 - Prohibition of unnecessary injury (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/346, CDDH/III/353) (concluded)

2. Mr. BAXTER (United States of America), Rapporteur, said that the article was a slightly modified version of article 33 of draft Protocol I, with some small drafting changes to make it appropriate for a Protocol on non-international armed conflicts.

Article 20 was adopted by consensus.^{1/}

New article 20 bis - Protection of cultural objects and of places of worship (CDDH/III/347, CDDH/III/353) (concluded)

3. Mr. BAXTER (United States of America), Rapporteur, said that new article 20 bis was the result of a proposal made in the Working Group for the inclusion in draft Protocol II of an article analagous to article 47 bis of draft Protocol I. It was a simplified version of the latter article.

New article 20 bis was adopted by consensus.^{2/}

* Resumed from the forty-sixth meeting.

1/ For the text of article 20, as adopted, see the report of Committee III (CDDH/236/Rev.1, annex I).

2/ For the text of article 20 bis, as adopted, see the report of Committee III (CDDH/236/Rev.1, annex I).

Article 21 - Prohibition of perfidy (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/348, CDDH/III/353)

4. Mr. BAXTER (United States of America), Rapporteur, said that article 21 was the only one on which the Working Group had not reached a consensus. There had been two main points of view: one, that it would be appropriate to include such an article in draft Protocol II, to correspond to article 35 of draft Protocol I; the other, that the notion of perfidy was hard to reconcile with the laws of non-international armed conflict and that it would therefore be difficult to include a suitable article in draft Protocol II. It might be necessary to vote on the matter.

5. Mr. EL GHONEMY (Egypt), speaking on a point of order, proposed that article 21 should be sent back to the Working Group for further consideration, in an effort to avoid a breach in the practice of approving articles by consensus.

It was agreed by consensus to refer article 21 back to the Working Group for further consideration.

Article 22 - Quarter (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/349, CDDH/III/353) (concluded)

6. Mr. BAXTER (United States of America), Rapporteur, said that the article was identical with article 38 of draft Protocol I.

Article 22 was adopted by consensus.^{3/}

New article 22 bis - Safeguard of an enemy hors de combat (CDDH/III/350, CDDH/III/353) (concluded)

7. Mr. BAXTER (United States of America), Rapporteur, said that new article 22 bis was identical with article 38 bis of draft Protocol I, except for the omission of paragraph 3 concerning prisoners of war who fell into enemy hands under unusual conditions.

New article 22 bis was adopted by consensus.^{4/}

^{3/} For the text of article 22, as adopted, see the report of Committee III (CDDH/236/Rev.1, annex I).

^{4/} For the text of article 22 bis, as adopted, see the report of Committee III (CDDH/236/Rev.1, annex I).

Article 23 - Recognition signs (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/351, CDDH/III/353)(concluded)

8. Mr. BAXTER (United States of America), Rapporteur, said that the article was identical with article 36 of draft Protocol I concerning the improper use of certain protective emblems.

Article 23 was adopted by consensus.^{5/}

Article 27 - Protection of objects indispensable to the survival of the civilian population (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/352, CDDH/III/353)(concluded)

9. Mr. BAXTER (United States of America), Rapporteur, said that article 27 was a more concise version of article 48 of draft Protocol I. It omitted the reference to reprisals, because that problem was dealt with in a more general way in draft Protocol II.

10. Mr. BRETON (France) asked that in the French text "zones productrices d'aliments" should be replaced by the words "zones agricoles" as in article 48 of draft Protocol I.

Article 27, including the French modification, was adopted by consensus.^{6/}

Draft Protocol I (continued)

New article 64 bis - Reunion of dispersed families (CDDH/III/345) (concluded)

11. Mr. ALDRICH (United States of America), Rapporteur, said that article 64 bis was unique in having emerged from the Working Group unchanged. It was brief, clear and self-explanatory.

New article 64 bis was adopted by consensus.^{7/}

12. The CHAIRMAN invited representatives to make any explanatory statements they deemed necessary.

^{5/} For the text of article 23, as adopted, see the report of Committee III (CDDH/236/Rev.1, annex I).

^{6/} For the text of article 27, as adopted, see the report of Committee III (CDDH/236/Rev.1, annex I).

^{7/} For the text of new article 64 bis as adopted, see the report of Committee III (CDDH/236/Rev.1, annex I).

13. Mrs. MANTZOULINOS (Greece) recalled that her delegation in the Working Group had presented a proposal, co-sponsored by the delegations of ten other countries, for introducing a new article 20 bis to cover the protection of historic monuments and places of worship which constituted the national heritage of a country. That proposal reiterated the principles contained in article 47 bis of draft Protocol I, but more succinctly and, solely in relation to non-international armed conflicts. In discussing that proposal many delegations had referred to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and particularly to Articles 4 and 19 of that Convention; for that reason, a reference to it had been inserted by way of the preamble.

14. The aim of article 47 bis of draft Protocol I and article 20 bis of draft Protocol II was to protect historic monuments and places of worship which constituted the cultural heritage of a people against all hostile acts in international and non-international armed conflicts respectively. That would cover unique architectural masterpieces of inestimable value in relation to the history of the country concerned and to the culture of its people. The need to define the concept of "cultural heritage" and to protect that heritage at all times, and not merely during armed conflicts, had been a cause of continuing concern to the United Nations Educational, Scientific and Cultural Organization and was reflected in the International Convention for the Protection of the Cultural Heritage, signed in Paris on 16 November 1972. She referred the Committee to article 1 of that Convention for a definition of the term "monuments". In the view of her delegation, any place of worship that satisfied that definition would be protected by the new article 20 bis.

15. Her delegation had been happy to learn that Committee I, in approving article 74 of draft Protocol I on the repression of breaches of that Protocol, had agreed that any attack on a historic monument, place of worship, or work of art would, under certain conditions, constitute a grave breach of the Protocol.

16. Mr. WOLFE (Canada) said that his delegation had been glad to join in the consensus on articles 20 bis and 23. He wished to make it clear, however, that his delegation understood the reference in article 20 bis to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict being qualified by the recognition that certain realities of warfare must be taken into account. To the extent that The Hague Convention provided certain exceptions, his delegation interpreted that reference as giving those exceptions validity in the Protocol.

17. His delegation also understood that, notwithstanding the comma after "places of worship", the words "which constitute the cultural heritage of peoples" qualified the whole enumeration (CDDH/III/347).

18. With regard to article 23, his delegation interpreted the words "whenever applicable" as meaning that if the State concerned was not a party to a particular convention dealing with a protective emblem, it was not bound by the provisions respecting the emblem concerned (CDDH/III/351).

19. Mr. BARILE (Italy) said that he welcomed the consensus that had been reached on most of the articles, as he had always considered that the humanitarian rules of the two draft Protocols should correspond. The Italian delegation wished to emphasize its special satisfaction at the adoption of new article 20 bis which aimed at ensuring that cultural objects and places of worship - the cultural heritage of the people - were protected. He was not happy with the situation on article 21 and hoped that at the fourth session it would be possible to reach agreement on a version of wider scope than the present one.

20. Mr. REED (United States of America) said that his delegation had accepted the consensus on the articles just approved and the humanitarian purposes they stood for. It had previously expressed concern at the fact that those articles represented a further extension of Article 3 common to the Geneva Conventions without adequate consideration of their likely application in practice. Common Article 3 had hitherto not achieved the necessary degree of application, and the incorporation in draft Protocol II of such extensive international regulations of internal conflicts did not enhance the Protocol's chances of acceptance. Such an ambitious approach might militate against the hope that innocent victims of internal conflicts would receive more humanitarian treatment.

21. Mr. EL GHONEMY (Egypt) said that the interpretation of article 20 bis was the personal view of the representatives concerned. His own delegation maintained its position regarding the scope of application of that article to cover places of worship.

22. Mr. OKA (Japan) said that the articles just adopted were essentially the same as the corresponding articles in draft Protocol I and would thus raise the level of protection in internal conflicts to equal that of protection in international conflicts. In view of the far-reaching impact the articles were expected to have, he was concerned about their future enforcement and the degree to which they would be observed. He shared the concern of the United States representative.

23. In some cases, the substance of articles in draft Protocol I were not appropriate to draft Protocol II. His delegation had reservations on whether the idea of perfidy as formulated in Protocol I could be wholly transplanted to Protocol II. He shared the doubts expressed, in particular, on paragraph 1 (c) of article 21. He welcomed the decision to refer the article back to the Working Group so that more time and thought could be given to its appropriateness in draft Protocol II.

24. Mr. BAXTER (United States of America), Rapporteur, wished to refer to one element in the work of the Working Group on which it had been unable to reach a successful conclusion, namely the proposal submitted to the Working Group by the representative of Nigeria for an article dealing with mercenaries (CDDH/III/GT/82), reading as follows:

"Article 42 quater - Mercenaries

1. The status of combatant or prisoner of war shall not be accorded to any mercenary who takes part in armed conflicts referred to in the Conventions and the present Protocol.
2. A mercenary includes any person not a member of the armed forces of a Party to the conflict who is specially recruited abroad and who is motivated to fight or take part in armed conflict essentially for monetary payment, reward or other private gain."

The matter had been discussed at length in the Working Group and had proved to be much more complex than appeared when the study of the topic began. It had not been possible to arrive at an agreed text, despite the several attempts which he had made to prepare a draft that would be generally acceptable. The matter would have to be re-opened at the fourth session and he suggested that the Nigerian proposal on mercenaries should be circulated as a Conference document rather than as a working paper of the Working Group. That of course was a matter for the representative of Nigeria to decide. He further suggested that the Committee's report should contain some account of the debate which had taken place in the Working Group on the subject.

25. He regretted the failure to reach a conclusion on the subject, which was closely related to article 42, and he hoped that at the fourth session it would be possible to arrive at an agreed definition of a mercenary and also to agree on the consequences of a person having the status of a mercenary.

26. Mr. AJAYI (Nigeria) said that, in his view, the situation was not as gloomy as the Rapporteur had made it appear. He was certainly not alone in thinking that the Working Group could congratulate itself on the way in which the matter had been handled. It had emerged clearly that there was definite support for the substance and spirit of his proposal; only one delegation had had serious reservations and that was not with regard to the intent of the proposal but as to the definition of a mercenary. He also wished to thank the Rapporteur for his personal commitment to the cause of the proposal. The alternative texts which he had submitted had been well received.

27. He would leave it to the Committee to decide how to deal with the question further, and in particular whether it should be discussed again by the Working Group at the current session.

28. The CHAIRMAN said that if the Working Group were able to reach agreement at the current session, that would be the most satisfactory solution. If not, the suggestion that the Nigerian proposal on mercenaries should be issued as a Conference document, and the subject re-opened at the fourth session, would be put before the Committee for decision.

29. Mr. BAXTER (United States of America), Rapporteur, said that in the report which he was to submit to the Committee, he would do his best to accentuate the positive aspects of the discussions which had taken place in the Working Group, while not minimizing the difficulties encountered. He did not propose to include the various drafts on the subject, because that would accentuate the differences. If no agreement was reached at the current session, it would be best for the Committee's report to contain a fairly full account of the discussion in the Working Group, including not only the proposal originally made but the possible lines of development and the text which had been discussed in the Working Group on the previous day.

30. Mr. VAN LUU (Democratic Republic of Viet-Nam) wished to propose that the Working Group should meet again during the current session in an attempt at least to clarify the problem further. The members of the Working Group had been unanimous in their moral disapproval of mercenaries and on the need for an agreed text on the subject.

31. The CHAIRMAN suggested that the Working Group should meet immediately after the close of the Committee's meeting.

It was so agreed.

The meeting rose at 11.10 a.m.

SUMMARY RECORD OF THE FIFTIETH MEETING

held on Tuesday, 8 June 1976, at 11.40 a.m.

Chairman: Mr. SULTAN (Egypt)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 42 - New category of prisoners of war (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2)

1. The CHAIRMAN explained that the meeting had been called specifically to consider the decision of the Working Group with regard to article 42. He had just learned that there had not been sufficient time in which to reach a compromise, although the Rapporteur had striven for five weeks to achieve that aim. He hoped that a compromise would be reached at the fourth session.
2. Mr. ALDRICH (United States of America), Rapporteur, said that it was with deep regret that he had to report that the Working Group was not able to submit a text of article 42 for action by the Committee at the current session. It was clear that a number of delegations had reservations about the draft text of that article and needed more time to consider it. The Working Group had decided, however, that the text of the article, with only a slight editorial change, should be circulated as a Committee document.^{1/} It proposed that the text should not be discussed at the current session, but that final action should be deferred until the fourth session. It also proposed that article 42 should be the first item to be considered by the Committee at the fourth session, when the Committee could decide either to adopt it or to refer it back to the Working Group. He felt sure that it could then be adopted by consensus.
3. The CHAIRMAN asked whether the Committee was willing to accept the Rapporteur's proposal.

It was so agreed.

^{1/} The Rapporteur's draft of article 42, as amended, was later circulated as Committee III document CDDH/III/362.

4. The CHAIRMAN invited delegations that wished to do so to explain their positions.

5. Mr. LONGVA (Norway) said that at the first session his delegation had stated its view that the solutions to be found to the problems of guerrilla warfare would constitute a test of the success or failure of the Conference. By the adoption of articles 35, 40, 41 and 42 bis of draft Protocol I an acceptable solution had been found to those problems with respect to their humanitarian aspects. It was in that context that his delegation was able to support the Rapporteur's proposal for article 42. The text fell short of what his delegation had hoped for, but had the article been put to the vote, his delegation would have voted in favour of it, for the following reasons.

6. Firstly, paragraph 1 considerably enlarged the group of persons entitled to prisoner-of-war status - a development which, in his delegation's view, was based on a realistic assessment of the realities of contemporary armed conflicts.

7. Secondly, paragraph 2 reaffirmed the important principle of international law that, while all combatants were obliged to comply with the rules of international law, violations of those rules should not deprive a combatant of his right to combatant status or, if he fell into the hands of the adverse Party, to prisoner-of-war status.

8. The most important and successful innovations were found, however, in paragraphs 3 and 5, the first of which laid down, for the first time, a code of conduct in combat situations that both imposed humanitarian restraints and took adequate account of the military necessities of guerrilla warfare. Paragraph 5 accorded combatant and prisoner-of-war status to prisoners captured in police actions subsequent to combat; experience had shown that such prisoners were in the majority.

9. As far as paragraph 4 was concerned, his delegation had some reservations about the concept of "separate but equal" on which it was based and would have preferred a clear-cut statement that a combatant who fell into the hands of an adverse Party while failing to meet the requirements of the second sentence of paragraph 3 remained entitled to the protection of the third Geneva Convention of 1949 and of Protocol I. Since, however, that was what paragraph 4 amounted to in substance, it had accepted the text as a compromise. He hoped that delegations which could not accept such a clear-cut statement would be able to review their positions and that such a statement could be adopted at the fourth session.

10. Much had been said in the Working Group about the need for deprivation of prisoner-of-war status as a sanction against violations of paragraph 3, in order to ensure the protection of the civilian population. His delegation did not favour that idea, since recent experience had shown that the prospect of such deprivation often led to desperate action by combatants who might otherwise have surrendered; that was the real danger to the civilian population. It agreed, however, that it was important to include both deterrents and inducements. Paragraph 3 contained a deterrent that it believed to be adequate, namely loss of combatant status as a result of violations of its provisions, with the consequent possibility of prosecution and punishment for acts of combat that would otherwise be considered lawful.

11. The retention of formal prisoner-of-war status even in such situations would seem to his delegation to be the necessary inducement to ensure maximum protection for the civilian population.

12. While his delegation deeply regretted that it had not been possible to reach a consensus on article 42, it felt that, in the circumstances, it was the wisest course to postpone a final decision until the fourth session. He hoped that the positive spirit and the willingness to consider the problems and opinions of others which had characterized the work would be maintained and would guide the Committee when a decision was finally taken.

13. Lastly, he expressed his delegation's gratitude to the Rapporteur, without whose efforts it would have been impossible to reach the present point, at which a solution to the problems raised by article 42 was at hand.

14. Mr. MOLINA-LANDAETA (Venezuela) said that his delegation fully agreed that a decision on article 42 should be postponed until the fourth session, since the necessary conditions for a consensus did not exist and to take a vote would only be to divide the Committee. That would give Governments time to consider what was a complex question. Moreover, if a vote was taken on the article, delegations would have to make a number of reservations on various paragraphs.

15. As Chairman of the Latin American Group, he wished to express the Group's complete satisfaction with the work of the Rapporteur, who should not be disappointed by the failure to reach a consensus on an extremely difficult article. It was thanks to his work that the differing positions of various delegations had been brought closer together.

16. Mr. EL GHONEMY (Egypt) said that his delegation wholeheartedly associated itself with the tributes paid to the Rapporteur. Despite any objections that might be made to the proposed text, his delegation regarded the principles embodied in it as a milestone in the history of international law and a credit to the wisdom of the Rapporteur. It hoped that the humane attitude which inspired the draft would guide the Committee in its consideration of the article at the fourth session.

17. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) expressed his delegation's profound satisfaction with the Working Group's efforts to produce a generally acceptable text for article 42. He wished particularly to commend the Rapporteurs and the representatives of the Democratic Republic of Viet-Nam, Norway and other countries for their persistent efforts to achieve a compromise.

18. He welcomed the decision to postpone final action on the text until the fourth session and hoped that delegations would take advantage of the intervening period to study the text in the context of the articles approved at the two previous sessions.

19. Mr. ABADA (Algeria) said he regretted that article 42 had not been completed, but supported the wise decision to postpone action until the following year. His delegation had supported the second alternative in square brackets for paragraph 4 in the Working Group because it wished to see the whole of the third Geneva Convention applied to national liberation combatants or guerrillas. It had also joined in the efforts which had finally produced the draft of paragraph 4 (CDDH/III/GT/102).

20. His delegation had accepted the draft because article 42 was a key article and a fundamental element of draft Protocol I and of the new humanitarian law, and a consensus had therefore to be sought. His delegation had also accepted a compromise because it had wanted a decision to be taken at the current session, in order to complete consideration of a difficult emotional and political problem so that the Conference could work in an easier atmosphere at the fourth session.

21. He joined in the tributes paid to the Rapporteurs and wished particularly to thank the representatives of Norway and the Federal Republic of Germany for their co-operation and understanding.

22. Mr. IPSEN (Federal Republic of Germany) said that his delegation would have joined in a consensus on article 42 in its present form, in view of the importance of the article, although it still had some reservations. It continued to be of the opinion

that the basic aim of draft Protocol I, namely, the greatest possible protection of the civilian population, could be endangered by paragraph 3 of the article. That danger could, however, be reduced by the strict and honest application of the provision.

23. With regard to paragraph 4, he wished to reiterate what he had said earlier, namely that neither the internal law nor the basic view of the Federal Republic of Germany with regard to the subject of paragraph 4 created any obstacle to the full application of the third Geneva Convention of 1949. The substance of paragraph 4 could only be interpreted as meaning that the third Convention remained the strict standard for the protection referred to in that paragraph.

24. He expressed the hope that the Committee would be able to work out a generally acceptable text for article 42 at the beginning of the fourth session.

25. Mr. SOKIRKIN (Union of Soviet Socialist Republics) said that, given the circumstances, he considered that the Committee's decision on article 42 was a reasonable one and he supported it. His delegation, like others, regretted that it had proved impossible to reach a consensus at the current session but he was hopeful that it would be possible to do so at the fourth session. Only if it was not accompanied by reservations could such a consensus have real force.

26. He associated his delegation with the expressions of appreciation of the work done by the Rapporteur, who had shown tireless energy and impartiality in his endeavours to formulate a generally acceptable text. He also thanked all the delegations which had shown a spirit of co-operation and good will in working out a text which could serve as a basis for the formulation of the definitive text of article 42. In that connexion, he mentioned in particular the delegation of the Democratic Republic of Viet-Nam.

27. Article 42 was a key article in draft Protocol I and he hoped that as a result of the same spirit of co-operation and good will it would be possible to adopt it by consensus and without reservations at the beginning of the fourth session.

28. Mr. SIDKY (Observer for the Organization of African Unity), speaking at the invitation of the Chairman, said that, in view of the importance of article 42 for the development of international humanitarian law and the progress made with respect to the protection of national liberation movements, he considered that the statements made in the Committee at the current and the following meeting should be given the fullest possible treatment in the summary records. He also hoped that the Chairman would make a statement to the Press on the subject of article 42.

29. The CHAIRMAN said that the summary records of the meetings would reflect the Committee's deliberations adequately. He himself was not competent to hold a Press conference; perhaps the Rapporteur could do so.

30. Mr. ALDRICH (United States of America), Rapporteur, said that he would be unable to do so, since he had to prepare the section of the Committee's report dealing with article 42.

31. The CHAIRMAN pointed out to the observer for the Organization of African Unity that the Conference had its own Press service; he could rest assured that it would keep the Press fully informed of developments in connexion with article 42.

The meeting rose at 12.30 p.m.

SUMMARY RECORD OF THE FIFTY-FIRST MEETING

held on Tuesday, 8 June 1976, at 3.20 p.m.

Chairman: Mr. SULTAN (Egypt)

In the absence of the Chairman, Mr. Herczegh (Hungary),
Vice-Chairman, took the Chair.

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 42 - New category of prisoners of war (CDDH/1, CDDH/225 and
Corr.1, CDDH/226 and Corr.2) (continued)

1. Mr. CERDA (Argentina) said that the texts proposed by the Rapporteur for article 42 of draft Protocol I (CDDH/III/GT/100 and 102)^{1/} were the result of a real effort at compromise. He hoped that on that basis it would be possible to work out and adopt a text acceptable to all delegations. That was the feeling of the Latin American Group, as its Chairman, the representative of Venezuela, had indicated at the fiftieth meeting (CDDH/III/SR.50).
2. The aim was to strike a balance between the two basic elements of the problem, namely, on the one hand the need to allow combatants the maximum facilities, with regard for the new moral concepts that had emerged from recent conflicts, and on the other hand, the protection owed to the civilian population, which was an essential task of humanitarian law. To arrive at such a balance was no easy task. The way was beset with technical problems which had political implications.
3. Mr. ABDINE (Syrian Arab Republic) said that his delegation distinctly preferred the original ICRC text. The object was to extend the prisoner-of-war status under the 1949 Geneva Conventions to national liberation movements. Delegations should have limited their proposals to that question, without indulging in generalizations.
4. That in no way affected his delegation's esteem for the Rapporteur, who had introduced a new text designed to reconcile the various positions. None the less, the text did not entirely meet his delegation's views.

^{1/} The Rapporteur's draft of article 42, as amended by the Working Group, was later circulated as Committee III document CDDH/III/362.

5. First, paragraph 2 did not give either the need to protect combatants or to the need to protect civilians and civilian property its due. Moreover, the wording appeared to encourage violations of the rules of humanitarian law, by treating combatants who violated humanitarian rules as prisoners of war and refusing to deprive them of that status. A certain degree of protection was in fact granted to combatants violating the Geneva Conventions and the two Protocols, and that was something which his delegation was unable to accept.

6. Furthermore, such protection ran counter to other provisions of draft Protocol I and the 1949 Geneva Conventions. According to texts adopted by Committee I, grave breaches of the Protocols and Conventions were regarded as war crimes. Other texts laid upon the High Contracting Parties the obligation to investigate and repress breaches of the Conventions and Protocols. If, however, the proposed article 42 were applied to the letter, the other texts would be stripped of all value. If prisoner-of-war status was granted to combatants violating the Conventions and the Protocols, that would help to encourage breaches and restrict the possibility of bringing those responsible to book.

7. Secondly, conditional clauses were not suitable for a legal text. In paragraph 4, for instance, the word "If" should be deleted and more appropriate wording used. It might perhaps be better to say "A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in".

8. Thirdly, his delegation was in favour of the second alternative in paragraph 4, which would give wider protection.

9. Finally, the proposed article 42 was in fact very long. It would be better to make it shorter, by deleting paragraphs 6, 7 and 8, for example, which merely confirmed provisions already laid down by existing law.

10. For all those reasons, his delegation was not in any way dissatisfied that the adoption of article 42 was to be referred to the fourth session of the Conference.

11. Mr. AL SUGAIR (Saudi Arabia) said that his delegation had followed the debate on article 42 with interest. It had participated in the discussions of the Working Group which had made an effort to draft a text acceptable to all. He believed, however, that the article needed to be examined more thoroughly. The proposal not to take any decision at the current session was a wise one and his delegation was in favour of referring article 42 to the fourth session of the Conference.

12. Mr. CRETU (Romania) paid a tribute to the efficiency, wisdom and impartiality of the Rapporteur. The Working Group had made considerable progress towards solving the problem of new categories of prisoners of war, and the present text of article 42 had much to recommend it. In his view, however, the final version should correspond more exactly to the facts of the modern world; combatants who were members of national liberation or resistance movements should be given greater protection without restrictions likely to place them at a disadvantage in relation to other combatants. He hoped that at its fourth session the Conference would arrive at a consensus on a text that would be more favourable to those categories of combatants.

13. Mr. AL-MOUSSA (Kuwait) said, that while he approved of the principle underlying the present text of article 42, he thought it would be premature to adopt the final version at the current session, despite the valuable work of the Committee and the Working Group. Since more than forty amendments had been submitted it was not surprising that the Committee had been unable to reach a conclusion. He congratulated both Rapporteurs.

The meeting rose at 3.45 p.m.

SUMMARY RECORD OF THE FIFTY-SECOND MEETING

held on Wednesday, 9 June 1976, at 10.30 a.m.

Chairman: Mr. SULTAN (Egypt)

ADOPTION OF THE REPORT OF COMMITTEE III (CDDH/III/361)

1. Mr. COMBE (Legal Secretary) drew the Committee's attention to certain corrections that should be made in the draft report (CDDH/III/361): the word "second" in the first sentence of paragraph 13 should be replaced by "third"; paragraph 47 should include a reference to the amendment by Austria and Belgium in document CDDH/III/307, together with a foot-note to the effect that that amendment had been submitted in connexion with article 65 of draft Protocol I. The following amendments should be made in the French text of paragraph 49: the word "doit" in the eleventh line should be replaced by "devrait" and the word "ainsi" should be inserted before "réglé" in the same line, while the word "absolue" should be inserted after "impossibilit " in the twelfth line.

2. Mr. ALDRICH (United States of America), Rapporteur, said that the report had been prepared jointly by Mr. Baxter and himself, each dealing with the topics with which they had been concerned in the Working Group. He suggested that the most expeditious way to deal with the report would be to consider the introduction first, then each article in turn in the order in which they appeared in the report. A few points had been raised with him informally and he would refer to them in connexion with the articles to which they related.

The Rapporteur's suggestion was approved.

I. Introduction

Paragraphs 1 to 13

3. Mr. MENCER (Czechoslovakia) said that in his view an additional sentence should be inserted at the end of paragraph 13 to the effect that the Committee should also consider the question of reprisals.

4. Mr. ALDRICH (United States of America), Rapporteur, said that that suggestion was quite appropriate. Committee I had asked for Committee III's views on the subject; in that connexion, he referred to document CDDH/I/320/Rev.2.

5. Mr. GENOT (Belgium) said that he considered that the point made by the representative of Czechoslovakia was adequately reflected in paragraph 80 of the report.

6. Mr. ALDRICH (United States of America), Rapporteur, said that he thought it appropriate to indicate in paragraph 13 that the question of reprisals had still to be considered, despite the fact that it was dealt with in paragraph 80.

It was so agreed.

Paragraphs 1 to 13 were adopted, subject to the above-mentioned addition to paragraph 13.

II. Report on the articles adopted by the Committee

Draft Protocol I

Article 35 - Prohibition of Perfidy

Paragraphs 14 to 19

7. Mr. BARILE (Italy) said that he was not happy with the wording of the second part of paragraph 15 and, in particular, with the English text which did not conform to the French text. He preferred the French text but would like some changes to be made in that too. He suggested a text along the following lines for the fourth sentence: "The Committee agreed that confidence could be neither an abstract confidence, nor a confidence linked to rules which differed from the rules of international law, and that one must speak of confidence in something concrete."

8. Mr. ALDRICH (United States of America), Rapporteur, said that he was prepared to amend the English text of the fourth sentence to read: "The Committee agreed that confidence could not be an abstract confidence but must be tied to something more precise."

9. The CHAIRMAN suggested that the representative of Italy should get in touch with the Rapporteur and work out an agreed text.

It was so agreed.

10. Sir David HUGHES-MORGAN (United Kingdom), referring to paragraph 18, said that the fourth sentence did not reflect what had actually occurred. As his own delegation and a number of others had expressed reservations on that point, he did not think it was correct to say that it was the understanding of the whole Committee. He would prefer the sentence to read: "Ultimately, the Committee agreed to accept paragraph 1 (c), the Rapporteur giving an undertaking that he would include a sentence to that effect in his next draft of article 42; some delegations expressed their reservations on this point."
11. Mr. ALDRICH (United States of America), Rapporteur, said that he could not agree with the United Kingdom representative. He thought it had been the understanding in the Committee that the Rapporteur would include a sentence in his next draft of article 42 to the effect that some delegations wished to make it clear that they were not committing themselves to support such a sentence. The wording he had used did not commit any delegation to anything. It was merely a question of noting that that would happen and it was now past history, as the sentence was in the draft before the Committee and would be at the next session also. The statement in the draft report expressed the state of events without commitment by any delegation about the sentence in question.
12. Sir David HUGHES-MORGAN (United Kingdom) withdrew his suggestion, but said that if anyone suggested that the Committee was bound to accept such a sentence in any new draft he would ask that the discussion which had taken place at the current meeting should be borne in mind.
13. Replying to a point raised by Mrs. DARIIMAA (Mongolia), in connexion with paragraph 18, Mr. ALDRICH (United States of America), Rapporteur, said that in English it was perfectly correct to speak of United Nations signs, emblems or uniforms. It would sound strange to refer to the United Nations Organization and he would prefer not to alter the language of article 35, which had already been adopted by the Committee.
14. Mrs. DARIIMAA (Mongolia) said that she accepted the Rapporteur's explanation.
15. Mr. MENCER (Czechoslovakia), reverting to the Italian representative's comments on paragraph 15, said that the sentence following that which the Italian representative had proposed should be amended. It referred to "international law applicable in armed conflicts" and then defined that phrase. He thought that the definition was too limited. Moreover, the

words "the laws governing the conduct of armed conflict" in the English and "el conjunto de leyes que rigen la forma de conducir los conflictos armados" in Spanish were not synonymous. He did not like the word "laws" and suggested that, instead of the definition, the words "international law applicable in armed conflicts" might be replaced by "international rules governing the armed conflicts in question" (règles internationales relatives aux conflits armés en question).

16. Mr. ALDRICH (United States of America), Rapporteur, said that it would be desirable to define at some single point, presumably in the article on definitions, the phrase "international law applicable in armed conflicts". That suggestion had indeed been made elsewhere in the report. He did not think the phrase suggested by the representative of Czechoslovakia meant precisely the same thing, for in his opinion it went considerably beyond the phrase "international law applicable in armed conflicts". He suggested that the wording which he had used should be left as it was and that the Drafting Committee should be asked to define the phrase and insert it in the article on definitions.

17. Mr. LOPEZ-IMIZCOZ (Argentina), referring to the Spanish text of paragraph 15, said that the word "confianza" was not the correct translation of "confidence". The corresponding French text spoke of "bonne foi" and the Spanish text should correctly refer to "buena fe".

18. Mr. BARILE (Italy) endorsed the remarks made by the representative of Czechoslovakia with regard to paragraph 15. The expression "the laws governing the conduct of armed conflict" was too restrictive. He would prefer something along the lines of "the rules concerning the armed conflict". He agreed with the Rapporteur that the term "international law applicable in armed conflicts" should be defined.

19. Mr. ALDRICH (United States of America), Rapporteur, wondered whether representatives were trying to revise the text of article 35. In his view, the expression "the laws governing the conduct of armed conflict" was correct and it would not be proper to replace it by "the rules of international law concerning the conflict". It would not be possible to broaden the definition of international law without changing the meaning of the article, which would be dangerous.

20. Mr. GENOT (Belgium) supported the Rapporteur. The matter was, in any case, dealt with in paragraph 43, so that no change was necessary.

21. Mr. SOKIRKIN (Union of Soviet Socialist Republics) pointed out that the word "consensus" was missing from the Russian text of paragraph 19.

22. The CHAIRMAN said that account would be taken of the comments made by the Argentine and USSR representatives.

Paragraphs 14 to 19 as amended, were adopted.

Article 38 - Quarter

Article 38 bis - Safeguard of an enemy hors de combat

Paragraphs 20 to 26

23. Mr. CASTREN (Finland) said that, in the second sentence of paragraph 25 of the English and Spanish texts, "Committee I" should be replaced by "Committee II" as in the French text.

Paragraphs 20 to 26, as amended, were adopted.

Article 39 - Aircraft occupants

Paragraphs 27 to 31

24. Mr. SIDKY (Observer for the Organization of African Unity), speaking at the invitation of the Chairman, said that paragraph 29 did not reflect the discussion that had taken place. He also thought that, in the reference to the closeness of the vote, a value judgement was being expressed. In addition, the comment that article 39 might have to be reconsidered at the fourth session was unnecessary, since the whole of the Committee's work would in any case be reviewed at the plenary meetings at that session. He therefore suggested that in paragraph 29 a sentence should be inserted after the word "aircraft" beginning with the words "As regards the second problem, some delegations argued that ..." and continuing with the last two sentences of paragraph 29. That would be followed by "The problem was resolved by vote ..." and the remainder of that sentence. The reference to the closeness of the vote should be deleted.

25. Mr. ALDRICH (United States of America), Rapporteur, said that it would be easy enough to reorganize the paragraph in the way suggested, but the real point of importance was the recognition of the fact that article 39 might need to be reconsidered; that should not be omitted. The Committee was not

deciding that the article should be reconsidered but merely noting that many delegations felt that such reconsideration would be desirable. It was obvious that no reference to reconsideration at the plenary meetings at the fourth session was intended.

26. Mr. ABDINE (Syrian Arab Republic) said that the text of paragraph 29 reflected the point of view of certain delegations only, on a matter which had been decided by a vote. It would be better, therefore, to say that the article might possibly be reconsidered at the fourth session or that some delegations expressed the view that such reconsideration was needed. In addition, he proposed that the words "Le Groupe de travail n'a pas pu trancher" at the end of paragraph 29 of the French text should be deleted.

27. The CHAIRMAN, referring to the Syrian representative's second point, said that the sentence appeared only in the French text and would automatically be deleted.

28. Mr. ALDRICH (United States of America), Rapporteur, said that he found the change proposed in the Syrian representative's first suggestion quite unsatisfactory. Article 39 clearly needed to be reconsidered, although the report merely stated that it might need reconsideration.

29. Mr. MOLINA-LANDAETA (Venezuela) said that the last two sentences of paragraph 29 appeared to show a conflict only between the practical and the humanitarian arguments with regard to attacks on airmen descending by parachute. It should also be stated that some delegations had abstained from voting for reasons of a legal nature.

30. Mrs. DARIIMAA (Mongolia) suggested that the reference to article 39 which appeared in the French text of paragraph 28 should be inserted in the English, Russian and Spanish texts.

31. Mr. SOKIRKIN (Union of Soviet Socialist Republics), referring to paragraph 29, said that the question of a vote was important, since a legal document was being drawn up which would be adopted by delegations and ratified by Parliaments. It would be wise, therefore, to accept the Rapporteur's wording, so that the problem could be reconsidered at the fourth session and decided by the large majority - or consensus - which would ensure implementation. At the present stage there was no guarantee that if the provision were included it would be approved by a large majority.

32. Mr. CRUCHO de ALMEIDA (Portugal) said that, even if the words "the Committee" in the fourth sentence of paragraph 29 were replaced by the words "certain delegations", the rest of the sentence should remain. It was not a value judgement, but a close vote, with a large number of abstentions. The sentence reflected what had happened.

33. Mr. ABADA (Algeria) said that he supported the proposal by the observer for the Organization of African Unity for the rearrangement of paragraph 29 and the deletion of the sentence beginning "In view of the relative closeness of that vote ...". Otherwise it would imply that the question had not been settled by vote and needed reconsideration. After hearing some speakers, in particular the representative of Portugal, he was prepared to agree that the words concerning the relative closeness of the vote could be retained, but it should not be said that the Committee recognized that the question might need to be reconsidered. Some less definite wording should be used, such as: "it was recognized ...".

34. The CHAIRMAN asked the Syrian representative if he would accept the wording proposed by the Algerian representative.

35. Mr. ABDINE (Syrian Arab Republic) replied in the negative. He would prefer the wording "Some delegations ...".

36. Mr. ALDRICH (United States of America), Rapporteur, said that, in the light of the discussion, the best course would seem to be to redraft the third and fourth sentences in the following way: "As regards the second problem," followed by the last two sentences of the paragraph; the words "The problem" would be inserted before the words "was resolved" and the words "the Committee recognized" replaced by "some representatives expressed the view"; finally, the following words would be added at the end of paragraph 29: "Other representatives abstained for reasons they considered to be of a legal nature."

It was so agreed.

Paragraphs 27 to 31, as amended, were adopted.

Article 40 - Independent missions

Paragraphs 32 to 40

37. Mr. ALDRICH (United States of America), Rapporteur, drew attention to an amendment he had omitted to include, namely, the addition of the following words at the end of paragraph 35: "It

should further be mentioned that the Committee did not discuss espionage in sea warfare."

38. Mrs. DARIIMAA (Mongolia) requested that the reference to paragraph 40 which appeared in the French version of paragraph 33 should be included in the English, Russian and Spanish versions.

39. Mr. ALDRICH (United States of America), Rapporteur, said that the words "this article" in the English text, which was the original, were perfectly clear and he would be reluctant to make any change to conform with a translation. If the number of the article was necessary in the Russian text, the translators would see to it.

40. Mr. COMBE (Legal Secretary) said that the normal French version would be "le présent article". It would be better with the number, but the matter was not important enough for an amendment.

41. Mrs. DARIIMAA (Mongolia) accepted the explanations.

Paragraphs 32 to 40, as amended, were adopted.

Article 41 - Organization and discipline

Paragraphs 41 to 45

Paragraphs 41 to 45 were adopted.

Article 42 bis (b) - Protection of persons taking part in hostilities

Paragraphs 46 to 52

42. Mr. SABEL (Israel) said that there were two distinct proposals for a new article 42 bis: one referred to in paragraph 46 as article 42 bis (a) and the other referred to in paragraph 47 as article 42 bis (b). The discussions in the Working Group had been on the latter article only. He suggested that that should be reflected in paragraph 52 by inserting the title in brackets after the article: "(Protection of persons taking part in hostilities)".

It was so agreed.

Paragraphs 46 to 52, as amended, were adopted.

Article 64 bis - Reunion of dispersed families

Paragraphs 53 to 55

Paragraphs 53 to 55 were adopted.

Draft Protocol II

Article 20 - Prohibition of unnecessary injury

Paragraphs 56 to 59

Paragraphs 56 to 59 were adopted.

Article 20 bis - Protection of cultural objects and of places of worship

Paragraphs 60 to 63

Paragraphs 60 to 63 were adopted.

Article 21 - Prohibition of perfidy

Paragraphs 64 and 65

Paragraphs 64 and 65 were adopted.

Article 22 - Quarter

Paragraphs 66 to 68

Paragraphs 66 to 68 were adopted.

Article 22 bis - Safeguard of an enemy hors de combat

Paragraphs 69 to 72

Paragraphs 69 to 72 were adopted.

Article 23 - Recognized signs

Paragraphs 73 to 76

Paragraphs 73 to 76 were adopted.

Article 27 - Protection of objects indispensable to the survival of the civilian population

Paragraphs 77 to 82

Paragraphs 77 to 82 were adopted.

The report, as a whole, as amended (CDDH/III/361) was adopted by consensus.

The meeting rose at 11.45 a.m.

SUMMARY RECORD OF THE FIFTY-THIRD (CLOSING) MEETING

held on Thursday, 10 June 1976, at 10.20 a.m.

Chairman: Mr. SULTAN (Egypt)

ADOPTION OF ADDENDA TO THE REPORT OF COMMITTEE III
(CDDH/III/361/Add.2 and CDDH/361/Add.1)

Article 42 - New category of prisoners of war (CDDH/III/361/Add.2)

1. Mr. ALDRICH (United States of America), Rapporteur, introducing the report on article 42, said that it differed from other reports in that it was not reporting on an article that had been adopted but on a draft article which would be decided on at the beginning of the fourth session. He had had in mind, and a number of representatives had suggested, that it would help Governments in considering article 42 if they could be provided with an account of its history and purpose. The Committee's report at the fourth session could no doubt provide more details on the meaning of certain phrases, but document CDDH/III/361/Add.2 represented the most that could be put forward at the present time.
2. He drew attention to the following corrections: the foot-note at the end of page 1 should be added to the end of the second paragraph on that page; and in the last line of the last paragraph on page 2, the word "he" should be replaced by "an armed combatant".
3. The CHAIRMAN suggested that the report should be considered page by page.

Page 1

Page 1, as amended, was adopted.

Page 2

4. Mr. FELBER (German Democratic Republic) suggested that the last sentence of the third paragraph should be redrafted to read: "Therefore, it seemed possible to elaborate paragraph 2 as it stands now and to leave the issue of status ...".

It was so agreed.

5. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) suggested that the words "in the national liberation movements" should be inserted after the word "situations" in the fourth line of the last paragraph. The words were used in connexion with article 41 in the Working Group's report (CDDH/III/338, page 8).
6. Mr. ALDRICH (United States of America), Rapporteur, said it would be difficult in a report at the present time to define the situations where a combatant could not distinguish himself. The amendment was a small one but if accepted it might attract others. The purpose of the paragraph was to make it clear that there could be unusual, extraordinary situations where a combatant could not distinguish himself without destroying his chances of success. It would be raising a point of substance not dealt with by the Committee to imply that that could not occur in occupied territory and he therefore felt that it was a matter which should be left over until the fourth session. To reopen the matter now would provide an opportunity to limit the provision to national liberation movements.
7. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) said he would agree to the insertion of a reference to resistance movements and to a postponement to the fourth session, on the understanding that the question would be thoroughly studied at that session.
8. Mr. ALDRICH (United States of America), Rapporteur, said that he could not imagine the situation occurring except in occupied territories or in wars of liberation. If the Working Group agreed, he would accept the insertion after the word "situations" of the words: "particularly in wars of national liberation or in occupied territory", or he would agree to the omission of the word "particularly".
9. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) said that the second alternative would be more in keeping with paragraph 7 of article 42 as drafted by the Working Group (CDDH/III/362).
10. Mr. ALDRICH (United States of America), Rapporteur, said that his only reason for wishing to include the word "particularly" was to avoid limiting the provision to the two situations in question. He asked whether the Working Group would accept the wording: "in wars of national liberation and in occupied territory". The words "resistance movements" would not cover all the people concerned.
11. Mr. LONGVA (Norway) said that he would like the word "particularly" to be retained for the time being. The situation might be clearer at the fourth session, but he wished to give the matter further thought. He would accept the rest of the phrase but appealed to the Ukrainian representative to accept a compromise on the word in question.

12. Mr. GILL (Ireland) appealed to the Ukrainian representative not to press his amendment. There was a danger that it might reopen the whole debate on article 42. He seemed to be making a pre-emptive strike for the fourth session which could not be allowed without the whole point being argued again. He himself was satisfied that the text of article 42 should be reconsidered at the fourth session in a co-operative spirit, but there would be no hope if the text was subtly altered at the current session.

13. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) said that he would agree to the Norwegian proposal. With regard to the Irish representative's appeal, it seemed to him that the amendment corresponded in principle to what had always been said concerning article 42. The whole point of his amendment was to prevent any change in the practice set forth in paragraph 7.

It was agreed that the words "particularly in wars of national liberation and in occupied territories" should be inserted after the word "situation" in the last paragraph on page 2.

14. Mr. EATON (United Kingdom) suggested that in the third paragraph on page 2 the word "only" in the fourth line should appear after instead of before "article 85".

15. Mr. ALDRICH (United States of America), Rapporteur, said that the position of the word was intentional, the purpose being to indicate that article 85 was the only article that covered the status of a prisoner of war after final conviction. It was true, however, that article 85 covered only the period in question.

16. Mr. ABDINE (Syrian Arab Republic) said that paragraph 2 of article 42 created an imbalance between protection against violation of the rules of international law applicable in armed conflicts and the protection of civilians, to the detriment of civilians and their property. That was not acceptable to his delegation. The paragraph encouraged violation of international humanitarian law. More important, the text contradicted other texts in the draft Protocols and the Geneva Conventions which imposed a duty on States to prosecute such violations. If prisoner-of-war status was given to persons violating the Conventions, States could not prosecute them. The text also contradicted provisions adopted by Committee I stipulating that serious violation of the Conventions was a war crime. Surely paragraph 2 was not intended to protect war criminals.

17. Mr. ALDRICH (United States of America), Rapporteur, said that there were no grounds for suggesting that a prisoner of war was immune from punishment: a prisoner of war could and should be tried and punished and he was sure the Syrian representative would not want the status of prisoner of war to carry immunity from punishment. The position could be made clear in the summary record, but he could not change the paragraph.

18. Mr. ABDINE (Syrian Arab Republic) repeated his contention that war criminals should not be protected by being given prisoner-of-war status. A possible solution to the problem would be to include a statement to the effect that a combatant who had violated the provisions of Protocol I and the Geneva Conventions, while he might be granted prisoner-of-war status, could nevertheless be prosecuted if he had committed a serious offence against them.

19. Mr. ALDRICH (United States of America), Rapporteur, said that the Syrian representative's remarks were based on a misunderstanding, since a prisoner of war was not immune from trial for war crimes. He would be happy to explain the point in private to the representative of Syria.

20. In reply to a question from the CHAIRMAN, Mr. ABDINE (Syrian Arab Republic) said that he was willing to meet the Rapporteur privately to settle the matter.

21. Mr. VAN LUU (Democratic Republic of Viet-Nam), referring to the tenth line of the third paragraph in the French text, said that the expression "enemy personnel" ("personnel ennemi") was too vague. In addition, it had been agreed during the discussions in the Working Group that the term "military deployment" ("déploiement militaire") should be clarified by the addition of an explanatory phrase to the effect that that term meant the taking up of firing position.

22. Mr. ALDRICH (United States of America), Rapporteur, explained that the expression "enemy personnel" meant members of the armed forces, but could also include some other persons such as civilian guards at military installations. It was better to use a rather vague term. With regard to deployment, he did not think that it was possible to define the term "military deployment" at the present stage and he hoped that the representative of the Democratic Republic of Viet-Nam would be willing to leave the matter of definition until the fourth session.

23. Mr. VAN LUU (Democratic Republic of Viet-Nam) said that he accepted that suggestion.

24. Mr. de GABORY (France) pointed out a discrepancy between the French and English texts: the words "is visible to the adversary" in the English text had been translated by "à la vue des forces armées", whereas the correct translation was "à la vue de l'adversaire".

Page 2 as amended, was adopted.

Page 3

25. Mr. LOPEZ IMIZCOZ (Argentina) suggested that the following new sentence should be inserted after the word "participate" in the fourth line of the English text of page 3: "in that connexion, it is expected that the display of such weapons would serve to identify him as a combatant at that time" ("Al respecto se espera que la exhibición de tales armas sirva para caracterizarlo como combatiente en esos momentos"). His delegation had emphasized, in the Working Group, that that was the meaning to be given to the text.

26. Mr. ALDRICH (United States of America), Rapporteur, said that he had no difficulty in accepting that proposal, but simpler wording could be used in English, e.g., "The purpose of this requirement is to identify the individual as a combatant".

27. Mr. FELBER (German Democratic Republic) said that he thought that the third paragraph on page 3 should be redrafted, since it provided a mixture of explanations relating to paragraph 4 of article 42 and conclusions regarding that article as a whole. He proposed that it should be reworded to read: "Paragraph 4, which was suggested late in the third session of the Conference, was considered to be the best basis for a compromise". The sentence beginning "As a result" should be replaced simply by "It obtained a considerable degree of support". The last sentence of the paragraph should be placed at the very end of the report.

28. Mr. ALDRICH (United States of America), Rapporteur, said that he accepted the proposal of the representative of the German Democratic Republic. The two sentences proposed could form the beginning of the following paragraph, instead of remaining as a separate paragraph.

29. Mr. VAN LUU (Democratic Republic of Viet-Nam) drew attention to an error in the ninth line of the French text, where the words "absence de destruction" should read "absence de distinction".

30. It had been decided, at the final meeting of the Working Group, that documents CDDH/III/GT/100 and CDDH/III/GT/102 should both be circulated so as to provide a basis for preparations for the fourth session. The text of the third paragraph on page 3 of the document under consideration was a kind of fusion of those two texts, so that the original text of paragraph 4 of draft article 42 had been lost.

31. Mr. ALDRICH (United States of America), Rapporteur, replied that the Committee had decided that the Working Group's proposal (circulated under symbol CDDH/III/362) should be placed before it at the fourth session; it had not been able to adopt it at the present session, but would at least be able to consider it at the beginning of the fourth session.

32. Mr. VAN LUU (Democratic Republic of Viet-Nam) maintained that the two Working Group documents should be circulated.

33. The CHAIRMAN said that that was not what had been decided. If the draft article, at the fourth session, was referred back to the Working Group, all the relevant documents would be available.

Page 3, as amended, was adopted.

Page 4

34. Mr. de GABORY (France), referring to the last paragraph of the French text, said that the expression "le meilleur élargissement possible" was not acceptable, since it implied a value judgement not present in the English text ("the greatest possible increase"). The correct translation was "le plus grand accroissement possible". Moreover, the correct translation of the English expression "at the cost of" was not "aux depens de" but "au prix de".

35. Mr. SABEL (Israel), referring to the "savings clause" paragraph on page 4, asked whether it was necessary to give examples.

36. Mr. ALDRICH (United States of America), Rapporteur, explained that the aim had been to make the paragraph more intelligible to the ordinary reader. An alternative would be to use a form of words such as "to take only two examples", that would show that there were others.

37. Mr. SABEL (Israel) said that, from the legal point of view, the paragraph would be better as a bald statement, since the meaning of Article 4 of the third Geneva Convention of 1949 was perfectly clear.

38. Mr. SOKIRKIN (Union of Soviet Socialist Republics) said that the last paragraph on page 4 created the impression that protection of guerrilla combatants could be increased only at the cost of loss of protection to the civilian population. That was not an accurate reflection of the situation, since some delegations considered that it was possible to increase the first type of protection while maintaining the second type. He therefore suggested that the Rapporteur should rephrase the paragraph so that it reflected that point of view also.

39. Mr. ALDRICH (United States of America), Rapporteur, said that he thought that it had been recognized that the granting of greater protection to combatants dressed as civilians would inevitably increase the risks to which the civilian population was exposed. To pretend otherwise would, in his view, be to indulge in self-deception.

40. Mr. SOKIRKIN (Union of Soviet Socialist Republics) said that the Working Group had endeavoured to identify the sort of protection that could be granted to guerrilla combatants without increasing the risks to which the civilian population was exposed. It had not succeeded in doing so and the issue would have to be taken up again at the fourth session of the Conference. The statement in the last paragraph on page 4 that protection of guerrilla combatants was possible only at the cost of some loss of protection to the civilian population was not entirely accurate.

41. Mr. ALDRICH (United States of America), Rapporteur, suggested that the concern of the USSR representative might be met if the following changes were made in the paragraph: in the third line the word "perhaps" would be inserted after the word "combatants"; two sentences along the following lines would be added after the first sentence: "Some delegations stressed that one could not have the one without the other. Other delegations disagreed and felt that adequate protection could be ensured to the civilian population"; the first part of the second sentence would be altered to read "In any event, the negotiation of the precise tradeoffs between them ...".

42. Mr. SOKIRKIN (Union of Soviet Socialist Republics) said that a version along the lines suggested by the Rapporteur would be acceptable to his delegation.

43. Mr. VAN LUU (Democratic Republic of Viet-Nam) considered that the first sentence of the paragraph should be redrafted to permit of the inclusion of a phrase such as "while ensuring adequate protection of the civilian population".

44. Mr. ALDRICH (United States of America), Rapporteur, said that he would be unwilling to alter the basic structure of the paragraph, but it should be possible, without doing so, to find wording that would reflect both points of view. He would be happy to hold informal consultations with the representative of the Democratic Republic of Viet-Nam on the matter.

45. Mr. LONGVA (Norway), clarifying the statement he had made on the subject at the fiftieth meeting (CDDH/III/SR.50), said that his delegation realized that certain methods of combat used in guerrilla warfare increased the risks to which the civilian population was exposed. Since such methods were used, however, it considered that to increase the degree of protection granted to guerrilla combatants would have the effect of reducing the risk to civilians.

46. Mr. BELOUSOV (Ukrainian Soviet Socialist Republic) suggested, as an alternative to the text suggested by the Rapporteur, that the first part of the first sentence should be altered to read: "In summary, it may be stated that in the view of many delegations article 42 was recognized as a compromise ..." and that an additional sentence reading "Other delegations disagreed" should be inserted between the first and second sentences.

47. Mr. de GABORY (France) welcomed the suggestion by the Ukrainian representative. His delegation would not be in favour of inserting the word "perhaps" after the word "combatants", as suggested by the Rapporteur.

48. Mr. ALDRICH (United States of America), Rapporteur, said that the first sentence ought to be acceptable to all delegations; he doubted that that would be the case if the word "perhaps" was not inserted. The two new sentences which he had suggested would reflect, respectively, the two points of view expressed on the subject.

49. The CHAIRMAN suggested that the Rapporteur should hold informal consultations with the delegations concerned with a view to producing a generally acceptable text.

It was so agreed.

Page 4 was adopted subject to the redrafting of the last paragraph.

Document CDDH/III/361/Add.2 as a whole, as amended, was adopted.

New article 42 quater - Mercenaries (CDDH/III/361/Add.1)

50. Mr. BAXTER (United States of America), Rapporteur, said that in preparing document CDDH/III/361/Add.1 he had tried to identify the main lines of agreement and disagreement and to crystallize the issues involved, in order to facilitate the work of the Committee and its Working Group at the fourth session of the Conference.

Page 1

Page 1 was adopted.

Page 2

51. Mr. LOPEZ IMIZCOZ (Argentina) said that the word "explosión" should be replaced by the word "exposición" in the first line of the Spanish text of page 2.

Page 2, as amended, was adopted.

Pages 3 and 4

Pages 3 and 4 were adopted.

Document CDDH/III/361/Add.1 as a whole, as amended, was adopted.

CLOSURE OF THE SESSION

52. After the usual exchange of courtesies, in which the CHAIRMAN, Mr. AJAYI (Nigeria), speaking on behalf of the African Group, Mr. MOLINA-LANDAETA (Venezuela), speaking on behalf of the Latin American Group, and Mr. MENCER (Czechoslovakia), speaking on behalf of the group of Socialist countries, took part, the CHAIRMAN declared closed the third session of Committee III.

The meeting rose at 11.55 a.m.

FOURTH SESSION

(Geneva, 17 March - 10 June 1977)

COMMITTEE III

SUMMARY RECORDS OF THE FIFTY-FOURTH TO SIXTIETH MEETINGS

held at the International Conference Centre, Geneva,
from 15 April to 13 May 1977

Chairman: Mr. H. SULTAN (Egypt)

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

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SUMMARY RECORD OF THE FIFTY-FOURTH (OPENING) MEETING

held on Friday, 15 April 1977, at 10.15 a.m.

Chairman: Mr. H. SULTAN (Egypt)

ORGANIZATION OF WORK

1. The CHAIRMAN welcomed all those who had taken part in the Committee's work previously, and also those who were participating in it for the first time. He informed the Committee that its officers were the same as at the third session; the two Vice-Chairmen were Mr. G. Herczegh (Hungary), and Mr. D. Erdembileg (Mongolia); the Rapporteur was Mr. G. Aldrich (United States of America). Two new legal secretaries, Miss A.M. Birchler and Mr. B. Gianoli, were available to the Committee and to all representatives. The procedure would be the same as at the previous sessions.

2. Mr. ALDRICH (United States of America), Rapporteur, stated that the Working Group would be continuing its consideration of all pending texts, except for Article 42 on which it would be necessary for the Committee to take a decision.

3. He drew members' attention to the report of Committee III at the third session (CDDH/236/Rev.1), particularly paragraph 13. At the end of the third session it had still remained for the Working Group to consider Articles 42, 63, 64 and 65 to 69 of draft Protocol I, and Articles 21 and 32 of draft Protocol II, together with a proposal concerning the general principles for the protection of oil and of installations for its extraction, storage, transport and refining (CDDH/III/GT/62/Rev.1), submitted by the Arab group; however, that group had decided to withdraw its proposal, which therefore no longer called for consideration by the Committee.

4. In addition there remained a proposal concerning aggression and non-discrimination (CDDH/III/GT/42) (reproduced in document CDDH/III/284), and a proposal concerning mercenaries (CDDH/III/GT/82). The Committee would also be continuing its consideration of reprisals, as requested in document CDDH/I/320/Rev.2. One item was not mentioned in CDDH/236/Rev.1, paragraph 13, namely Article 49 concerning works and installations containing dangerous forces. The Rapporteur wished to sound out opinion on that matter, and to that end proposed that all distinctive emblems used in accordance with the Geneva Conventions of 1949 should be considered by a Working Group which might also include some members of Committee II.

5. As for the work programme of the Working Group, the Rapporteur considered that draft Article 42 quater concerning mercenaries should be an early concern. The representative of Nigeria, however, who had submitted the draft article, felt that it would be better to defer its consideration in order to give delegations an opportunity to work together with a view to a better solution.

6. In conclusion, he proposed that the Working Group tackle, initially, the most difficult articles, such as Article 65; once agreement on such items could be reached, it would prove easier to deal with other pending articles. The group might meet in the early afternoon.

7. The CHAIRMAN observed that it had been stated at the Committee's fifty-third meeting that Article 42 would be the subject of a decision at the beginning of the fourth session (CDDH/III/362). Consequently, he suggested that a vote be taken on that draft article at the Committee's fifty-fifth meeting, on Monday, 18 April.

8. Mr. MILLER (Canada) wished to comment on the procedure to be followed in dealing with Article 42. The Chairman intended to ask the Committee to come to a decision on Monday, 18 April. Committee III's report (CDDH/236/Rev.1), however, rightly concluded its paragraph 94 with the statement that: "It was decided by the Committee that final action on Article 42 as a whole should be deferred until the fourth session of the Conference in 1977 and that draft Article 42 would have priority on its agenda at the beginning of the fourth session, for prompt adoption, if possible, or for further modification by the Working Group, if necessary."

9. He was bound to confess that if the Committee was set on reaching a decision so soon, his delegation would be in a quandary as it was awaiting fresh instructions which, he hoped, would enable it to state its position more clearly.

10. He added, however, that he had no intention of re-opening the discussion on the substance of the article.

11. The CHAIRMAN pointed out to the representative of Canada that he had only quoted the last sentence of paragraph 94 (CDDH/236/Rev.1). There had, in fact, been an agreement in principle. Article 42 had been discussed at length; over fifty speakers had expressed their views; the Secretariat had issued a document containing in extenso all the speeches concerning Article 42; a Working Group had held twenty-five meetings on the subject of that article, and he was not anxious to call the Committee's terms of reference into question. He was, however, prepared to defer the vote until Tuesday, 19 April, at 10 a.m.

12. Sir David HUGHES-MORGAN (United Kingdom) said that he shared the views of the representative of Canada. In his opinion, twenty-four hours would not be sufficient to make contacts. The question had been studied by all the Governments, but still more time would be necessary to enable the various interpretations given to the article to be discussed. He would prefer that the vote on Article 42 should be postponed until Friday, 22 April.

13. Mr. DIXIT (India) said that he would like to see all the difficulties smoothed out. For that reason he also would be glad if members could have more time at their disposal for consultations. The date of 19 April seemed to him too close and he asked for a longer delay.

14. Mr. ABADA (Algeria) agreed with the Chairman that a decision on Article 42 should be taken as soon as possible. It was indeed one of the most important articles, but at the same time it was one of the texts which had been most carefully analysed during and in between the sessions. Further, adoption by consensus was more in accordance with the spirit in which the Conference worked, and it would be preferable, as far as possible, to avoid having to take a vote.

15. It was not for him to express an opinion on the request for adjournment made by some representatives, but he noted that they had undertaken not to reopen the discussion. At the third session, Article 42 had been studied by the Committee, by the Working Group and further by a small group of men of good will, meeting unofficially, who had made great efforts to reach a compromise and had always remained open to all suggestions. If the Committee postponed the adoption of Article 42, it should be fully aware of its responsibilities and of the need to continue and complete the examination of the other questions on its agenda.

16. Mr. PAOLINI (France) said that his delegation would like to hold consultations on Article 42 with other delegations and especially with delegations from countries not forming part of the same geographical group as France. As, furthermore, some representatives needed further time while they awaited instructions, he proposed that the decision on Article 42 should be deferred until Friday. He added that there was no question of re-opening the debate and that he hoped the Committee would be able to reach a consensus.

17. The CHAIRMAN once again emphasized the need to proceed directly to a vote, without any discussion.

18. Mr. BARILE (Italy) said that he shared the opinions of the Canadian, United Kingdom and French representatives and thought that an adjournment of the decision would facilitate the adoption of the text by a larger majority.

19. The CHAIRMAN said that he was anxious not to prolong the discussion on the item and suggested that, in the absence of objection, the Committee should meet on Friday, 22 April, at 10 a.m. to vote on Article 42.

It was so agreed.

The meeting rose at 11 a.m.

SUMMARY RECORD OF THE FIFTY-FIFTH MEETING

held on Friday, 22 April 1977 at 10.20 a.m.

Chairman: Mr. H. SULTAN (Egypt)

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

Draft Protocol I

Article 42 - New category of prisoners of war (CDDH/III/362)

1. The CHAIRMAN reminded members of the Committee that they would have to take a decision on Article 42 of draft Protocol I, concerning a new category of prisoners of war, proposed by the Working Group and reproduced in document CDDH/III/362. Members would be given an opportunity to explain their positions after the Committee had taken a decision.

2. The draft was essentially a compromise text, produced after two years of hard work, official and unofficial contacts and prolonged discussion and meditation. He would very much like the article to be adopted by consensus and appealed to members to show understanding and good will.

3. Mr. Meir ROSENNE (Israel) said he could not agree to the adoption of the article by consensus and requested a vote.

At the request of the representative of Algeria, a vote was taken on draft Article 42 by roll-call.

Madagascar, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Madagascar, Mali, Mauritania, Mexico, Mongolia, Morocco, Netherlands, Nigeria, Norway, Oman, Pakistan, Panama, Peru, Poland, Qatar, Republic of Korea, Romania, Saudi Arabia, Senegal, Socialist People's Libyan Arab Jamahiriya, Socialist Republic of Viet Nam, Somalia, Sri Lanka, Sudan, Sweden, Syrian Arab Republic, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Emirates, United Republic of Cameroon, United Republic of Tanzania, United States of America, Venezuela, Yugoslavia, Zaire, Afghanistan, Algeria, Austria, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, Costa Rica, Cuba, Cyprus, Czechoslovakia, Democratic People's Republic of Korea, Ecuador, Egypt, Finland, France, German Democratic Republic, Germany (Federal Republic of), Ghana, Greece, Honduras, Hungary, India, Indonesia, Iran, Ivory Coast, Jordan, Kuwait, Lebanon.

Against: Brazil, Israel.

Abstaining: New Zealand, Nicaragua, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, Uruguay, Argentina, Australia, Bolivia, Canada, Chile, Colombia, Denmark, Guatemala, Holy See, Ireland, Italy, Japan.

Article 42 (CDDH/III/362) was adopted by 66 votes to 2, with 18 abstentions.

4. The CHAIRMAN said that forty-one representatives wished to explain their votes.

Explanations of vote

5. Mr. ALDRICH (United States of America), Rapporteur, said that the preparation of the Committee's report on its work during the current session would be made easier if delegations which had their explanations of vote in writing would be good enough to let him have a copy.

6. Mr. TODORIĆ (Yugoslavia) expressed his appreciation to all the delegations which had worked hard to improve the combatant and prisoner-of-war status of members of liberation movements fighting for the sovereignty, territorial integrity and political independence of their countries.

7. Thus, it was clear that the combatant would retain his status as such when he carried his arms openly during military operations and his status as prisoner of war when he fell into the power of an adverse party. That distinction would not only make it easier to identify a combatant but would help to provide effective protection for the civilian population.

8. The compromise text considerably broadened the category of persons entitled to the status of prisoner of war but also confirmed the duty of every combatant to observe the rules of international law.

9. His delegation therefore felt that Article 42 should not be the subject of reservations. Its provisions were clearly in conformity with the decisions of the international community and with the purposes and principles of the United Nations. The rules were general in scope and would contribute to the development of international humanitarian law. They represented a milestone in the history of that law.

10. Sir David HUGHES-MORGAN (United Kingdom) said that his delegation had thought it proper to abstain mainly because of the ambiguity of some of the words and phrases contained in Article 42. His delegation appreciated the efforts made by the Rapporteur to draft a text reflecting the various considerations expressed in the Working Group: that text had received widespread support and might well become acceptable to the United Kingdom when its interpretation had been clarified. The Rapporteur had had a most difficult task and the way in which he had discharged his duties must be warmly applauded.

11. During the Working Group's discussions on the article, the United Kingdom delegation had sought to work towards a satisfactory compromise solution aimed at creating a balance between the protection of the civilian population and the desire to accord humanitarian protection as prisoners of war to a greater number of combatants. In the case of guerrillas that was a particularly difficult task; the civilian population could be effectively protected only if a clear distinction was made between the combatant and the civilian. The latter would be put at unacceptable risk if an unsatisfactory interpretation was given to some parts of Article 42.

12. In the first place it was vital that a strict interpretation should be given to the second sentence of paragraph 3 when it referred to the situations in which a guerrilla fighter could not distinguish himself from the civilian population as required by the first sentence of the paragraph. That could only happen within occupied territory. In unoccupied territory it was always possible for guerrilla fighters to take steps to distinguish themselves from the civilian population when engaged in military operations.

13. Secondly, the use of the word "deployment" in paragraph 3 (b) was not perhaps very fortunate. It was a word with many meanings; his delegation would interpret it as referring to any movement towards a place from which an attack was to be launched. That interpretation would not include movements of a strategic nature, although it was most unlikely that guerrillas would ever move in a strategic sense. Moreover the existence of electronic devices, currently in common use, meant that guerrillas must anticipate being under visual observation even during darkness and other conditions of poor visibility.

14. Lastly, there would be some difficulty in giving, as required under paragraph 4, treatment which was equivalent to that of a prisoner of war to a person who had lost his combatant status. Any combatant who violated the rules in paragraph 3 became liable to trial and punishment. He lost his combatant status and was therefore to be treated as a person who did not have the right to engage in armed conflict even though he would be accorded rights equivalent to those contained in the third Geneva Convention of 1949.

15. The United Kingdom delegation would note with particular attention the statements made in explanation of vote and would carefully examine the report to be prepared by the Rapporteur. If it was accepted that the interpretations his delegation had put forward were valid, it would be happy to support Article 42 in plenary session.

16. Mr. LONGVA (Norway) said that the existing international conventions for the protection of war victims were still to a large extent based on the same conception of military operations as the Brussels Declaration of 1874. However, contemporary armed conflicts were often waged in accordance with differing conceptions, commonly described as guerrilla warfare. In practice such conflicts had fallen outside the scope of existing conventional law. Warfare of that nature had taken place and would continue to do so regardless of legal constructions. By adopting Article 42, which was a fundamental element in the package consisting of Articles 1, 35, 40, 41, 42, 42 bis and the proposal contained in document CDDH/I/233, the Committee had been able to ensure maximum protection for all war victims, and especially the civilian population, also under such circumstances. His delegation lent its full support to Article 42, for the following reasons:

17. Paragraph 3 contained rules relating to the protection of the civilian population. The code of conduct for combatants laid down in paragraph 3 was based on two standards. The first sentence contained the general rule, which did not seem to differ from universally acknowledged standards. The second sentence provided for a special standard to be applied in "situations in armed conflicts where, owing to the nature of the hostilities, an armed combatant cannot so distinguish himself." The situations envisaged were situations of guerrilla warfare. The special standard contained an obligation to carry arms openly in certain situations, i.e. where a contrary conduct would jeopardise the protection of the civilian population. The merit of the special standard was to strike a balance between the protection of the civilian population on the one hand, and military necessity on the other, and duly to safeguard both interests at the same time. There could be no doubt that application of that rule would lead to greater protection of the civilian population as compared with the present situation.

18. Article 42 conferred on guerrillas the status of combatant and of prisoner of war, and entitled them to the same treatment as members of regular armed forces. That innovation meant an improvement of the humanitarian protection of members of guerrilla units. Thereby they would be motivated to ensure the application of international humanitarian law. That would in turn lead to a better protection of all war victims, and in particular of the civilian population.

19. The implementation of Article 42 was based on a system of inducements and sanctions.

20. The inducements consisted of the aforementioned offer of status of combatant and prisoner of war also to guerrillas, and the assurance that they would under all circumstances benefit from the procedural safeguards laid down in the third Geneva Convention of 1949 and draft Protocol I if made the object of penal prosecution by the enemy.

21. The sanctions consisted of the loss of combatant status for combatants who violated the second sentence of paragraph 3 and were captured in flagrante delicto. That meant that such combatants might be made the object of penal prosecution and punishment even for acts which would otherwise be considered as lawful acts of combat. That sanction seemed to be adequate and sufficient in order to ensure the application of the rule contained in the second sentence of paragraph 3.

22. Paragraph 4 made it clear that also persons who had lost their combatant status because of violations of the second sentence of paragraph 3 should benefit entirely from the protection provided to prisoners of war, including the procedural guarantees in case of prosecution and punishment.

23. The interpretation of Article 42 had to be based on the general principles of interpretation recognized in international law. Furthermore, the article had to be interpreted on the background of the principles which were at the basis of international humanitarian law applicable in armed conflicts, as well as of its drafting history. Article 42 constituted an extension of the application of principles such as humanity, charity, equity, fairness and justice, principles which would provide important guidelines in its interpretation. Other valuable guidelines in that respect were to be found in the summary records and reports of Committee III.

24. The material field of application of Article 42 was laid down in Article 1; the personal field of application in Article 41. It followed from the first sentence of paragraph 3, that that sentence contained the general rule which would apply in all situations not covered by the special rule contained in the second sentence. The combat situations to which the special rule primarily referred, namely guerrilla warfare, were those to which the weaker party normally would have to resort in the context of resistance against the domination of a territory by alien forces. Within the framework of the field of application of Article 42 as laid down in Article 1, such situations would most typically arise in occupied territories and in the situations described in paragraph 2 of Article 1.

25. He wished to stress the spirit of co-operation that had made it possible to arrive at a compromise text on a particularly thorny subject, and expressed his thanks for the untiring devotion shown by the Rapporteur.

26. Mr. AL GHUNAIMI (Egypt) welcomed the adoption by a very large majority of Article 42, which touched on the vital interests of all countries. Since those interests were often contradictory, the adoption of Article 42 was an impressive example of goodwill and co-operation. No doubt parts of its wording left something to be desired, but his delegation, in a spirit of compromise, had nevertheless voted for a text which was the fruit of lengthy and sometimes difficult discussions.

27. It was the general view that a guerrilla combatant was a legitimate incognito combatant, who should be given the benefit of the doubt whenever freedom of manoeuvre required disguise at any stage of the combat. That right to be treated as a lawful combatant, and in case of capture as a prisoner of war, was inviolable, and could not be derogated from by virtue of the first sentence of paragraph 3. That right was the first principle on which the interpretation of the whole article must be based.

28. However, that basic right of the guerrilla did not release regular combatants from their obligation to wear their uniform during military operations, failing which they would be committing an act of perfidy.

29. Referring to the remark by the United Kingdom representative concerning the word "deployment", he said that the term "military deployment" related to the last step in the immediate and direct preparation for an attack, when the combatants were taking up their firing positions. He pointed out that in paragraph 3 (b) it was specified that the guerrilla must carry his arms openly "during such time as he is visible to the adversary", without prejudice of course to the right to resort to the methods and means of combat tolerated by the Conventions and by Article 35, paragraph 2, of Protocol I.

30. He pointed out that his delegation understood the term "visible" as intended by the Working Group, namely being able to be seen by the naked eye and only within such visual range.

31. Despite the defects of Article 42, he wished to congratulate all those who had taken part in its drafting, and all those who had voted for it.

32. Mr. HERNANDEZ (Uruguay), noting that the Committee's work had always been directed to extending and widening the protection of the civilian population, regretted that the wording of Article 42 was imprecise and vague, and consequently ineffective. He was concerned about the foreseeable consequences of the lack of a clear distinction between the combatants and the civilian population, which would expose the civilian population to a quite unnecessary risk. At its thirty-first meeting the Committee had adopted Article 46, entitled "Protection of the civilian population", which stated that "The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations ...", and went on to say that "The civilian population as such, as well as individual civilians, shall not be the object of attack." That was a vital point.

33. Paragraph 4 was obscure, because of the contradictory way in which it was formulated.

34. Paragraph 5 also appeared to pose a problem concerning the identification of the combatant.

35. Those were some of the questions raised for his delegation by the text, which was one that would be of vital importance in international armed conflicts.

36. Mr. ABDINE (Syrian Arab Republic) noted with satisfaction that Article 42 involved several innovations. The most important was that in paragraph 3, which was intended to reduce the restrictions imposed by the 1949 Geneva Conventions on members of resistance and liberation movements in order to allow them to enjoy the status of prisoners of war. However, like any other compromise text, the paragraph was not always quite clear, and his delegation would therefore like to explain its interpretation of the article.

37. Firstly, in order to gain the status of combatant, and consequently of prisoner of war, a member of a resistance or liberation movement need meet only one condition, and that was to carry his arms openly (a) during each military engagement, and (b) during such time as he was visible to the adversary while he was engaged in a military deployment "immediately" preceding the launching of an attack in which he was to participate. There was no other condition. In other words, what was required of regular armies to distinguish them from the civilian population did not apply to a member of a resistance or liberation movement. Secondly, the requirement to carry arms in paragraph 3 (b) should be understood in the context of the military deployment that "immediately" preceded the attack. That word must be emphasized in order to avoid any tendentious interpretation. Thirdly, the rule set forth in paragraph 3 implied that the combatant knew or ought to know that he was visible to the enemy, otherwise the obligation to carry arms openly did not apply. Fourthly, the word "arms" meant any arms of a military nature, of whatever sort. Fifthly, if the combatant had no arms to show, he would be regarded as being a combatant whose status was governed by Article 42, paragraph 5. Lastly, the status of combatant fighting for a resistance or liberation movement, which carried the right to the status of prisoner of war, should be understood in a very broad sense. In addition to the usual situations, it covered the possibility of mass uprisings, even in occupied territory.

38. In a spirit of compromise his delegation had agreed to the proposed text, which it did not find entirely satisfactory. It hoped that the Drafting Committee would introduce certain editorial amendments to improve the text.

39. Mr. OHM (Republic of Korea) said that he supported Article 42, as adopted by the Committee, because it was a provision that took account of the realities of modern armed conflicts. The article would undoubtedly help to improve the protection of combatants and of the civilian population.

40. Paragraph 1, read in conjunction with Article 41, granted the status of prisoner of war to members of guerrilla forces and of national liberation movements. Paragraph 2 reaffirmed the principle of international law that, while all combatants should observe the relevant rules of international law, violations of those rules would not deprive them of their right to prisoner-of-war status except as provided in paragraphs 3 and 4. His delegation feared that the application of paragraph 3 would give rise to certain problems. However, it was prepared to accept the text if the phrase "military deployment preceding the launching of an attack" meant any movement of combatants in the direction of a location from which they would launch an attack. During any such movement the combatants should distinguish themselves from civilians by carrying arms openly.

41. Mr. MARTIN HERRERO (Spain) said that his delegation, like all the other members of the Conference, wished to achieve the common aim of the reaffirmation and development of humanitarian law. From that standpoint the essential question was to ensure the protection of the civilian population without endangering the security of States. The text adopted did not quite succeed in achieving those aims. In a spirit of compromise that deserved praise, the sponsors had drawn up a text that was somewhat heterogeneous, sometimes contradictory, and not altogether clear. It was undeniable that guerrilla warfare was a phenomenon that was essentially incompatible with any form of regulation so that it was a contradiction to attempt to bring it under a system of law. That was why Spain had abstained. Its abstention was a concession and a conciliatory move, since it was essential to preserve the moral authority of the Conference by avoiding confrontation even when unanimity proved impossible and there had to be a vote, as in the present instance. However, his delegation reserved the right to speak again at a plenary meeting.

42. Mr. SUKHDEV (India) said that his delegation had throughout upheld the principles laid down in Article 42. That article would strengthen the cause of liberation movements. Without it a great number of individuals would have been deprived of the protection of humanitarian law, which was the main object of draft Protocol I. The realities of the present situation must be recognized. The need had long been felt for a provision on those lines. The Committee had at last fulfilled that task. It might have been hoped that the article would be adopted by consensus, but the very large majority that had supported it was almost as good as a consensus.

43. Mr. VALLARTA (Mexico) explained that his delegation had voted for Article 42 because his country's traditional policy was to support peoples fighting colonial domination and foreign occupation in the exercise of their right to self-determination. Those who were fighting colonialism deserved the protection afforded by Protocol I since their struggle had the international character of the armed conflicts envisaged in that Protocol.

44. In common with all provisions which had emerged after prolonged and difficult negotiations, the approved text revealed some shortcomings. Of particular note was the fact that its implementation might involve certain risks for the civilian population. His delegation none the less considered that all peoples who were the victims of colonialism and foreign domination had the right to seek independence by all the means within their power. The right of such peoples to rise against their oppressors must be respected, and to that end it could become necessary to depart from the rules applicable in other international conflicts. Moreover, it was not indispensable to distinguish between combatants and the civilian population when an entire nation was subjected to a régime of violence.

45. Mr. OEBIT (Indonesia) reminded the Committee that it had spent much time discussing Article 42 in order to narrow down differences of opinion. His delegation considered the article as a new development of the law relating to armed conflicts, with particular regard to combatants in resistance or liberation movements. It had no difficulty in accepting the principles upon which the article rested and hoped that, with its adoption, guerrilla fighters would be more humanely treated and protected.

46. Mr. KUSSBACH (Austria) said that his delegation had voted for Article 42, which represented a compromise finally reached by the Committee after long and difficult negotiations conducted with great energy and competence by the Rapporteur.

47. From the outset of those negotiations, his delegation had shown itself firmly in favour of the basic humanitarian ideas underlying the article. It accordingly welcomed the result achieved, even though it regretted that the compromise text contained some imperfections. Clearly, it was too weighty, too complex and consequently difficult to implement. Furthermore, it left scope for various interpretations, and the traditional distinction between the civilian population and the combatants was brought down to an absolute minimum. Despite those obvious weaknesses, however, the text was acceptable to his delegation since it took account of important humanitarian principles which it had long supported.

48. Mr. CRETU (Romania) said that his delegation had always attached great importance to Article 42, which dealt with a major and largely new problem in the area of humanitarian law applicable in armed conflicts. It would have welcomed the adoption of the article by consensus rather than by vote.

49. To defend itself against an aggressor in an armed conflict a country must use all its resources, including the commitment to the struggle of large sections of the population not enrolled in the armed forces. For that reason his delegation had always maintained that the broadest possible protection should be extended to members of resistance movements fighting aggression and of liberation movements.

50. Even though it did not wholly reflect the need for protection of those categories of individuals, Article 42 none the less marked an advance in international law as currently applied to armed conflicts; that was why his delegation had voted for it. He wished to pay tribute to all those on the Committee who had spared no effort to reach that result, and also to the Committee's Rapporteur whose patience and conciliatory spirit had been beyond praise.

51. Mr. MAHONY (Australia) said that the fact that his delegation had not voted for Article 42 should in no way be seen as a reflection on the ability of the Chairman of the Working Group who, despite the many difficulties encountered, had succeeded in drawing up an article which had been so widely accepted. It had, however, serious doubts about the precise meaning and legal implications of the article.

52. He would stress a most important principle, namely that the provisions enacted in favour of combatants who complied with Article 42 should in no way place the security of the civilian population in jeopardy or at risk. A most important safeguard for the security of the civilian population was that the benefit of paragraph 3 of Article 42 was only available to combatants who, by reason of Article 41, were entitled to participate directly in hostilities. Article 41 laid down a number of requirements which would have to be met in full.

53. His delegation attached particular importance to the requirement that a combatant intending to take advantage of paragraph 3 must carry his arms openly during each military engagement and during the time that he was visible to the adversary while engaged in military deployment preceding the launching of an attack in which he was to participate. His delegation regarded that requirement as an important safeguard against the abuse of Article 42 by persons who must be completely set apart from those combatants who could benefit from that special exemption.

54. He wished to place on record various interpretations which his delegation attributed to a number of provisions in Article 42. The situations in which Article 42 would operate were those referred to in Article 2 common to the four Geneva Conventions of 1949. In pursuance of what was now paragraph 4 of Article 1 of draft Protocol I, those situations included armed conflicts in which peoples were fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (United Nations General Assembly resolution 2625 (XXV)). In those situations, combatants who complied with the requirements of Article 42 were entitled to the treatment provided by that article. As for situations of the kind referred to in the second sentence of paragraph 3, they would only occur, according to the understanding of his delegation, on the territory of the adverse Party. Article 42 had no application in situations other than those mentioned.

55. With regard to the application of the article to combatants, Article 41 of draft Protocol I stipulated that the members of armed forces which complied with that article were combatants who had the right to participate directly in hostilities. Article 42 imposed on combatants the obligation to distinguish themselves from the civilian population whilst they were engaged in an attack or a military operation preparatory to attack. The article went on to recognize that as situations could arise in armed conflict where, owing to the nature of the hostilities, an armed combatant could not distinguish himself from the civilian population, he could retain his status as a combatant provided that in such situations he carried his arms: (a) openly during each military engagement; and (b) during such time as he was visible to the adversary whilst he was engaged in a military deployment preceding the launching of an attack in which he was to participate. His delegation was concerned about the meaning to be attributed to the word "deployment" in paragraph 3 (b), for it had many meanings. In the present context, he would interpret "deployment" to include a movement by a combatant to an attack. As to the words "visible to the adversary", his delegation interpreted them as including any form of surveillance, electronic or otherwise, used to keep a member of the forces of an adversary under observation.

56. If a combatant did not comply with the requirements specified in paragraphs 3 (a) and (b) he would lose his status as a combatant, i.e. would have no right to participate directly in hostilities. If in spite of that he were to participate directly in hostilities after non-compliance with the requirements of paragraphs 3 (a) and (b), he would be liable to trial and punishment, under the law of the country where the armed conflict was taking place, for any offences he might commit.

57. Paragraph 4 of Article 42 specified the treatment to be accorded to a person who had forfeited his right to be regarded as a prisoner of war under the article. His delegation had had considerable difficulty in identifying the precise treatment to be accorded to such a person. The difficulty arose out of the application of the provisions of the third Geneva Convention of 1949, relating to the treatment of prisoners of war, to a person who had forfeited that status and who at the material time might be held pending trial or undergoing punishment. That was a matter which his delegation would study further.

58. Mr. MARTINEZ (Argentina), after noting that his delegation had always supported provisions aimed at facilitating the struggle for liberation waged by countries and peoples subject to colonial domination or alien occupation, and by victims of racial discrimination, stated that in his view, Article 42 applied solely - using the terms of paragraph 4 of the new Article 1 of draft Protocol I - to "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, 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". The Argentine

delegation would restrict the application of Article 42 to draft Protocol I because it was absolutely certain that the situations envisaged in draft Protocol II fell altogether outside the provisions of that article.

59. With those reservations and in view of the clarity of the provisions of paragraph 2 of Article 1 of draft Protocol I regarding their field of application, the Argentine delegation heartily approved of the spirit expressed in such provisions. Nevertheless, to be consistent with the position it had adopted throughout the debate on Article 42, the Argentine delegation considered that the text the Committee had just adopted did not ensure adequate protection to the civilian population, and, in particular, to the civilian population of countries in which wars of liberation were or would be taking place. By legislating in that way, one of the basic objectives of humanitarian law was sacrificed, namely, the establishment of a balanced compromise between humanitarian considerations and military needs.

60. The Argentine delegation, while fully appreciating the reasons for the provisions of Article 42, nevertheless considered that those provisions could be improved. It had preferred, by the attitude it had taken during the vote, not to stand in the way of the adoption of so valuable and necessary a provision, in view of the long and bloody struggles that loomed ahead for many subjugated peoples.

61. Mr. IPSEN (Federal Republic of Germany) said that Article 42 was, in fact, one of the key articles of Protocol I. In particular, paragraph 3 of Article 42 was of exceptional legal and practical importance, because it provided a very carefully elaborated balance between the basic aim of draft Protocol I, namely, the protection of the civilian population, and the need for humanitarian protection of combatants referred to in the second sentence.

62. The delegation of the Federal Republic of Germany had taken an active part in the drafting of those provisions. To fulfil their purpose, they would have to be interpreted honestly and precisely in accordance with the customary rules of interpretation laid down in Article 31, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, which prescribed that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

63. Keeping strictly to that rule of interpretation, which had been endorsed by the International Court of Justice, he wished to state clearly how his Government understood the several provisions of Article 42. With regard to the introductory sentence of paragraph 3, the report of Committee III on Article 42 had already specified that that sentence restated the generally recognized rule of distinction. His delegation therefore considered that the basic rule contained in the first sentence of paragraph 3 of Article 42, to the effect that combatants were obliged to distinguish themselves from the civilian population, meant that those combatants should distinguish themselves in a clearly recognizable manner. In the second sentence of the

same paragraph, however, account was taken, quite correctly and adequately, of situations that occurred in some modern types of international armed conflict. The delegation of the Federal Republic of Germany understood, therefore, that the second sentence of paragraph 3 applied only to exceptional situations such as those occurring in occupied territories.

64. Finally, the interpretation of the term "deployment", which had been introduced by his delegation, had caused some difficulty because it was a specifically military term. As his delegation understood it, the words "military deployment preceding the launching of an attack", in sub-paragraph (b) (second sentence of paragraph 3) meant any uninterrupted tactical movement towards a place from which an attack was to be launched. He therefore objected strongly to the interpretation given by the representatives of Egypt and Syria.

65. As for paragraph 4 of Article 42, the delegation of the Federal Republic was able to restate the position it had adopted at the third session of the Conference, namely, that neither international law nor the basic view of the Federal Republic of Germany with regard to the subject of paragraph 4 created any obstacle to the implementation of that provision in full conformity with the third Geneva Convention of 1949. In his view, the substance of paragraph 4 meant that the third Convention was and would remain the strict criterion for protection referred to in paragraph 4 of Article 42.

66. His delegation reserved the right to review its fundamental position, as just stated, if the explanations of vote of other delegations gave rise to serious doubts regarding the agreement that had been reached. In that case, and in view of the doubts already created by the explanations of vote regarding the word "deployment", the delegation of the Federal Republic would be compelled to change its positive position with regard to Article 42 at the plenary meeting of the Conference.

67. Mr. ABADA (Algeria) welcomed the adoption of the text of Article 42, which marked, in his view, a notable step forward towards a more realistic and frankly modern concept of humanitarian law, and an endeavour to keep in step with history. The difficulties that had had to be overcome, and those that remained, were known to all, but the Algerian delegation none the less wished to express its satisfaction at the new spirit that had emerged.

68. His delegation had spared no effort in the attempt to achieve a text that, although a compromise, was none the less the only possible text, since it met the basic concerns of the various parties that had freely agreed to a confrontation of their respective points of view so that the areas where they converged would appear. It believed that the text of Article 42 which the Committee had just adopted was an unquestionable improvement on the original ICRC text. During the general debate in Committee, the Algerian delegation had pointed out

the weaknesses of the initial text, its inadequacy and the unfavourable repercussions that it would have on the recognition of the combatant status of guerrillas; that text had been wisely modified in a most realistic manner. It should, moreover, be recalled that the appraisal of the significance of Article 42 remained linked with the new version of Article 41 adopted during the third session and with the text of Article 42 bis. In the light of the foregoing, paragraph 3 of Article 42 expressed correctly the balance that had been struck between the principle of protection for the civilian population and the consideration of the special needs of guerrilla combatants. Certainly, the provisions of the article could be taken to pieces in order to arrive at the most favourable interpretation according to the approach that was chosen by one side or the other; nevertheless, in the opinion of his delegation, the text adopted contained all the elements needed to make it possible, in the case of the armed conflicts envisaged in paragraph 2 of Article 1 of draft Protocol I, to ensure respect for the basic principles of humanitarian law. That was what mattered at that time.

69. He wished, furthermore, to stress that Article 42 remained directly linked to the provisions of Article 1 of draft Protocol I, and was indeed the practical application of those provisions, which, without it, would be academic. It was therefore clear that the situations to which Article 42 referred were the same as those envisaged in paragraph 2 of Article 1 of draft Protocol I.

70. An active humanitarian spirit had guided those who had contributed to the elaboration of the text adopted, which despite its imperfections clearly revealed the obstacles that had been overcome. It was to be hoped that those who were still haunted by doubts, hesitation and uncertainty would appreciate that humanitarian spirit and strive to shake off old habits and the fetters of tradition.

The meeting rose at 12.25 p.m.

SUMMARY RECORD OF THE FIFTY-SIXTH MEETING

held on Friday, 22 April 1977, at 3 p.m.

Chairman: Mr. H. SULTAN (Egypt)

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

Draft Protocol I

Article 42 - New category of prisoners of war (concluded)

Explanations of vote

1. The CHAIRMAN invited further statements relating to the vote on Article 42 (CDDH/III/362) which had taken place at the fifty-fifth meeting.
2. Mr. VAN LUU (Socialist Republic of Viet Nam) said that the adoption, by a quasi-consensus, of Article 42 would be a source of satisfaction to all those who had worked untiringly on the drafting of the article. It was in line with the great step forward constituted by the adoption of new Article 1 of draft Protocol I under which peoples fighting against colonial domination, foreign occupation and racist régimes were recognized as taking part in international armed conflicts and as entitled to the protection of the Geneva Conventions of 1949 and of the two draft Protocols. In according to such guerrillas, if not the status of prisoners of war, at least the protection accorded to prisoners of war under the third Geneva Convention of 1949, Article 42 took cognizance of the reality of a type of war, characteristic of modern times, in which guerrillas, in certain circumstances, did not distinguish themselves from the civilian population.
3. His delegation thanked all those who had voted in favour of the article and those who had displayed realism and good will by abstaining in the vote or by voluntarily absenting themselves. It was convinced that the same realism and good will would ensure the correct application and interpretation of the article. He shared the view of the Yugoslav representative that there would be no reservations on Article 42. He hoped that the United Kingdom delegation, which had greatly contributed to the realistic consideration of the problems involved, would be able to vote in favour of the new article in the plenary Conference.
4. Article 42 was a compromise which did not yet accord full justice to the combatants of national liberation movements. As the movements of the oppressed peoples grew in strength, however, mankind's awareness of the need for justice in respect of those combatants would grow and he was fully confident that, at a future diplomatic conference on the uninterrupted development of humanitarian law, the last remnants of injustice would be removed.

5. Mr. TOPERI (Turkey) said that Article 42 represented a compromise of various views and required some explanation. Although the article did not fully come up to Turkey's expectations, his delegation had voted in favour of it in a spirit of compromise and co-operation.

6. The Turkish Government had always supported the national liberation movements recognized by regional intergovernmental organizations such as the League of Arab State and the Organization of African Unity. Only liberation movements which were recognized by regional organizations and which were widely and universally accepted should be covered by the article. His delegation viewed the article in that context and considered armed conflicts that did not comply with those conditions to be outside the scope of the article.

7. Mrs. MANTZOULINOS (Greece) said that her delegation had voted in favour of Article 42, with certain reservations. During the discussion in the Working Group, it had expressed misgivings that, in the event of violation of paragraph 3, the protection of the civil population might be jeopardized. In her delegation's view, it was only in occupied territories that situations might arise in which guerrillas could not distinguish themselves from the civilian population. It was also sceptical with regard to the legal clarity of paragraph 4, which would confront States with the difficulty of defining "protections equivalent in all respects to those accorded to prisoners of war" in order to ensure that a captured guerrilla - who had not met the requirement of paragraph 3 - would have all the privileges and immunities of a status which he was formally denied by the same Protocol.

8. The ambiguities of the present text were liable to give rise to serious difficulties of implementation. Her delegation had nevertheless thought it necessary to support the text, which took account of current realities and events which required to be covered in the additional Protocols.

9. Mr. ROSAS (Finland) said that the adoption of Article 42 was a remarkable step towards the successful outcome of the Conference. His delegation had repeatedly stressed the importance of the article and the need to achieve as broad agreement as possible on its specific content. The Finnish delegation had had no difficulty in voting in favour of the text adopted, which did not deviate radically from the existing law when interpreted in a flexible and rational manner.

10. His delegation stressed the importance of the basic distinction between combatants and civilians, so as to give the civilian population the greatest possible amount of protection while taking into account the realities of guerrilla warfare. From that angle, it wished to stress the link between paragraph 3 of Article 42 and

the prohibition of perfidy in Article 35. The loss of combatant status for persons who deliberately feigned civilian status when they were about to attack and were visible to the adversary seemed to be a necessary sanction in order to prevent such activities. Humanitarian treatment, however, could not be denied in those circumstances; an effort to overcome that difficulty was made in paragraph 4, which should not be taken as a very dramatic step in view of the general rule expressed in paragraph 2, granting prisoner-of-war status to combatants who violated the law of armed conflict.

11. Miss BOA (Ivory Coast) said that Article 42 represented the key to and raison d'être of the additional Protocols to the Geneva Conventions. Her delegation welcomed its adoption but regretted that so many delegations had abstained in the vote. An abstention should not, however, be regarded as a negative vote.

12. All were aware of the situation of the peoples which were still under foreign domination and which were conducting a guerrilla struggle to achieve independence. Such guerrillas could not, of course, be organized in the same way as the armies of constituted States; on humanitarian grounds, however, those which observed the Conventions and conducted their struggle under a responsible command must be accorded protection and a recognized status. In that context, her delegation considered that the text of paragraph 3 was crystal clear and required no interpretation.

13. Mr. AKKERMAN (Netherlands) said that his delegation had voted in favour of Article 42 notwithstanding certain misgivings about the clarity of some of the provisions.

14. In his delegation's view, the armed combatant who, owing to the nature of the hostilities, could not distinguish himself in the way required by the first sentence of paragraph 3, but who failed to meet even the minimum requirements set out in the second sentence of that paragraph, committed a breach of the Protocol, the sanction for which was the loss of combatant status. It was his delegation's interpretation that such a person might be prosecuted and punished for acts which, if committed by someone endowed with combatant status, would have been regarded as lawful acts of combat, even if such person was given protection equivalent in all respects to that accorded to prisoners of war by the third Geneva Convention of 1949 and by the Protocol.

15. It understood the expression "military deployment" used in the second sentence of paragraph 3 to mean "any movement towards a place from which an attack was to be launched".

16. His delegation was glad to see that the protection implied in combatant status was extended to situations in which it had hitherto been non-existent. That innovation constituted an improvement of the humanitarian protection of combatants in situations that might arise in guerrilla warfare. It was to be hoped that, as a result of that increase in the number of those benefiting from combatant status, the new beneficiaries would be prompted to comply with the requirements set out in Article 42, thereby ensuring the application of international humanitarian law to all possible victims of war and, in particular, the civilian population. To deny protection to the guerrilla fighter would fail to encourage him to abide by the duties of a subject of international humanitarian law.

17. Any weakening of the distinction between combatants and the civilian population would, of course, jeopardize the implementation of Article 42. His delegation was convinced, however, that Article 42, if applied by combatants in a humanitarian spirit, would contribute to the enforcement of the rule of distinction. Only if thus implemented would Article 42 be a truly humanitarian achievement.

18. Mr. PAOLINI (France) said that, by voting in favour of Article 42, his delegation had wished to record its attachment to the principle of provisions entitling resistance combatants to prisoner-of-war status and extending the application of such humanitarian protection.

19. It regretted, however, that there were certain ambiguities in the text which should have been removed before its submission to the Committee. There were two points the interpretation of which should not be left in doubt: firstly, combatants must distinguish themselves clearly from the civilian population in order to safeguard the protection of the latter. His delegation considered that the first sentence of paragraph 3 confirmed the general obligation on combatants to distinguish themselves from the civilian population by adopting a physical distinctive sign as required by Article 4 of the third Geneva Convention of 1949. Secondly, his delegation considered that the situations referred to in the second sentence of paragraph 3 - in which an armed combatant could not distinguish himself from the civilian population - could arise only in occupied territory.

20. Mr. CHARRY SAMPER (Colombia) said that the Colombian delegation had abstained in the vote for reasons which not only had been confirmed by the ample discussions that had taken place but had been corroborated by the explanations of vote of previous speakers.

21. Firstly, it seemed inappropriate, in a Conference which was a legal rather than a political body, to advance solidarity with nations in their struggle for independence and for emancipation from colonialism as a basic argument for voting on a text. On that issue, Colombia had invariably ranged itself alongside those who were fighting for their national identity and full independence. The present question, however, was that of the clarity and precision of texts, of their viability and humanitarian content, and not a political declaration. The Conference's aim of reaffirming and developing humanitarian law would not be furthered by introducing sources of confusion and contradictory interpretations into the texts.

22. A century earlier, when the earliest Geneva Convention had been under discussion, civilians had not been involved in war, which had been viewed as an exclusively military affair between belligerents. At the present day they ran the same risks as the combatants, or even more, and the paradox arose that the distinction between civilians and military was clearer in peacetime than in wartime, when it tended to be blurred. That was due to various factors, such as the disappearance of traditional warfare, the introduction of unconventional types of weapons, strategies, etc., and the combination of the most sophisticated techniques with the most primitive methods of fighting. The very concept of international war had changed: in a world where internationalization, and even supra-nationalization, were the rule, war too was being internationalized. The dividing line between an internal and an international conflict was not always clear; at least, it was far less so than in previous centuries.

23. That meant that the sphere of application of Article 42 could not be confined within any specific ideological doctrine. In a few decades, the phenomenon of colonialism might have completely changed, but the texts adopted by the Conference were meant to be permanent. All were aware that colonialism was not something static and clearly defined: there were different variants of colonialism and neo-colonialism in the world.

24. The basic reason for his delegation's abstention was that Article 42 constituted an addition to Article 4 of the third Geneva Convention of 1949, i.e., it related to prisoners of war in international conflicts; it was in no way concerned with internal conflicts and its field of application was that of Protocol I. Paragraphs 3, 4 and 5 lacked precision, and that lack of precision might lead to arbitrary interpretations. The article did not provide sufficient safeguards for the civilian population, whereas it was the protection of the innocent which should have priority. Although combatants as defined in Article 41 were distinct from the civilian population, in practice armed combatants would not be clearly distinguished, which implied an immediate risk to the civil population. The important reference in the ICRC text to the condition of having a fixed distinctive sign and carrying arms openly had disappeared in the new text.

25. Lastly, his delegation believed that it was essential to humanitarian law that, in the new situations characteristic of modern warfare, the obligations of all combatants, whatever their war aims - whether they were defending a State or seeking to overthrow it - should be identical.

26. Mr. SKALA (Sweden) said that his delegation welcomed the adoption of an article in Protocol I which provided substantial protection for guerrilla fighters.

27. Article 42 was a compromise text and nobody could be absolutely satisfied with it. Although Sweden had voted in favour of it, it was concerned lest certain ambiguities might lead to different interpretations; that applied particularly to paragraphs 3 and 4, the wording of which was not explicit in every detail.

28. His delegation interpreted the passage in paragraph 3 referring to "situations in armed conflicts where, owing to the nature of the hostilities, an armed combatant cannot so distinguish himself ..." as applying only to guerrilla fighters during wars of national liberation and to members of resistance movements in occupied territory. Guerrilla fighters would thus comply with the rules of international law even if they were advancing in civilian clothing and with concealed arms. If they were then attacked by the adverse party, they would still be entitled to protection under Article 42 provided that they carried their arms openly during the military engagement.

29. The situation was different when the guerrillas had the initiative. There, the important point was that the guerrillas could not take advantage of civilian status in order to start an attack. The time limit within which they were required to show their combatant status was not stated in exact terms. The expression used was "while he is engaged in a military deployment preceding the launching of an attack". The Swedish delegation interpreted "military deployment" in that context to mean military preparations immediately before an attack.

30. It had been said that attacks from ambush were the most common method of guerrilla warfare. That method depended on surprise and could hardly be prohibited. The provisions of paragraph 3 might be interpreted to mean that guerrillas had to show their arms in an ambush. That rule, however, would not be easy to apply and would not in fact change guerrilla warfare very much.

31. In some cases, guerrillas might not fulfil the conditions laid down in paragraph 3. Sanctions could then be inflicted in accordance with paragraph 4, but even in that case a high level of protection was afforded to guerrilla fighters. They would

not be regarded as prisoners of war, but would receive the same protection as prisoners of war under the third Geneva Convention of 1949. That was a considerable improvement. The Detaining Power had the possibility to accuse them of the non-fulfilment of the provisions of paragraph 3; that should be a sufficient sanction in most cases.

32. While Article 42 gave substantial protection to members of liberation and resistance movements, it was to be hoped that it would not be interpreted in such a way that the protection of civilians would suffer.

33. Mr. ABDUL EL AZIZ (Libyan Arab Jamahiriya) congratulated the Committee on bringing into being a new category of prisoners of war which would include guerrilla fighters and members of national liberation movements and resistance groups. Although his delegation would have preferred a more forceful and clearer text, it had voted in favour of Article 42 for two reasons: first, because the article bore witness to the fact that the international community acknowledged the importance of the role of members of resistance groups and considered that they should be brought within the purview of international humanitarian law and because of the need to extend protection to their members since those movements were fighting for a noble ideal, namely their desire for freedom and for the liberation of their territory. It was for that reason that his country paid particular attention to such a noble principle. Article 42 also afforded protection to the civilian population and to members of national liberation movements, particularly in view of paragraph 4. That protection was similar from all points of view to that prescribed by the third Geneva Convention of 1949 and draft Protocol I concerning prisoners of war, which meant that the status of members of national liberation movements was no different from that of regular soldiers as regards their right to the status of prisoners of war except perhaps in name.

34. Much work still remained to be done in connexion with the status of different types of combatants, and he associated his delegation with the statements made by the representatives of Egypt and Syria at the fifty-fifth meeting.

35. Mr. CHENIER (Canada) said that his delegation regretted it had been unable to support the draft of Article 42, particularly in view of the importance of the problem it dealt with and the time and effort which had been put into its preparation.

36. His delegation was concerned about the perhaps necessary vagueness of the language adopted. It hoped, of course, that practice would make the meaning more precise and thus provide the appropriate balance between, on the one hand, the overriding

requirement to protect the civilian population and, on the other, the military requirements of the combatant engaged in guerrilla-type operations. Such a balance must place the rights and protection of the civilian population above all other considerations, and that condition was best met when the long-standing requirement that the combatant should clearly reveal his status as such was maintained.

37. While recognizing the requirement that the combatant should so distinguish himself from the civilian population, paragraph 3 also recognized that certain situations would exist where a combatant, owing to the nature of the hostilities, could not so distinguish himself. It was perhaps trite to note that the word "cannot" did not mean that the combatant did not have the means so to distinguish himself, but rather referred to the fact that to do so would jeopardize his own safety or the success of his operation. In interpreting the article, such considerations could not be allowed to take precedence, and it was essential for the succeeding rules to be stringently applied and adhered to if the provision was not to work to the ultimate disadvantage of innocent civilians. Arms must be carried openly during the times set forth in paragraphs 3 (a) and 3 (b).

38. Paragraph 3 (a) presented no problem, but paragraph 3 (b) lent itself to far-ranging interpretations. Strictly speaking, to say that a person was visible to an adversary and had knowledge of that fact would suggest that the person concerned must be aware of the whereabouts of his adversary and thus be in a position to make the appropriate assumption. In view of the present-day common use of sophisticated optical and electronic scanning devices, that assumption must be made more quickly than in earlier times. In areas under the general control of the adversary, it was an assumption that could be made all the time. As to deployment, it might be easier to say that it had not commenced in a particular case than to lay down in advance rules describing when it had. In any event, deployment would have commenced when the person or persons concerned moved out from an assembly point or rendezvous with the intention of advancing on their objective, and at that point, regardless of risk, arms must be carried openly.

39. In his delegation's opinion, situations requiring the operations to be conducted in the manner contemplated by Article 42 could only occur in occupied territory.

40. His delegation considered that while, under paragraph 7, combatants assigned to regular, uniformed armed units of a Party to a conflict must continue to dress accordingly, it was implicit in that paragraph that members of such units, when assigned to duty with organized resistance units in occupied territory or other units engaged wholly in guerrilla-type operations, were entitled to the benefits of and must abide by the obligations of the article.

41. In conclusion, he said his delegation shared the concern expressed by the representative of the Federal Republic of Germany about the interpretation of the article reflected in some statements.

42. Mr. ROMAN (Chile) said that his delegation would have voted for Article 42 had it not been for the illogicalities it contained, as mentioned by previous speakers and, in particular, by the Colombian representative.

43. Paragraph 3, with its use of "como tal" twice in the second sentence of the Spanish text, was unclear. Paragraph 4 was illogical in that it stated that a combatant might forfeit his right to prisoner-of-war status, yet he would still be given protections equivalent in all respects to those accorded prisoners of war by the third Geneva Convention of 1949 and the present Protocol. Lastly his delegation could not accept paragraph 5, which prejudged any decision on Article 42 ter (Persons not entitled to prisoner-of-war status) and, in fact, implied the rejection of that article. For those reasons his delegation had abstained in the vote on Article 42.

44. Mr. BARILE (Italy) said that his delegation had abstained in the vote on Article 42 for several reasons. In the first place, paragraph 3 did not formulate any clear rule whereby combatants could be unmistakably distinguished from the civilian population: consequently, there was a danger that the humanitarian norms which constituted the essential basis of Protocol I, and which called for the complete protection of the civilian population, might be rendered ineffective in the cases covered by the second part of paragraph 3; for in such cases he thought it would be difficult to distinguish the combatants from the civilian population, and an adverse party might therefore invoke military necessity in justification of an attack on the civilian population as a whole.

45. Paragraph 4, which promised protection "equivalent in all respects" to those accorded prisoners of war by the third Geneva Convention of 1949 and Protocol I, even to a combatant who had failed to meet the requirements of the second sentence of paragraph 3, seemed ambiguous. His delegation interpreted the equivalence to mean, however, that a person in the situation referred to in paragraph 4 would be protected only from the formal and procedural point of view; in respect of offences he might have committed in his role as a guerrilla fighter and of other offences, he would receive no special privileges and would be subject to the usual penal laws.

46. Mr. Meir ROSENNE (Israel) said that his delegation had gladly participated in the work of the Committee and of the Working Group because it considered that, in view of the increased role played by irregular elements in modern warfare, guerrilla fighters and irregular combatants should be better protected by humanitarian law.

47. Unfortunately, the Article 42 on which the Committee had voted had been so changed during its drafting that in its present form it lay open to serious misinterpretation. He feared that representatives would be accused of having destroyed the essential and vitally important rule that combatants must always, in all circumstances, be distinguished from civilians. Mr. Jean Pictet (ICRC) had stressed the importance of that rule in the official Commentary on the Third Convention, and Mr. Draper (United Kingdom), at the XXIst International Conference of the Red Cross, at Istanbul, had warned that to allow the irregular combatant, "the man with the bomb who is a civilian in all outward appearances", to be brought within the framework of the protection given to regular armed combatants under Article 4 of the Geneva Prisoner-of-War Convention would mean that no civilian would henceforth be safe, as the uniformed combatant would no longer know who was his adversary and who was not. Yet paragraph 3 of Article 42 recognized that there were situations where, owing to the nature of the hostilities, an armed combatant could not distinguish himself from the civilian population. His delegation could not accept that provision, which was contrary to the very essence of humanitarian law.

48. The only way in which the protection of the civilian population could be ensured was by making a clear distinction between civilians and combatants. Combatants disguised as civilians endangered the civilian population. By sanctioning a blurring of the distinction between civilians and combatants, the Committee had thwarted one of the primary aims of the additional Protocol. The temporary advantage which an irregular force might thus hope to gain could endanger the civilian population for which the force was fighting. Surely that was not what the Committee had really intended.

49. Terrorism was directed against civilians, and acts of terrorism committed by persons dressed as civilians were not and never had been a form of combat accepted by the rules of the law of war. Any article which could be interpreted as giving legal status to such acts constituted an abuse of the rules of the law of war, and Israel would not be a party to such an article.

50. Thus, the principle of the distinction between combatants and civilians and that of complete respect for the law of war were fundamental to humanitarian law as exemplified by all the international conventions on the subject. Those principles had been respected in the original ICRC draft of Article 42 and in the amendments submitted by many delegations. It was because of their omission from the present version of Article 42 that Israel had voted against it.

51. Mr. REED (United States of America) said that his delegation supported Article 42, which recognized the realities of armed conflict and provided the structure which should improve the treatment for all members of the armed forces held prisoner by the adversary. That must be done, however, without reducing the important protections of civilians and the civilian population.

52. As the text of the article was a compromise, its language required explanation, and he proposed to indicate the interpretation his country placed on certain parts of the article.

53. In the first place, in all cases, combatants must, prior to and while engaging in attacks, effectively distinguish themselves from civilians and the civilian population. So far as concerned the second sentence of paragraph 3, it was the understanding of the United States that the situations referred to could only exist in the circumstance of territory occupied by the adversary. In addition, it was the United States view that paragraph 3, while recognizing the realities of armed conflict, was designed to ensure that combatants while engaged in a military operation preparatory to an attack, even a guerrilla attack in an occupied territory, could not use their failure to distinguish themselves from civilians as an element of surprise in the attack. Combatants using their appearance as civilians in such circumstances to aid in the attack would violate the terms of the article.

54. By failing to reinforce the important distinction between themselves and civilians, combatants would necessarily jeopardize the protection of the civilian population they were attempting to serve. The United States understood the phrase "military deployment preceding the launching of an attack" to mean "any movement toward a place from which an attack is to be launched". Combatants must distinguish themselves from civilians during the phase of the military operation which involved moving to the position from which the attack would be launched.

55. Lastly, Article 42 provided the assurance of fair treatment for those combatants who failed to distinguish themselves from civilians as required by the article and who, in consequence, if captured, were not entitled to be prisoners of war. Although the article assured their protection, it was clear that combatants who failed to meet the minimum requirements of the second sentence of paragraph 3 forfeited their combatant status and might be tried and punished as unprivileged belligerents. That meant that such unprivileged belligerents might be tried and punished for acts which would otherwise be considered lawful acts of combat.

56. In conclusion, he said it was the United States view that if Article 42 was given fair and honest application it would have good results for all persons affected by it.

57. Mr. MBAYA (United Republic of Cameroon) said that it was hardly necessary to explain his delegation's vote in favour of Article 42 of Protocol I as the article was but the culmination of many declarations by African States on the need to combat apartheid and the domination of the majority by a minority in any part of the African continent. Cameroon had always supported those declarations and national liberation movements fighting to implement them. International humanitarian law could no longer ignore liberation movements, and the adoption of Article 42, which followed logically on the adoption of Articles 1(2) and 41, was of capital importance in affording protection for freedom fighters. Although the text did not fully meet the wishes of the African delegations and had certain shortcomings which would make its implementation difficult, it represented a definite step forward.

58. He thanked all those who, by voting in favour of the article, had shown their support for Africa and expressed the hope that all Parties to the Conventions and Protocols, even those whose delegations had voted against Article 42, would implement it in good faith.

59. Mr. GILL (Ireland) said that his delegation had abstained on Article 42 because it considered that in its present form the article reduced the protection which should be afforded to the civilian population in an armed conflict to an unacceptable degree. The protection of the civilian population during an armed conflict was secured to a great extent by an obligation on combatants to distinguish themselves from the civilian population while engaged in an attack or in a military operation preparatory to an attack.

60. His delegation was not blind to the realities of modern warfare and had originally been prepared to support Article 42, even if that meant accepting, albeit with reluctance and apprehension, some relaxation in the obligation imposed on certain combatants under the Conventions. However, during the process by which Article 42 had developed into its present form, as the result of a compromise between strongly opposing viewpoints, it had become unbalanced. The protection of the civilian population, which humanitarian principles demanded, had been eroded to an extent which had made it impossible for his delegation to vote in favour of the article.

61. Mr. AJAYI (Nigeria) said that the result of the vote on Article 42 was a victory for reason and justice. Throughout the protracted debates on the issue, his delegation had maintained that it was unrealistic to require members of national liberation movements fighting against colonialist, racist and apartheid régimes, particularly in southern Africa, to distinguish themselves, in the classical military concept, in their struggles against a

more powerful adversary. Such a requirement would defeat the very purpose for which peoples took up arms in defence of the freedom which was the birth-right of every human being. To deny that reality was to undermine the progressive development of international humanitarian law as reflected in paragraph 2 of Article 1 of Protocol I and the many resolutions of the United Nations General Assembly which had pronounced on the legitimacy of the armed struggles of national liberation movements. In his delegation's view, the text adopted by the Committee was an important contribution to that law and was consistent with paragraph 2 of Article 1 of Protocol I.

62. His delegation had voted in favour of the article in a spirit of compromise and to facilitate the task of the Committee and of the Conference, although it would have preferred the article to be adopted by consensus. It was, however, glad to see that the majority of the world community was unshaken in its determination to uphold the legitimacy of the armed struggle of peoples fighting against oppression and injustice.

63. The difficulties which some delegations experienced concerning the compromise text did not arise from the ambiguity of the text, as they claimed, but lay in the need for a change of heart on the part of those who created the intolerable situations which compelled people to resort to guerrilla warfare in defence of human dignity or to liberate their fatherland. His delegation appealed to those who had such difficulties to convince the colonialist, racist and apartheid régimes and the Powers which occupied the land of others to yield to international public opinion by changing their abhorrent policies and withdrawing their forces. Once they had done so, the fears of certain delegations would be allayed, the compromise text could be relegated to the archives and the peace and security of the world would be strengthened.

64. His delegation wished to state categorically that it did not expect the compromise text to be made the subject of any reservations.

65. Mr. OGISO (Japan) said that his delegation feared that paragraphs 3 and 4 of Article 42 might give rise to difficulties, since they failed to draw the clear distinction between combatants and civilians which was essential to protect the latter in the event of hostilities. His delegation recognized that it was unrealistic to require the same degree of distinction for irregular forces as for regular forces, and it had no objection to taking account of the characteristics of the combats of irregular forces in deciding on the criteria that should govern prisoner-of-war status. Any blurring of the distinction between members of irregular forces and the civilian population,

with a view to protecting the former, might however result in insufficient protection for the latter. It was important to achieve a balance between the protection accorded to both. Paragraphs 3 and 4 of Article 42 tended to lay too much stress on protection of the members of irregular forces and too little on that of the civilian population. His delegation had therefore abstained in the vote.

66. Mr. GENOT (Belgium) said that it was universally recognized that, in the event of armed conflict, it was necessary to guarantee effective protection, on the one hand, of the civilian population and, on the other, of combatants who committed acts prejudicial to the enemy. Those two levels of protection, each of which was the corollary of the other, lay at the heart of any endeavour to codify and develop humanitarian law. If, however, anyone could take part in a combat, in any manner whatsoever, protection of the civilian population would be illusory; some balance between the two kinds of protection was therefore required. In the face of the new forms of combat which had arisen in modern times, and following the efforts initiated in 1907, as reflected in Article 1 of the Regulations annexed to the fourth Geneva Convention of 1949, and pursued further in 1949, the Committee had sought to achieve such a balance and, by a majority vote in which his delegation had joined, had adopted Article 42.

67. The basic rule relating to the need to distinguish between combatants and the civilian population, the stated aim of which was to protect the civilian population, was laid down in the first sentence of paragraph 3 of Article 42. Without derogating from that rule, the second sentence of the paragraph dealt with certain situations, for instance, in occupied territories, where owing to the nature of the hostilities a combatant was unable to distinguish himself, in the traditional meaning of that term, from the civilian population. In such cases, distinction from the civilian population took a special form, involving a requirement that arms should be carried openly in the circumstances referred to in paragraphs 3 (a) and (b). That part of the text, although necessarily less explicit, called for strict interpretation in accordance with its spirit. The requirement that arms should be carried openly in such situations was designed to ensure that the combat was fair and that there was sufficient distinction from the civilian population.

68. Paragraph 4 provided that a combatant who failed to meet the requirements of paragraph 3 and, in special circumstances such as those obtaining in the case of occupation by a foreign power, the minimum requirements of that paragraph, would forfeit his right to be a prisoner of war and would be liable to be tried and punished for offences which, had they been committed by a person enjoying combatant status, would have been regarded as legitimate. The

fact that the guarantees relating to treatment, procedure and protection were those accorded under the third Geneva Convention of 1949 in no way affected the stringency of that provision, which was justified by the need to ensure protection of the civilian population.

69. Article 42 thus broadened the categories of combatant without prejudicing the universal application of humanitarian law and thereby met its twin objectives: namely, the protection of those who were lawfully engaged in combat and the protection of the civilian population.

70. Any attitude other than that which had led to the adoption of Article 42 would make the guerrilla the pariah of humanitarian law, not only to his own detriment but to that of the civilian population. The easing of the conditions laid down in 1949, together with the continued recognition, and adaptation to given circumstances, of the rule regarding distinction, gave ground for hope that there would be a more universal application of the laws relating to war to the advantage of all, and in particular, of the civilian population.

71. Mr. ARMALY (Palestine Liberation Organization), speaking at the invitation of the Chairman, said that it was encouraging to note the resolute manner in which the Committee, mirroring world opinion, had voted in favour of Article 42. The national liberation movements, which were the true representatives of peoples subject to colonial domination, foreign occupation and racist régimes - all of which applied to the Palestinian people - welcomed the protection thus accorded to their combatants. Admittedly, consensus should have been reached on an article which had the support of all delegations save those which continued to violate the basic principles of humanitarian law and to ignore the legitimate rights of peoples fighting for their right to self-determination. Such an attitude, however, in no way detracted from the significance of the Committee's vote, which was an important step forward in the growing recognition, through international instruments, of the legitimacy of the struggle of national liberation movements and the need to guarantee their fighters adequate protection.

72. It had been no easy matter to arrive at a compromise formula. In its desire to make an effective contribution to the work of the Conference and to promote the universal principles of humanitarian law, his delegation, along with others had spared no effort to reach a just solution. While the final text was not fully satisfactory to his delegation, it provided a sound platform for the introduction of a wide range of improvements as humanitarian law developed.

73. His delegation considered that Article 42, under which guerrillas would receive protection equal to that granted to regular combatants, would give added force to paragraph 2 of Article 1. It noted that the second sentence of paragraph 3 recognized that there were situations in which, owing to the nature of the hostilities, it was not possible to distinguish between combatants and the civilian population. In such cases, the requirements set forth in paragraphs 3 (a) and (b) would have to be very narrowly interpreted. In that connexion, the words "visible to", in paragraph 3 (b) of the English text, were a more accurate reflection of the thinking that had prevailed when Article 42 had been drafted than the words "exposé à la vue de" in the French text. Contrary to the suggestions of certain delegations, his own delegation interpreted those words to mean visible to the naked eye, since any recourse to electronic devices would divest the article of its value and undermine its very purpose. It also understood the words "military deployment preceding the launching of an attack", in the same sub-paragraph, to refer to the period of time immediately preceding the attack. Any other interpretation would be contrary to the spirit of a provision which was concerned with the protection of a guerrilla in a military engagement.

74. Furthermore, paragraph 4 provided that members of national liberation movements would receive the same protection as that accorded to regular combatants under the third Geneva Convention of 1949 and the Protocol. He would stress that such protection should not be regarded as a concession or favour and that a member of a national liberation movement would be in exactly the same position as a regular combatant so far as those instruments were concerned.

75. With regard to Article 42 as it related to occupied territories and the need to protect civilians, his delegation considered the territories occupied by the enemy to be not only those occupied as a result of the 1967 war but also those occupied by the Zionists since 1948, which covered the whole territory of Palestine. He reminded the Committee of the statements made in the Working Group at the third session, particularly by the representative of the People's Democratic Republic of Viet-Nam who had referred to the impossibility of distinguishing members of national liberation movements from the civilian population. While he understood those delegations which had none the less spoken in favour of such a distinction, albeit theoretical, he did not think that the international community would be deceived by the concern expressed by the representative of Israel about the matter. That concern would have been better expressed at the repeated bombing by Israeli aircraft of Palestinian refugee camps, with a resultant heavy loss of life among the civilian population. The need to protect the civilian population should not be used as an excuse to take action against national liberation movements which had to fight with unequal means against the aggressor and occupier.

76. By its vote on Article 42, the Committee had advanced the cause of humanitarian law. Although the article was not totally satisfactory, he trusted that, as the international community developed and reaffirmed the 1949 Conventions, it would come to recognize the need to give greater strength and protection to those who fought for the national liberation movements.

77. Mr. JIN Chung Kuck (Democratic People's Republic of Korea) said that his delegation had voted in favour of Article 42. In view of the significance of paragraph 2 of Article 1, he wished to stress that combatants fighting against domination through imperialism and colonialism, alien occupation and racism should be recognized as legitimate combatants and that their lawful rights should be fully protected. Paragraph 2 of Article 1 accorded fully with the demands of a new situation in which national liberation movements were extending throughout Asia, Africa and Latin America.

78. On the question of mercenaries, his delegation agreed that they should not be granted the status of combatants and prisoners of war. Mercenaries were mobilized in the aggressive wars of imperialists and were criminals who were opposed to political independence, peace and mankind. His delegation was grateful to the Nigerian delegation for its initiative in raising that matter.

79. Mrs. SILVERA (Cuba) associated her delegation with those which had spoken in support of Article 42 and of the call of peoples subjected to colonial domination and racist régimes for the right to self-determination and independence, in accordance with the principles of international law. Article 42 answered that call and was in keeping with United Nations resolutions on the need for additional international instruments and rules with a view to increasing the protection of fighters struggling for freedom from colonial domination and racist régimes.

80. Mr. CARNAUBA (Brazil) said that his delegation's negative vote on Article 42 had been dictated by certain technical aspects of its provisions and it would have taken a different position had it been possible to introduce certain changes. Its main concern was that the provisions relating to identification of combatants were not sufficiently clear to ensure that the civilian population would be protected from the inevitable risks when it was not possible to identify unmistakably those engaged in military activities. He emphasized that under no circumstances could his delegation's vote be interpreted in such a way as to disregard the underlying principles of his country's foreign policy and the stand it took, in different international bodies on different occasions, in support of peoples fighting against colonial domination, foreign occupation and racist régimes in the exercise of the legitimate right to self-determination. He said those guidelines of Brazilian foreign policy were well known throughout the world and he quoted as example his country position concerning apartheid and the Middle East issues.

81. Mr. KERMODE (New Zealand) said that his delegation had abstained in the vote because Article 42 still presented some difficulties of both a legal and a practical nature. During the debate on that article at the preceding session, his delegation had clearly stated that, in the interests of preserving and ensuring the maximum protection for civilians, combatants should during combat clearly distinguish themselves from the civilian population. It had also stated that it could recognize only one set of rules for all combatants during armed conflict. It continued to subscribe to those principles.

82. In the opinion of his delegation, the governing provision of Article 42 was embodied in the first sentence of paragraph 3, which restated the existing obligation on all combatants to distinguish themselves during combat from the civilian population. It regarded that as an indispensable protection for the soldier but even more as essential for the safety of the civilian population.

83. His delegation did not regard the second sentence of paragraph 3 as significant or as permitting much derogation from the governing principle, because in its view a situation where combatants could not, if they so wished, adequately distinguish themselves in combat from the civilian population could seldom arise. If that were ever to occur, however, two situations would exist: firstly, it could happen only in occupied territory and, secondly, the obligations required of a combatant while engaged in military deployment would extend throughout all planned and co-ordinated movements by groups of individuals to or during a military tactical operation. He considered, of course, that that single rule applied to all combatants.

84. His delegation also found confusion and some inconsistency in the sanction to be imposed on combatants who failed to carry out the obligation to distinguish themselves from civilians. The effect of paragraph 2 seemed to be that a combatant who failed to carry out the provisions of paragraph 3 would lose his combatant status and his right to be a prisoner of war if he fell into the power of the adverse party. In that context, the loss of combatant status seemed unlikely to have serious practical consequences, but the loss of prisoner-of-war status, which in his view was implicit in that article, would certainly be an effective sanction in the case of the regular soldier and of other combatants who had the opportunity to distinguish themselves.

85. His delegation had already stated that seldom, if ever, would there be occasion for the provisions of paragraph 4 to apply, which was perhaps fortunate since he could not regard it as providing for any real sanction. Its main effect was to contribute to the ambiguity and uncertainty concerning the consequences of failure to observe the fundamental rule stated in paragraph 3.

86. His delegation would have preferred a much simpler provision, according to which any individual who was captured while not distinguishing himself as a combatant would be treated as a civilian. In its view, that was the most effective sanction for ensuring observance of the basic duty of combatants to distinguish themselves in warfare. For those reasons his delegation continued to have considerable reservations with regard to Article 42.

87. Mr. Meir ROSENNE (Israel) said that it was his understanding that representatives had been speaking in explanation of vote. Such an explanation was out of order for the representative of the Palestine Liberation Organization. Nevertheless, he (Mr. Rosenne) had not raised a point of order at the time in order to facilitate the task of the Chairman. But, since the representative of the PLO had denied the right of Israel to exist and had spoken of so-called "Israeli atrocities", he wished to raise a point of order at the present juncture. He wondered whether the recent massacres in Lebanese villages, involving the killing of children and the raping of women, constituted legitimate acts of war and whether those responsible for them should have the status of prisoners of war.

88. Mr. EL-FATTAL (Syrian Arab Republic) said that it was impossible for him to keep silent when hearing certain views expressed at a conference aimed at improving international humanitarian law. There could be no doubt that the fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12 1949 did apply to the occupied Arab territories. By logical extension, it also applied to such occupied territories as Zimbabwe and Namibia. His delegation had therefore voted in favour of Article 42, while realizing that Israel would never apply that article even if it had voted for it. He wondered why Israel had felt obliged to vote against not only his country but also Zimbabwe and Namibia and whether or not it intended to apply the fourth Geneva Convention to all occupied territories.

The meeting rose at 5.10 p.m.

SUMMARY RECORD OF THE FIFTY-SEVENTH MEETING

held on Friday, 29 April 1977, at 10.15 a.m.

Chairman: Mr. H. SULTAN (Egypt)

ANNOUNCEMENT BY THE CHAIRMAN

1. The CHAIRMAN said that one of the Vice-Chairmen of the Committee, Mr. Dugersuren of Mongolia, had been appointed Minister for Foreign Affairs. On behalf of all members, he thanked Mr. Dugersuren for his co-operation during the first three sessions of the Conference and wished him a distinguished and happy future.

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

Draft Protocol

Report of the Working Group on the new article on mercenaries and on Articles 63, 64, 65 and 66

2. The CHAIRMAN drew attention to the Working Group's report (CDDH/III/369 and Corr.1) from which the Committee would note that texts of the following articles had been submitted for its consideration: a new article on mercenaries (CDDH/III/363), Article 63 (CDDH/III/368), Article 64 (CDDH/III/367), Article 65 (CDDH/III/366) and Article 66 (CDDH/III/365). The Committee was not required to take any action on the Working Group's report, which was submitted for information only.

3. He suggested that, in accordance with its normal practice, the Committee should first take a decision on the texts submitted by the Working Group. Thereafter, delegations could, if they so wished, explain their votes.

It was so agreed.

New article on mercenaries (CDDH/III/363)

4. Mr. ALDRICH (United States of America), Rapporteur, said that the Working Group had preferred to leave it to the Drafting Committee to determine the proper place in the Protocol of the proposed new article on mercenaries (CDDH/III/363) which, as the Committee would recall, had originally been numbered 42 quater. If adopted, it would appear in draft Protocol I at some point in Part III, Section II near to Article 42 which the Committee had already adopted.

* Incorporating document CDDH/III/SR.57/Corr.1

5. Although the new article had not received the Working Group's unqualified acceptance, he would suggest that it be adopted by consensus, subject to any reservations that might be formulated after its adoption. His other comments relating to the new article would be found in the Working Group's report (CDDH/III/369 and Corr.1, pages 2 and 3).

6. Mr. OEBIT (Indonesia) said that the meaning of paragraph 2 (e) of the new article was not entirely clear to his delegation. He suggested that the words "and sent by that State" be amended to read "and not sent or approved by that State".

7. Mr. ALDRICH (United States of America), Rapporteur, agreed that the sub-paragraph required clarification. He suggested that it be referred to the Drafting Committee so that the necessary change could be made.

It was so agreed.

The new article on mercenaries (CDDH/III/363) was adopted by consensus.

Article 63 - Field of application (CDDH/III/368)

8. Mr. ALDRICH (United States of America), Rapporteur, said that the proposed text of Article 63, which related to the field of application of Section III, was self-explanatory. He suggested that it should be adopted by consensus.

Article 63 (CDDH/III/368) was adopted by consensus.

Article 64 - Refugees and stateless persons (CDDH/III/367)

9. Mr. ALDRICH (United States of America), Rapporteur, said that, as stated in the Working Group's report (CDDH/III/369, page 5), Article 64 had been largely disposed of at the third session of the Conference but had remained under discussion owing to the concern felt about persons who became refugees after the beginning of an armed conflict. At the current session, the Working Group had considered that that question should be pursued further as a separate matter and that the text of Article 64 should be adopted as it stood at the end of the third session. In the circumstances, he would suggest that Article 64 be adopted by consensus.

Article 64 (CDDH/III/367) was adopted by consensus.

Article 65 - Fundamental guarantees (CDDH/III/366)

10. Mr. ALDRICH (United States of America), Rapporteur, said that Article 65 was one of the most important and complex in Protocol I; the fact that the Working Group had been able to reach agreement within two weeks attested to its industry and constructive attitude.

Although the text was perhaps not fully satisfactory to all delegations, the Working Group took the view that it was the best formula that could be reached in a relatively short period of time. He suggested that Article 65 be adopted by consensus.

Article 65 (CDDH/III/366) was adopted by consensus.

Article 66 - Objects indispensable to the survival of the civilian population (CDDH/III/365)

11. Mr. ALDRICH (United States of America), Rapporteur, said that the ICRC text of Article 66 had been largely superseded by the Committee's adoption of Article 48 in 1975. The Working Group considered, however, that Article 66 provided a useful occasion to clarify the territorial scope of the restrictions on attacks laid down in the Protocol and to define more closely the application of the prohibitions contained in Article 48, paragraph 2, as it related to the national territory of a Party to a conflict. For that reason, it had been possible to reach agreement fairly quickly on Article 66, which he again would suggest should be adopted by consensus.

Article 66 (CDDH/III/365) was adopted by consensus.

Explanations of vote

12. The CHAIRMAN, noting that the Committee had adopted all the texts of the articles referred to it in the Working Group's report (CDDH/III/369 and Corr.1), invited explanations of vote on the new article on mercenaries (CDDH/III/363).

13. Mr. JIN Chung Kuck (Democratic People's Republic of Korea) said that while his delegation was grateful to the Nigerian delegation for raising the issue of mercenaries, it could not lend its full support to the last part of paragraph 2 (c), starting with the words "and, in fact, ...", nor to paragraph 2 (e). It therefore wished to enter a reservation with regard to those two sub-paragraphs.

14. Mgr. LUONI (Holy See) said that his delegation had joined in the consensus on the new article on mercenaries in a spirit of compromise. It considered, however, that the article should have referred expressly to Article 65 on fundamental guarantees, as adopted by the Committee, so as to ensure minimum protection for persons who, irrespective of their misdeeds, were among the prime outcasts of society, and to guarantee those fundamental human rights which transcended any considerations of politics or expediency.

15. Mr. CLARK (Nigeria) said that, with its decision, the Committee had dealt a fatal blow to the mercenaries who had wreaked endless havoc in Africa. It had likewise unequivocally condemned their activities, which had led to so much loss of life and destruction in that continent. It had exposed the hypocrisy of States which treated recruitment of mercenaries as illegal while condoning their activities and placing a higher premium on the life of common criminals than on that of their innocent victims. The doctrine whereby the administration of the law could be used as an excuse for avoiding the protection which that law prescribed was inadmissible.

16. His delegation welcomed the new article on mercenaries. Its provisions were clear: no attempt had been made to deny mercenaries the common humanity which was theirs together with the rest of mankind, nor the fundamental guarantees under the Conventions and the new Article 65 of Protocol I. Henceforth, however, they would not be regarded as combatants in any conflict and would therefore not enjoy the rights due to a combatant or prisoner of war.

17. Mr. TODORIĆ (Yugoslavia) said that the new article on mercenaries was an important contribution to humanitarian law. In the first place, its terms accorded with those of the United Nations General Assembly resolutions on mercenaries, who under the new article would not be entitled to combatant or prisoner-of-war status, and they would further the application of the principle of the right to self-determination as laid down in the United Nations Charter. Secondly, the article was in keeping with the Definition of Aggression (General Assembly resolution 3314 (XXIX), annex), under Article 3 of which the sending of mercenaries who carried out acts of force constituted aggression, and with the Declaration on Principles of International Law concerning Friendly Relations among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex), according to which each State was required to refrain from organizing or encouraging the organization of bands of mercenaries. By defining mercenaries, the Conference had thus helped to discourage the sending of mercenaries against peoples determined to govern themselves and to defend their freedom and independence, and had also promoted international peace and security.

18. Mr. GRIBANOV (Union of Soviet Socialist Republics) said that his delegation was much gratified by the Committee's consensus decision on the important new article on mercenaries, which was an indication of the constructive atmosphere of co-operation reigning among delegations. He trusted that the same atmosphere would continue to prevail. His delegation, for its part, was ready to participate in the Committee's future work in the same spirit of co-operation with a view to reaching a mutually acceptable compromise on the remaining articles.

19. Mr. LUKABU K'HABOUJI (Zaire) said that his country, which had been subjected to many attacks by mercenaries and therefore attached special importance to the new article, would have preferred a text that was more stringent in its provisions to prohibit the odious "profession" of paid killer, and more detailed in the obligations placed on States in whose territories mercenaries were recruited. It was particularly regrettable that the text ignored the latter aspect of the matter.

20. His delegation appreciated, however, that the new article was the outcome of compromise and it was therefore prepared to agree to it, with the exception of paragraph 2 (c). It considered that the last part of the sub-paragraph in particular, starting with the words "and, in fact, ...", weakened the text. His delegation would have preferred that part to be deleted and the words "and material", perhaps, added before the word "gain". In its view, the phrase beginning "and, in fact, is promised" was a trap devised by those delegations whose governments encouraged the recruitment of mercenaries. It would open the door to abuse and provide an alibi for mercenaries.

21. A Party to a conflict would be hard put to it to prove generous remuneration, since mercenaries' wages were paid either in their own countries or into bank accounts in other countries. No evidence existed in the form of pay-slips or remittance orders and, even if it did, it could only be held by the Party which made use of the mercenaries' services, so that the adverse Party had small chance of obtaining the necessary evidence under paragraph 2 (c). Further, the paragraph as presently worded would encourage a new kind of ideologically-motivated mercenary of which his country had had experience in the shape of many individuals who had fought alongside the rebels in the cause of disarray and bloodshed.

22. His country reserved the right to make a statement regarding its interpretation of paragraph 2 (c), and even of the whole of the new article on mercenaries. The spirit of conciliation manifested by his delegation was to be viewed within the context of his remarks but at the same time his delegation recognized that the mercenaries had been dealt a blow which would pave the way for the conclusion of more stringent regional instruments.

23. Mr. BARILE (Italy) said that while his delegation had participated in the consensus on the new article on mercenaries in a spirit of collaboration, it considered that paragraph 2 of the article still failed to define the category of mercenaries in a sufficiently clear and objective manner. In particular, it would stress that the absence of any express reference in the new article to Article 65, which related to fundamental guarantees, should not be interpreted as prejudging the universal scope of application of the latter, which applied equally to mercenaries.

24. Mr. HERCZEGH (Hungary) said that his delegation welcomed the adoption by consensus of the new article on mercenaries, the provisions of which would undoubtedly serve to strengthen international humanitarian law. Admittedly, those provisions did not cover all aspects of that international crime, but - despite praiseworthy efforts - it had not been possible to go further in the context of Additional Protocol I. His delegation trusted, however, that the new article would encourage Governments which had not yet prepared rules of criminal law prohibiting the recruitment, training, formation and commitment of mercenaries to take the necessary legislative action in order to eliminate completely the crime of the mercenary system from the field of international relations.

25. Mrs. HERRAN (Colombia) said that her delegation had joined in the consensus on the new article on mercenaries in a spirit of compromise. It would have preferred, however, the article to have contained an explicit reference to the fundamental guarantees provided in Article 65.

26. Sir David HUGHES-MORGAN (United Kingdom) said that his delegation was glad to be able to join in the consensus on the article. His Government had strongly deprecated the employment of mercenaries in certain recent conflicts. It was entirely proper that, through the article, the international community should express its disapproval of the activities concerned. His delegation also welcomed the reference on page 3 of the Rapporteur's report (CDDH/III/369 and Corr.1) to the fact that the fundamental guarantees of Article 65 must be accorded to captured mercenaries.

27. Mr. OULD SHEIKH (Mauritania) said that his delegation had voted in favour of the article in recognition of the seriousness of the evil represented by mercenaries for the African continent in general and for Mauritania in particular. It considered, however, that the text would have been improved if it had specifically covered all types of mercenary activity, because, in its view, mercenaries were not always motivated by the desire for material gain. The institution of mercenaries was tending more and more to assume a political and subversive character, and the text would have been clearer if it had sought to embrace those new cases in the general definition given in paragraph 2. With regard to paragraph 2 (c), his delegation was sceptical concerning the possibility of producing material proof of the fact that a mercenary had been promised material compensation substantially in excess of that paid to regular combatants, especially in view of the ultra-secret character of the contracts covering the engagement of mercenaries.

28. Mr. MAHONY (Australia) said that his delegation had not wished to oppose the adoption of the article, but had the article been put to the vote it would have abstained. Australia deprecated the employment of mercenaries and was legislating in relation to the matter; it nevertheless held the view, on humanitarian grounds, that mercenaries who were captured should not be refused prisoner-of-war status or be deprived of the fundamental guarantees provided in Article 65. It would have preferred an explicit statement to that effect to have been included in the new article and regretted that delegations had not been able to agree to such a provision. His delegation had been gratified to hear the statement by the representative of Nigeria that all the relevant protection of Protocol I applied to mercenaries as defined in the new article. It also noted a similar statement by the Rapporteur on page 3 of document CDDH/III/369 and Corr.1. The Australian delegation agreed with that view and would interpret the new article accordingly.

29. Mr. CRETU (Romania) said that his delegation had joined in the consensus on the article on mercenaries since it took the view that the text dealt satisfactorily, if not exhaustively, with an urgent and very important question. Romania had always condemned the use of mercenaries against the just liberation struggles of peoples and had always been in favour of the punishment of mercenaries. The new article contributed to the development of humanitarian law and introduced important clarifications into the definition and legal treatment of mercenaries. The fact that the article declared without reservation that mercenaries were not entitled to the status of combatant or of prisoner of war would facilitate the punishment of mercenaries and would discourage the parties to armed conflicts from using the services of those criminals.

30. Mr. VAN LUU (Socialist Republic of Viet Nam) said that, in his delegation's view, the new article constituted a great step forward in the development of humanitarian law in condemning an evil whose effects were still to be seen in Africa, where mercenaries were being used against peoples fighting for their national and social emancipation from colonialism, neo-colonialism and racism. His delegation would have preferred a stronger text which would at the same time have provided the necessary humanitarian guarantees; but the essentials were covered by the present, unanimously approved, article.

31. Mrs. SILVERA (Cuba) said that her delegation had joined in the consensus on the text of the new article since it found it generally acceptable, even though it failed to mention certain matters of substance. In particular, the text of the new article contained no exact definition of the category of mercenaries; no statement to the effect that the purpose of mercenary activity was to oppose, by armed violence, the processes of national liberation and to perpetuate colonial, neo-colonial and racist oppression and

exploitation; no reference to the responsibility of associations or organizations which, with the consent of certain States, advertised freely in the press or other media for the recruitment of mercenaries, offering large sums of money for their training and organization; no reference to the responsibility of States which allowed such associations to operate on their territories or those under their jurisdiction; and no reference to the responsibility of States which organized, equipped, trained, promoted and provided transit and transport facilities to mercenaries with the sole objective of achieving political aims by criminal methods.

32. Her delegation referred once again to those questions because there were still governments which, obsessed by imperialist and racist philosophies, were attempting to impede and destroy the processes of national liberations; it was, moreover, a subject on which humanitarian law should exert an influence, as the General Assembly of the United Nations had done in resolutions 2395 (XXIII), 2465 (XXIII), 2548 (XXIV), 3103 (XXVIII) and, more particularly, in resolution 31/34 of 30 November 1976, which stated that the use of mercenaries against movements for national liberation and independence constituted a criminal act and that the mercenaries themselves were criminals. The Cuban delegation was in favour of all the prohibitions adopted on the subject in the present Conference, since all such limitations would promote the purposes of a future Convention on mercenaries.

33. Mr. ALKAFF (Democratic Yemen) welcomed the fact that the Committee had achieved a consensus on the new article. Mercenaries had always been attracted by the hope of gain and had always fought against national liberation movements, as was attested by the experience of many countries of the third world. His delegation would have preferred a more strongly-worded text and would have liked to see some reference to the responsibility of States which engaged in the recruitment and training of mercenaries. It had voted for the article, however, believing that it constituted a serious blow to mercenary activity directed against peoples' liberation struggles. It hoped that the text would be followed up by additions to regional national conventions and legislation in a number of countries, leading in the future to the complete eradication of mercenary activity.

34. Mr. BACHIR MOURAD (Syrian Arab Republic) said that his delegation would have preferred a more stringent text giving no protection whatever to mercenaries; the protection of humanitarian law should be confined to combatants engaged in the sacred duty of defending their countries. Mercenaries' motives were usually of a very base nature and they often

committed grave crimes on the battlefield. His delegation shared the views of the representative of Zaire concerning the difficulty of producing the evidence required by paragraph 2 (c). Paragraph 2 (e) also needed further clarification. His delegation's interpretation was that members of the armed forces of a State, even if it was not a party to the conflict, were not mercenaries and were entitled to combatant and prisoner-of-war status. The same applied to reservists - i.e. men who had completed their active military service - if they were sent by their States in accordance with national policy to participate in a conflict. On the other hand, reservists who participated in a conflict from personal choice were not entitled to combatant status, even if they formed part of organized units and even if their country of origin had facilitated their departure for the combat area (in point of fact) such reservists, since they were men with military experience, constituted a prime source of mercenaries.

35. Mr. KHALIL (Qatar) said that his delegation would have preferred the article to have been drafted in stronger terms so that the crime of mercenary activity could have been eliminated once for all. As it stood, the article constituted an acceptable compromise and a point of departure for further international and regional agreements which would finally eradicate the crime in question. The criteria in the last part of paragraph 2 (c) were somewhat restrictive and tended to reduce the number of mercenaries to which the article might apply. It would have been sufficient to say that protection should not be afforded to mercenaries who were mainly motivated by the desire for private gain. He had not fully understood what the Syrian representative had said about reservists and added that his own interpretation of paragraph 2 (e) of the article agreed with that of the Syrian representative, namely that a mercenary could be recruited as a member of the reserve forces. He emphasized that he would like to hear the Rapporteur clarify that matter.

36. Mr. MENCER (Czechoslovakia) said that the article constituted one of the major successes of the Conference. His delegation endorsed the text because it reflected both the different views expressed during the discussions and a spirit of compromise which prevailed in the Committee. It would have preferred a more rigorous provision which explicitly prohibited mercenary activity and also the recruitment of mercenaries. It was regrettable that the definition contained in paragraph 2 did not begin with the words, "For the purposes of the present Protocol ...". His delegation would interpret the article as applying only to Protocol I.

37. Mr. BRANCO ALEIXO (Portugal) said that, during the third session of the Conference and again during the current session, his delegation had expressed a reservation concerning the fact that the article contained no reference to the fundamental guarantees provided under Article 65. Some delegations had spoken of mercenaries as criminals, but everywhere in the world even the worst criminals were protected by guarantees. His delegation had not insisted on the inclusion of such a reference because it found that its views were not shared by a majority of delegations; it wished to stress, however, that, in its interpretation, the mercenaries referred to in the new article were covered by the fundamental guarantees of Article 65.

38. Mr. ABDUL EL AZIZ (Libyan Arab Jamahiriya) said that the refusal to mercenaries of the status of combatant or prisoner of war was based on the view that mercenaries were criminals guilty of crimes against humanity, a view supported by the experience of many countries, particularly in Africa, one of the first continents to suffer from mercenary activity and which still suffered from it. The peace-loving peoples of the world would welcome the adoption of the new article as an important contribution to peace and security in Africa. The problem of mercenaries had occupied many minds during recent years. In his report on the third session of the Diplomatic Conference (document A/31/163), the Secretary-General of the United Nations had emphasized the question of mercenaries to the great satisfaction of the delegations of peace-loving peoples, and which had enabled the Diplomatic Conference to adopt a text depriving mercenaries of the benefit of the status of prisoners of war. The Conference had achieved that objective. His delegation would have liked the text to include an appeal to all States and organizations which recruited mercenaries to cease doing so. For humanitarian reasons his delegation wholeheartedly supported the new article.

39. Mr. AGBEKO (Ghana) said that his delegation fully supported the new article and congratulated the Nigerian representative on having cut through the mass of confusion which had surrounded the subject and having produced a clear definition of the category of mercenaries which it was the Conference's intention to ostracize. The new article was a deadly blow to the mercenary phenomenon and if, for any reason, it should be resurrected, the work of the Conference had provided the international community with the means of finishing it off once and for all.

40. Mr. DENEREAZ (Switzerland) welcomed the adoption by consensus of the new article on mercenaries. His delegation condemned unequivocally the use of mercenaries as a military system. It would, indeed, have preferred a text obliging States to prohibit the recruitment, training and sending into action of mercenaries. Switzerland considered that there was a need for an international convention forbidding States to make use of mercenaries.

41. While condemning the system, it would, however, have been more indulgent, with regard to mercenaries themselves, in view of the principles of humanitarian law which were the sole concern of the Conference. It therefore regretted that the new article contained no reference to Article 65 or, indeed, to Article 42 bis.

42. Mr. MILES (United States of America) said that the text just adopted would be of great help in dealing with one aspect of a particularly difficult and troublesome problem. However, a person who would qualify as a mercenary under the article was none the less a human being entitled to the basic guarantees of Article 65 and other provisions of international law. Such a person would, of course, be subject to criminal prosecution for any offences he might have committed.

43. Mr. GILL (Ireland) said that the text in document CDDH/III/363 just adopted went far enough to meet the objections voiced by his delegation and others at the previous session to have allowed his delegation to join in the consensus. The comments in the Rapporteur's report (CDDH/III/369 and Corr.1) and, in particular, the last paragraph on page 3, explaining the applicability of Article 65 of Protocol I to mercenaries, had helped to allay the fears of his delegation that the mercenary might fall through the humanitarian safety net of Article 65. His delegation had also noted the assurance given by the Nigerian representative, when introducing the article to the Working Group, that Article 65 applied to mercenaries. In his delegation's view, "mercenaries" meant persons who were determined by judicial process to belong to such a category.

44. Mr. RABARY-NDRANO (Madagascar) said that while the text on mercenaries just adopted did not afford complete satisfaction to everyone, including his delegation, it represented the limit of what was feasible as a compromise. His delegation therefore welcomed the fact that it had been adopted by consensus.

45. Practical implementation of the article might, perhaps, give rise to difficulties, particularly as regards paragraph 2 (c), which, in his delegation's view, would have been better if it had ended at the words "private gain".

46. Some representatives had suggested that the article was not sufficiently humanitarian, but they should, on the contrary, be satisfied that it was not anti-humanitarian, as were the aims and occupation of the people to whom it referred. He feared that any further additions such as had been proposed would destroy the consensus which had been achieved.

47. His delegation welcomed the fact that the text adopted represented an effort by the international community to place the question of mercenaries on an equally international plane. For his country could not remain indifferent to the fate of its brother countries in Africa, which had suffered most during the last ten years from the actions of mercenaries. Some delegations had suggested that mercenaries could have other motives besides private gain, but it would be outside the scope of humanitarian law to go into that question more deeply.

48. Mr. JEICHANDE (Mozambique) said that the adoption by consensus of the new article on mercenaries was particularly important for peoples fighting for their independence and freedom. By recognizing, after the resolutions of the United Nations General Assembly to which previous speakers had referred and the declarations of the Organization of African Unity of 1967 and 1971, that mercenaries, in view of their criminal character, could not benefit from the status of prisoners of war, the Conference had opened a new page in the history of humanitarian law. Those resolutions and declarations, however, had had little effect - as the troubles in Benin a mere seven months after the trial of the mercenaries in Angola indicated. His delegation would therefore have liked a more forceful text which would have condemned States implicated in the mercenary system. His delegation also associated itself with the objections to paragraph 2 (c) expressed by the representative of the Democratic People's Republic of Korea. The adoption of the article was, however, a victory for humanitarian law.

49. Mr. MOKHTAR (United Arab Emirates) said that the adoption of the new article on mercenaries represented a milestone in the progress of international humanitarian law. His delegation was happy with the text, which reflected a compromise.

50. Miss BOA (Ivory Coast) said that she had been unavoidably absent when the new article on mercenaries had been adopted, but wished to associate her delegation with the consensus. Although the text did not entirely meet the desires of the African countries, for the reasons which had been expressed by the representative of Zaire in particular, and especially because paragraph 2 (c) left the door open to abuses, her delegation recognized that the text was the most that could be achieved in condemning crimes against peoples fighting for self-determination which certain individuals had committed and were still committing, with the connivance of their own Governments and often with the backing of other more powerful Governments. The system of mercenaries was not only an obstacle to the freedom of peoples, but a form of interference in the internal affairs of countries which her Government had always denounced.

51. Mr. DOUMBIA (Mali) said that, while welcoming the almost unanimous approval of the new article on mercenaries, his delegation would have liked a stronger text which, in more precise terms, would have denounced the very idea of the system of mercenaries and called for its prohibition. But the text was a compromise one and represented perhaps the best that could be expected at the present stage. His delegation hoped that it would be only the first and that other more satisfactory international texts would follow.

52. He wished to stress, however, that the mercenary was motivated solely by the desire to obtain substantial remuneration and could not, therefore, be confused with persons who, for nobler motives, engaged in liberation movements fighting for freedom against racist and outmoded colonialist régimes.

53. Mr. SARACHO (Argentina) said that his delegation had supported the consensus on the new article on mercenaries because of its previously expressed view that the use of mercenaries hindered the achievement of freedom and independence by oppressed peoples. The adoption of the article was, therefore, a great step forward. It was now necessary for countries to adopt internal legislation condemning the system of mercenaries and preventing their use.

54. Mr. MBAYA (United Republic of Cameroon) associated his delegation with the statements made by the representatives of Zaire, Mauritania and Cuba, among others. Although the text adopted was far from satisfying his delegation, it had associated itself with the consensus in a spirit of co-operation and compromise. In spite of its imperfections, the article was of importance in the development of humanitarian law. His delegation shared the optimism of the representative of Nigeria when he had stated that its adoption was a mortal blow to the institution of mercenaries. Unfortunately, the mercenary was motivated exclusively by the hope of private gain and it would be very difficult to end his activities. Mercenaries were at the present moment fighting in Zaire and he wondered whether the provision just adopted would be enough to stop them. He looked forward to the time when a convention would be drawn up which would prohibit the recruitment of mercenaries.

55. Mr. CHENIER (Canada) said that his delegation had not opposed the consensus, although it had always been of the view that the article was unnecessary. If a vote had been taken, his delegation would have abstained because it considered that the persons covered by the article, though denied the right to be combatants and thereby rendered illegal combatants if they took a direct part in hostilities, were none the less human beings and therefore entitled to the fundamental protection provided for by Article 65. His delegation would have liked to see an explicit reference to Article 65, but considered that the absence of such a reference should not prejudice the application of Article 65 to such persons.

56. Mr. WULFF (Sweden) said that his delegation welcomed the new article on mercenaries. It hoped that the text could be improved in the Drafting Committee, especially paragraph 2 (c), so as to render circumvention of the provision more difficult.

57. His delegation would have liked a reference to the minimum protection of mercenaries in the text and therefore considered that the last paragraph of the Rapporteur's report on the article (CDDH/III/369, page 3), concerning the fundamental protection of mercenaries according to Article 65, was of great importance and should be included in the report of the Committee.

58. The CHAIRMAN said that representatives would have an opportunity to explain their votes on Articles 63, 64, 65 and 66 at the fifty-eighth meeting.

The meeting rose at 12 noon.

SUMMARY RECORD OF THE FIFTY-EIGHTH MEETING

held on Friday, 29 April 1977 at 3.15 p.m.

Chairman: Mr. H. SULTAN (Egypt)

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

Draft Protocol I

Explanations of vote on Articles 63, 64, 65 and 66 and on the new article on mercenaries (CDDH/III/363, CDDH/III/365, CDDH/III/366, CDDH/III/367, CDDH/III/368 and CDDH/III/369)

1. Mr. VAN LUU (Socialist Republic of Viet Nam) said that the Committee's approval at its fifty-seventh meeting of the texts of Articles 63, 64, 65 and 66 and of the new article on mercenaries was an eloquent example of the spirit of consensus in the Committee, based on realism and on a determination to further the progress of humanitarian law. His delegation saw in Article 65, which was the most extensive and most difficult of all the articles considered, a substantial broadening of the scope of protection offered to the civilian population under Article 1 and a reflection of certain realities of war during recent decades.

2. His delegation had consulted the Belgian and French delegations with regard to the interpretation of Article 65, paragraph 3, and they had agreed that its purpose was to protect arrested or detained persons as provided for in the second phrase of the second sentence of the paragraph. The last phrase of the sentence, however, might provide a pretext for an unscrupulous party to prolong the arrest or detention indefinitely. The Belgian and French delegations had therefore agreed that the following phrase should be inserted in the Rapporteur's final report: "... it being understood that the circumstances referred to in the last part of the second sentence of paragraph 3 may not be invoked as a pretext for withdrawing the protection accorded by the second part of that sentence".

3. Mr. JOMARD (Iraq) said that the Working Group had devoted considerable time to Article 65, which had proved to be one of the most difficult of all the articles it had dealt with. He commended the Rapporteur for the competence and impartiality which had made it possible to arrive at an acceptable text. Although his delegation had joined in the consensus, it had certain observations to make on the article. First, the criteria in the introductory paragraph were somewhat vague and obscure. Secondly, some of the details in the text which were already covered by domestic legislation had given rise to divergences of view among delegations and might lead to further difficulties in requiring countries to change their internal legislation. It would have been sufficient to mention the general principles on which penal law was founded rather than to go into such details.

4. Mr. SHERIFIS (Cyprus) said that his delegation was particularly gratified by the Committee's unanimous adoption of Article 65, which was one of the cornerstones of the Protocol.

5. During the Working Group's discussions, his delegation had proposed that all acts of intimidation or harassment by agents of an Occupying Power, aimed at the displacement of individuals or groups of the civilian population from the occupied area, should be included in the list of prohibited acts. It had refrained from pressing for specific mention of such acts only because it was satisfied with the statement in the Rapporteur's report (CDDH/III/369 and Corr.1) to the effect that the final wording of paragraph 2 of Article 65 was considered to encompass the prohibition of "intimidation, harassment and threats by agents of an Occupying Power aimed at forcing the movement of individuals or portions of the civilian population". He welcomed that authoritative interpretation, which had met with no dissenting opinion in the Working Group or in the Committee.

6. His delegation also welcomed the unanimous adoption of Article 66, which stipulated that the provisions of the Protocol applied to all attacks, including those conducted in the national territory belonging to a Party to the conflict but under the control of an adversary. Humanitarianism and understanding required that the destruction of objects indispensable to the survival of the civilian population should be prohibited. His delegation had, however, supported the provision for derogation in Article 66, paragraph 2, since it maintained that no price should be considered too high for the defence of national territory against aggression or for the recovery of a territory occupied by a foreign army. Moreover, it would be unacceptable to place greater restriction on those fighting for the freedom of their country than on an army of occupation, for which such derogation was provided by Article 53 of the fourth Geneva Convention of 1949.

7. Mr. HÖSTMARK (Norway) said that his delegation had supported the adoption of Article 65, which it considered to be of fundamental importance to the system of protection laid down in the draft Protocol.

8. Paragraph 4 of that article set forth some general principles of judicial procedure which States would have to apply within the framework of their more detailed domestic legislation. Referring to paragraph 4 (e), he said that, according to Norwegian penal procedure, the accused had to be present in all instances except the Supreme Court, in which, although he always had the right to be present, the presence of the accused was not indispensable to the proceedings and he would therefore not necessarily receive prior notice. The Norwegian Supreme Court had no competence as to the guilt of the accused but only as to the passing of sentence and the legality of the proceedings in the lower courts. The statements of the accused and of witnesses as recorded by the lower courts were always submitted in writing to the Supreme Court.

9. Referring to Article 65, paragraph 4 (h) he said that, in some specific circumstances and within a specified time-limit, Norwegian penal procedure provided the possibility of reviewing a case previously concluded, notably if substantial new evidence became available. Since that was part of Norwegian penal procedure, judgement in a penal case would not be final in the sense of Article 65 before the expiry of the time-limit.

10. Mr. IPSEN (Federal Republic of Germany) expressed his delegation's satisfaction at the Committee's adoption by consensus of the five articles that had been before it at the fifty-seventh meeting, and said that Article 65 represented a significant improvement in the law applicable in armed conflict. The provisions of the article were largely self-explanatory. His delegation's understanding of paragraph 4 (e) was similar to that of the Norwegian delegation: in the case of penal proceedings occupying two or more instances, in which the purpose of the last instance was to review only the applicable law and not the findings of the previous instance, the court of review had to decide whether or not the accused had to appear before it at the hearing. The court of review could not impose a higher penalty in the absence of the accused, and all the latter's rights as provided for in Article 65, paragraph 4 (e) were therefore fully granted.

11. The phrase "prosecution and trial in accordance with the applicable rules of international law" in Article 65, paragraph 7 (a) undoubtedly meant that the national law applicable in such cases must be strictly in conformity with the respective rules of international law.

12. Mr. AL-YAZIEDI (Saudi Arabia) said it was important to ensure that the strongest party in an armed conflict behaved humanely to those who fell into its power. He welcomed the Rapporteur's efforts in producing a text that was acceptable to all. The Rapporteur's report (CDDH/III/369 and Corr.1) was an excellent document. The Committee's adoption by consensus of the articles before it at the fifty-seventh meeting was the result of a spirit of compromise and good will on the part of all concerned. He expressed appreciation to delegations that had supported the idea of prohibiting the recruitment or training of mercenaries. His delegation associated itself with the Syrian representative's comments on paragraph 2 (e) of the new article on that subject (CDDH/III/363).

13. Mr. MAHONY (Australia) said that, although it had not wished to interfere with the adoption of Article 66 by consensus, his delegation was unable to support that article because it had doubts about its effect and legal implications. If the article had been voted upon, his delegation would have abstained in the vote. That position was consistent with the Australian delegation's position in the Working Group.

14. His delegation was opposed to the inclusion of the words "under its own control" in paragraph 2 of the article, since it considered that they placed an unacceptable limitation on the right of a State to defend its sovereign territory. It reserved its position on the article as long as those words were retained. The relevant paragraph of the Rapporteur's report reflected his delegation's views.

15. The phrase "imperative military necessity" was imprecise and open to subjective interpretation. His delegation would interpret it in a broad sense.

16. Mr. KHALIL (Qatar) said that his delegation was awaiting the results of the consultations on Article 64 referred to in the Rapporteur's report (CDDH/III/369 and Corr.1).

17. Article 65 as a whole was consistent with Islamic law governing the protection of the human being in all respects. His delegation considered that the article contained too many superfluous details but it had bowed to the wishes of the majority in accepting their inclusion. Steps had to be taken to prevent any Occupying Power from using intimidation to force populations to leave their land, as had been done in certain recent armed conflicts. World attention should be drawn to such practices.

18. While providing for certain reciprocal commitments, Article 66, paragraph 1, rightly emphasized the position of the victim rather than that of the aggressor. Paragraph 2 of the same article was a compromise between the protection of civilians and imperative military necessity. He supported the Rapporteur's comments (CDDH/III/369 and Corr.1) with regard to the term "control" in that paragraph.

19. Mr. JIN Chung Kuck (Democratic People's Republic of Korea) said that his delegation appreciated the efforts made to complete Article 65, paragraph 1 of which would make a positive contribution to the development of international humanitarian law. The article reflected the desire of persons who were fighting for justice and who were suffering the miseries of war in adverse conditions. It rightly condemned cruel and inhumane treatment on the ground of political convictions or national or social origin.

20. Paragraph 2 largely confirmed the provisions of the Universal Declaration of Human Rights, the principles of Nürnberg, the humanitarian criteria declared by the Far Eastern International Court and the 1949 Geneva Conventions, particularly Article 50 of the first Convention, Article 51 of the second Convention, Article 130 of the third Convention and Article 147 of the fourth Convention.

21. Inhumane acts such as violence to life, health or physical or mental well-being, torture of any kind or outrages on personal dignity were crimes defaming the honour of mankind and were a violation of international agreement on the expression of free will and of international criteria on the right to impartial trial. The foremost task of international law was to provide a legal guarantee to prohibit such crimes.

22. The terms "judicial procedure" and "national law" in Article 65, paragraph 4, meant those procedures and laws which accorded with the principles of recognized international law and international humanitarian law. Colonial or imperialist law could never belong to that category.

23. The contents of the article could not be recognized as an abandonment of the position against war criminals or those guilty of crimes against humanity.

24. Mr. GENOT (Belgium) said that his delegation wished to associate itself with the satisfaction expressed by other delegations at the Committee's adoption of the series of articles which had been before it at its fifty-seventh meeting, bearing in mind the fundamental importance of those articles for the protection of individuals in periods of armed conflict.

25. Referring to the comments of the representative of the Socialist Republic of Viet Nam with regard to Article 65, paragraph 3, he said that the purpose of his delegation's amendment had been to ensure the protection of individuals. The last phrase of the paragraph should be understood as an additional guarantee for the earliest possible release of arrested persons, particularly those arrested or detained under the penal code. He associated himself with the addition to the Rapporteur's report proposed by the representative of the Socialist Republic of Viet Nam.

26. Mr. LHO (Republic of Korea) said that his delegation considered that Article 65 as now drafted (CDDH/III/366) was a significant step forward in humanitarian law since it established minimum standards of humane treatment to be accorded to persons who were not entitled to more favourable treatment under the Geneva Conventions of 1949 or Protocol I.

27. Referring to paragraph 1, he said that his delegation interpreted it as being applicable to situations mentioned in Article 1 of draft Protocol I, and to the population of the occupied territory of a Party to the conflict.

28. In order to establish a minimum standard of fundamental guarantees for all who resided in an occupied territory in time of armed conflict, and also to develop further the Geneva Conventions, his delegation considered that nationals of a Party to a conflict should also be covered by paragraph 1.

29. His delegation could accept the remaining paragraphs of Article 65.

30. Mr. DIAZ DE AGUILAR (Spain) congratulated the Rapporteur on the drafting of Article 65 (CDDH/III/366) which reaffirmed the application of the principles of criminal law and procedure and would guarantee in the future an impartial trial and a just sentence for those covered by the article.

31. His delegation also wished to congratulate the Rapporteur on his clearly-worded report (CDDH/III/369 and Corr.1) which would permit of a more exact interpretation of the article.

ORGANIZATION OF WORK

32. Mr. ALDRICH (United States of America), Rapporteur, expressed his appreciation of the co-operation shown by all who had taken part in the work of the Working Group, and drew attention to the new proposals on Article 67 and Article 68 of draft Protocol I which, with Article 69 of that Protocol and Article 32 of draft Protocol II, would be considered by the Working Group at its next meeting.

The meeting rose at 3.55 p.m.

SUMMARY RECORD OF THE FIFTY-NINTH MEETING

held on Tuesday, 10 May 1977, at 3.15 p.m.

Chairman: Mr. H. SULTAN (Egypt)

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

Proposals submitted by the Working Group for further study
(CDDH/III/391)

1. The CHAIRMAN appealed to the spirit of co-operation and to the indulgence of the members of the Committee, who would have to take a position on fifteen articles, eight of them in draft Protocol I and seven in draft Protocol II. In order to expedite the proceedings, he would not reopen discussion on those articles; but he would give the floor to all those who might wish to explain their votes once the decisions had been taken. The report of the Working Group (CDDH/III/391) was purely informative. The different articles would be considered in the order shown on page 1 of the report.

2. Mr. DIXIT (India) asked to speak on a point of order. The Chairman had said that the Working Group's report was for purposes of information only, and that the Committee should take decisions on the articles submitted for its consideration without embarking upon fresh discussions. Committee members were, however, insufficiently informed about the questions to which some of those articles gave rise. It was difficult for them to give their acquiescence in such circumstances. As a lawyer, he would have wished for a decision on articles that were the subject of controversy to be deferred. He would none the less bow to the Chairman's ruling.

3. The CHAIRMAN observed that reports like that contained in document CDDH/III/391 were always adopted as documents of a purely informational nature. Members of the Committee would have an opportunity to explain their votes, and subsequently to take a more specific position when the final report was submitted to them.

4. Mr. ALDRICH (United States of America), Rapporteur, pointed out that the report submitted to the Committee, which set forth solely the views of the Working Group, was only the first of a series. The practice of submitting successive reports had been adopted in order to give the members of the Committee more speedy information about the problems which they would have to resolve. Such reports, moreover, constituted a basis for drawing up the Committee's final report. He would gladly take note of any comments or requests for changes to which the report that had been submitted might give rise.

Draft Protocol IArticle 37, paragraph 3 - Emblems of nationality (CDDH/III/383)

5. Mr. ALDRICH (United States of America), Rapporteur, said that the Working Group had decided by consensus to suggest that espionage should be referred to in paragraph 3 of Article 37, in order to avoid any possibility of the texts being interpreted as changing the rules relating to espionage. He pointed out that the word "and" should be replaced by "or" after "espionage" in the penultimate line of the proposed text.

Article 37, paragraph 3, as amended, was adopted by consensus.

Article 39, paragraph 1 - Occupants of aircraft (CDDH/III/382)

6. Mr. ALDRICH (United States of America), Rapporteur, observed that the revised version of paragraph 1 of Article 39 had been suggested by the members of Committee III at the third session of the Conference. The Working Group had not been unanimous about the need for such revision. It was now for the Committee to decide.

7. Mr. BACHIR MOURAD (Syrian Arab Republic) asked that the Working Group's proposal be put to the vote.

8. The CHAIRMAN suggested that the Committee should decide, by means of an initial vote, whether there was a case for giving the paragraph in question fresh scrutiny at the fourth session. If that vote was affirmative, the Committee would then vote on the new article in the form in which it was submitted.

It was so agreed.

The Committee decided by 51 votes to 12, with 14 abstentions, that the text of Article 39, paragraph 1, adopted at the third session, should be reconsidered.

The proposed text for Article 39, paragraph 1, in document CDDH/III/382 was adopted by 52 votes to 4, with 22 abstentions.

Article 46, paragraph 5 - Protection of the civilian population (CDDH/III/384)Draft Protocol IIArticle 26 - Protection of the civilian population

9. Mr. ALDRICH (United States of America), Rapporteur, said that the Working Group was proposing that the word "similar" should be inserted before "concentration", in paragraph 5 of Article 46 of draft Protocol I in order to give the text greater precision. The corresponding paragraph 5 of Article 26 of Protocol II might be amended in the same way.

Article 46, paragraph 5, of draft Protocol I was adopted by consensus.

The insertion of the word "similar" in Article 26 of Protocol II was agreed to by consensus.

Draft Protocol I

Article 47 bis - Protection of places of worship and of cultural objects (CDDH/III/385/Rev.1)

Draft Protocol II

Article 20 bis - Protection of places of worship and of cultural objects (CDDH/III/386/Rev.1)

10. Mr. ALDRICH (United States of America), Rapporteur, stated that the Working Group had not reached a consensus on the proposals submitted in document CDDH/III/385/Rev.1. He proposed, by way of solution, that in the second line of paragraph 3 of Article 47, the words "place of worship, a" should be inserted before the word "house", and that in Article 47 bis, the words "places of worship" should be deleted from the title and sub-paragraphs (a) and (b).

Articles 47 and 47 bis, thus amended, were adopted by consensus.

11. The CHAIRMAN suggested that as a consequential change, the wording of Article 20 bis of draft Protocol II should be amended by deleting the words "places of worship" in the fourth line.

Article 20 bis, as amended, was adopted by consensus.

Draft Protocol I

Article 49 - Works and installations containing dangerous forces and articles to be inserted in an annex to Protocol I (CDDH/III/378)

12. Mr. ALDRICH (United States of America), Rapporteur, said that the Working Group had approved the recommendations drawn up by the special Working Sub-Group concerning the sign to be used to identify the objects protected by that article. In his opinion, the additions to the article and the draft articles proposed for insertion in an annex should be adopted by consensus. The Working Group recommended that it should be left to the Drafting Committee to decide whether the Annex to Protocol I should be a separate annex or should be added to the existing annex, which admittedly dealt with quite different topics.

13. The CHAIRMAN invited the representatives to take a decision on the proposed texts.

Article 49 and the articles to be included in an annex were adopted by consensus.

Draft Protocol IIArticle 28 - Protection of works and installations containing dangerous forces and articles to be inserted in an annex to Protocol II (CDDH/379 and CDDH/III/390 and Corr.1)

14. The CHAIRMAN suggested that the same changes should be made to Article 28 of draft Protocol II.

It was so agreed.

Article 28 of Protocol II, as amended, was adopted by consensus.

Draft Protocol IArticle 67 - Protection of women (CDDH/III/375)

15. Mr. ALDRICH (United States of America), Rapporteur, drew attention to the compromise solutions reached by the Working Group for paragraphs 2 and 3 of Article 67 of draft Protocol I.

16. The CHAIRMAN asked the Committee to take a decision on that article.

Article 67 was adopted by consensus.

Article 68 - Protection of children (CDDH/III/376)

17. Mr. ALDRICH (United States of America), Rapporteur, said that the wording of paragraph 5 of the article had been criticized by one delegation, which had asked that the word "pronounced" should be replaced by the word "executed", since under his country's legislation it would not be possible to prohibit the pronouncement of the death penalty, but the prohibition of its execution might be acceptable. The Working Group had accepted that amendment.

18. The CHAIRMAN asked the members of the Committee if they approved the proposed amendment.

The amendment was adopted.

Article 68, thus amended, was adopted by consensus.

Article 69 - Evacuation of children (CDDH/III/377)

19. Mr. ALDRICH (United States of America), Rapporteur, drew attention to several errors in the English version of paragraph 3. In sub-paragraph (a) an "s" should be added at the end of the word "surname". The words "he speaks" should be added at the end of sub-paragraph (i) after the word "languages". In sub-paragraph (r) the comma after the word "address" should be deleted.

Article 69, as amended, was adopted by consensus.

Draft Protocol II

Article 21 - Prohibition of perfidy (CDDH/III/381)

20. The CHAIRMAN invited the Committee to vote on Article 21 by a show of hands.

Article 21 was adopted by 21 votes to 15, with 41 abstentions.

Article 26 - Protection of the civilian population (CDDH/III/387)
(concluded)

Article 26 bis - General protection of civilian objects (CDDH/III/388)

Article 28 - Protection of works and installations containing dangerous forces (CDDH/III/379 and CDDH/III/390 and Corr.1) (concluded)

Article 29 - Prohibition of forced movement of civilians (CDDH/III/389)

21. The CHAIRMAN, after commenting on the high number of abstentions in the vote on Article 21, suggested that as Articles 26, 26 bis, 28 and 29 all dealt with the question of reprisals, the Committee should consider those articles together.

22. Mr. ALDRICH (United States of America), Rapporteur, said that the Working Group had preferred to wait to take a decision on those articles until Committee I had completed its discussion of the question of the prohibition of reprisals in Protocol II. It was, for that reason, unnecessary to include a provision concerning the prohibition of reprisals in any of the articles of draft Protocol II adopted by Committee III. The blank spaces and square brackets remaining in Articles 26, 26 bis, 28 and 29 could therefore be removed. He asked whether the members of Committee III would agree to their removal by consensus.

23. Mr. FELBER (German Democratic Republic) said that he had doubts regarding the competence of Committee III to deal with those articles. It would be wiser to await the conclusions reached by Committee I before taking a decision.

24. Mr. ALDRICH (United States of America), Rapporteur, agreed that it might be necessary to await the judgement of Committee I.

25. The CHAIRMAN considered it unnecessary to convene the Working Group again. He asked the members of Committee III whether they were willing to await the decision of Committee I.

It was so agreed.

Article 32 - Privileged treatment (CDDH/III/380)

26. Mr. ALDRICH (United States of America), Rapporteur, drew attention to the fact that in the English text of Article 32, the comma after the word "necessary" in sub-paragraph (c) should be deleted.

27. The CHAIRMAN observed that the same correction should be made to the French text of the article.

Article 32 was adopted by consensus.

Explanations of vote

28. The CHAIRMAN invited delegations wishing to do so to explain their votes.

29. Mr. VAN LUU (Socialist Republic of Viet Nam), referring to Articles 67 and 68, which had been adopted by consensus, said that the report of the Working Group (CDDH/III/391) was a very accurate reflection of the discussions which had taken place on the amendments submitted by his delegation.

30. In the course of those discussions, prompted by the experience of the wars of recent decades and of previous wars, and more especially by malpractices committed by the occupying authorities against the civilian population in occupied territories (arrest, detention or wrongful internment in the case of patriotic acts of non-submission - which were not yet hostile acts on the part of the civilian population), the Working Group had reached almost unanimous agreement on a sentence to be inserted in Articles 67 and 68 designed to prevent the arrest or imprisonment of pregnant women and infants solely because of their convictions. Later it had been decided that it was unnecessary to state the same principle in two different articles, and a draft new Article 65 bis had been proposed covering not just pregnant women and infants but everyone. In the end the proposal had not been accepted, largely because the principle was already incorporated in Article 65, paragraph 1, although only in one brief phrase in the middle of a long one.

31. His delegation had not insisted on its proposal in order not to oppose the consensus. It could not help noting, however, that the principle of respect for political and other opinions and for convictions in general was phrased in an abstract manner in Article 65, paragraph 1, and that the specific application of the principle to pregnant women and minors, who deserved separate treatment, had completely disappeared.

32. In the view of his delegation, the formulation and development of humanitarian law should be based on less abstract and less academic methods that were closer to real life and would afford better protection against abuses. If Articles 67 and 68 each contained a phrase providing that pregnant women and very young children should not be arrested, detained or interned solely because of their convictions, those articles would better prevent abuses of the application of the law.

33. Mr. IPSEN (Federal Republic of Germany) stated the reasons why his delegation had voted against Article 21 of draft Protocol II. A rebel who took part in conflict covered by draft Protocol II would be in a very different position from that of the combatant to whom draft Protocol I referred in dealing with the prohibition of perfidy.

The combatant referred to in Article 41 of Protocol I had the right to participate directly in hostilities. If he acted fully in accordance with the rules of international law applicable in international armed conflicts he could naturally not be tried or punished for his military activities, even if those activities did serious harm to the enemy.

34. The position of the rebel referred to in Protocol II was quite different. The rebel was not a legally recognized combatant. Even if he complied with all the provisions of Protocol II, he would be tried or punished simply because he had taken part in a rebellion, and he would certainly be liable to the severest penalty applicable under the domestic penal code. The effect of that was that no moral or legal force could induce a rebel to observe a prohibition on resorting to perfidy. That prohibition could therefore have no positive effect in the conflicts to which Protocol II referred. Those were the practical considerations that had led his delegation to vote against Article 21.

35. The main reason it had voted against that article, however, was a legal one. If Article 21 laid down that killing by resort to perfidy was prohibited, it might be deduced a contrario that killing without resorting to such methods was allowable. Such "legalization" or justification of rebellion could not be accepted by a State without upsetting its own legal and constitutional order. No State could agree to legitimize acts of rebellion under an international provision. For those reasons, his delegation had voted against Article 21, which it deemed to be inadequately and unsatisfactorily formulated.

36. Mr. SUKHDEV (India) explained that in order to facilitate the work of the Committee, his delegation had joined in the consensus on the articles of draft Protocol II mentioned in the report (CDDH/III/391), except for Article 21, but that it reserved its position and comments on those articles.

37. Mr. EATON (United Kingdom), explained, with reference to Article 21 of draft Protocol II, that his delegation would have preferred no article on perfidy to be included in Protocol II. The fact was that the provision raised the whole question of the legality of the hostilities waged by the non-governmental side in a conflict covered by Protocol II. If such action was illegal in any case and the mere fact of taking it was punishable under Article 5 of Protocol II, it would at the very least be superfluous to forbid action in which perfidy played a part. Furthermore his delegation considered that the concept of perfidy was too closely connected with the rules of international law to be applicable to internal conflicts.

38. Nevertheless, the Committee had decided by a majority - though not a convincing one - to adopt the text. The United Kingdom would not interpret that provision as making it illegal to use police or other officers in civilian dress in internal conflicts.

39. Mr. MAHONY (Australia) explained why his delegation had abstained in the vote on Article 39 of draft Protocol I. His main concern was that the article did not expressly refer to a person parachuting out of an aircraft in distress who committed a hostile act while descending. The article did not settle the question whether a descending parachutist who committed a hostile act while descending was entitled to be spared from attack.

40. His delegation took the view that such a parachutist was taking a direct part in the hostilities and was not entitled to the immunity conferred under Article 39; in other words, he was not immune from attack during his descent.

41. His delegation had voted against Article 21 as it considered the inclusion of that article in draft Protocol II, as a matter of law, was inappropriate.

42. In regard to Article 47 bis, his delegation had not wished to oppose the consensus, but, if the article had been put to the vote, Australia would have abstained owing to the reference in subparagraph (c) to reprisals.

43. The subject of reprisals was being considered by a Working Group of Committee I, which was contemplating the possibility of a general prohibition of reprisals. If such a general prohibition were adopted, the particular prohibition provided for under Article 47 bis would become superfluous.

44. Pending the outcome of the discussions in Committee I, therefore, his delegation wished to reserve its position before taking a final position on a particular prohibition of reprisals in Article 47 bis or in any other article.

45. Mr. ROMAN (Chile) said that his delegation had joined in the consensus on paragraph 3 of Article 37, but that it had reservations on the advantages of adopting it, particularly with respect to the amendment on espionage. The area of espionage and military action was already clearly defined both in Article 29, paragraph 2, of the Hague Regulations of 1907, and in Article 40 of draft Protocol I.

46. Under the criminal law of most States which followed the Napoleonic Code of 1810, participation in a criminal act included incitement and mandatory orders by a superior. Consequently the amendment in question, with the meaning given to it by the Rapporteur, was not acceptable for the Chilean delegation, which would have voted against the amendment had it been put to a vote.

47. Chile had abstained in the vote on Article 21 of draft Protocol II because the wording was very vague, but agreed that the prohibition of the resort to perfidy laid down for international conflicts in draft Protocol I should also be included in draft Protocol II, particularly since the latter already contained provisions on the application of humanitarian principles to armed conflicts not of an international character, as in Article 20 (Prohibition of unnecessary injury) and Article 22 bis (Safeguard of an enemy hors de combat).

48. Mr. SOKIRKIN (Union of Soviet Socialist Republics) emphasized the importance of Article 21 of Protocol II. Since it was stated in Article 35 of draft Protocol I that it was prohibited to kill, injure or capture an adversary by resort to perfidy, it would be strange not to apply the same humanitarian principle to conflicts in which the armed forces of a country were opposed by anti-government armed forces or other armed groups, as covered by draft Protocol II. Of course, that provision did not mean that it was permitted to kill, injure or capture an adversary by resort to means other than perfidy. His delegation would, of course, be prepared to prohibit killing in general, but reality must be faced: war existed, and steps must be taken to make it less cruel. Consequently Article 21 should be kept in draft Protocol II to prevent the Parties to the conflict from resorting to measures prohibited in international conflicts by draft Protocol I.

49. Mr. CHENIER (Canada) said that his country's position on Protocol II was known to all delegations. First of all, Article 21 appeared to indicate that there were two ways of rebelling against a legitimate Government: a legal way of killing, injuring or capturing soldiers belonging to the government forces, and an illegal way. It was certain that many governments would be unable to accept such an article. Secondly, if the rebel forces did not apply the provisions of Article 21, there was a danger that the whole of draft Protocol II might not be recognized. What was the import of the article? What exactly was meant by the words "ruses" and "perfidy"? There might well be a danger that in future the provisions of Article 35 of Protocol I would be included in the article in question, without their being given the interpretation required by Protocol II. In the circumstances his delegation would have preferred to delete Article 21.

50. Mr. AJAYI (Nigeria) explained that his delegation, in voting against Article 21 of draft Protocol II, had taken a stand, not against humanitarian principles, but against the extension of an article on perfidy to armed conflicts not of an international character.

51. Just as it was logical that the struggle against colonial domination and foreign occupation should be governed by Protocol I, in accordance with Article 1, paragraph 2, it was just as logical that legitimate governments should reserve full freedom of action with respect to civil wars and to all the conflicts governed by

Protocol II. But the inclusion in Protocol II of provisions on perfidy would reduce governments to impotence, and would prolong civil wars without mitigating the sufferings of the civilian population. Thus such inclusion would encroach upon the de jure or de facto sovereignty of governments.

52. Moreover, recent events had shown that rebel groups, benefiting from foreign support, often resorted to propaganda methods to accuse the legal authorities of genocide and to whip up public support for their own cause.

53. For those various reasons, his delegation considered that the adoption of Article 21 was most regrettable.

54. Mr. NAKAMURA (Japan) paid a tribute to the Rapporteur's efforts to facilitate the adoption of Article 67 of Protocol I, particularly paragraph 3. However, as his delegation had already stated in the Working Group, the first sentence of that paragraph was not in accordance with the legal system in Japan. Japanese legislation provided only that the death penalty should not be executed on pregnant women, which left open the possibility of imposing it on mothers of infants. But the penalty could be suspended or mitigated to enable the mother to look after her infants. That had actually happened in the case of an infant's mother who had been accused of murder and sentenced to imprisonment of less than three years. In fact, favourable treatment for pregnant women and mothers of infants, while not specifically provided for in Japanese law, was left to the discretion of the judges.

55. Moreover, when Committee I had adopted Article 10 of draft Protocol II at its third session, it had voted 37 votes (including Japan) to 2 with 9 abstentions to keep the words "mothers of young children" in paragraph 4. If Article 10 remained unchanged, "mothers of infants" should be included in Article 67 of draft Protocol I in order to avoid any contradiction with Article 10. Notwithstanding those reservations, the new wording of paragraph 3 of Article 67 was the best possible compromise between different legal systems. That was why his delegation had maintained its position not to oppose the adoption of the article and to abstain in the case of a vote.

56. With respect to Article 49 of Protocol I, his delegation had already pointed out to the Working Group on 5 May that the proposed sign for works and installations containing dangerous forces could be confused with the Japanese national flag. It had therefore asked for a slight change in the sign. The Working Group had formally decided that there was no danger of confusion and that there was no reason to alter the sign. His delegation therefore interpreted that as meaning that all countries except Japan would be responsible for identifying the sign with the Japanese flag and that his country could in no case be accused, except in any case of deliberate deceit on the part of Japan, pursuant to Article 36 and the other relevant articles.

57. Mr. OHM (Republic of Korea) said that his delegation had voted in favour of Article 67 of Protocol I but considered that the last sentence in paragraph 3 did not prevent the death sentence from being passed on pregnant women and mothers of infants.

58. Mr. OEBIT (Indonesia) said that Articles 67, 68 and 69 of Protocol I effectively strengthened humanitarian law, particularly for the benefit of women and children. Articles 67 and 68, which had been adopted by consensus, stated a basic principle for the protection of pregnant women, mothers of infants and persons under 18 years of age. With respect to Article 39 of Protocol I, his delegation felt that paragraphs 1 and 2 supplemented the Rules of Air Warfare adopted at The Hague in 1923 and that the paragraphs concerned afforded better protection to the occupants of aircraft. However, it would have preferred to keep the text adopted at the third session.

59. Article 46 of Protocol I, unreservedly supported by Indonesia, was based on the experience gained in the Second World War and earlier conflicts. It offered civilian populations and civilians a protection which should be universally recognized. That was why his delegation considered that the use, for military purposes, of the presence or movement of the civilian population must be prohibited.

60. After stating that his delegation had voted against Article 21 of draft Protocol II because rebels could not, under any circumstances, be deemed to be combatants, he said that he was in favour of the adoption of all the other articles.

61. Mr. GILL (Ireland) said that he shared the misgivings expressed by other delegations concerning Article 47 bis of draft Protocol I. However, his delegation had not wished to oppose the consensus on the amendments suggested by the Rapporteur. Nevertheless, the deletion of any reference to places of worship in the article was regrettable. It was his delegation's view that the words "historic monuments or works of art" applied to the major places of worship of every nation and religion. He urged that his interpretation should be confirmed in the final Report.

62. Mr. BARILE (Italy) said that there was an omission in Article 68 of draft Protocol I and Article 32 of draft Protocol II. No mention was made in those articles of the universally recognized principle that a child, whatever its age, could not be sentenced if, at the time of the offence, it was incapable of cognizance. Should it be impossible to set a specific age for cognizance, a general principle should at least be included both in a separate paragraph of Article 68 of Protocol I, and as a general rule in Protocol II. That paragraph might be worded as follows: "No sentence in respect of an offence related to armed conflict shall be pronounced on children who, by reason of their age, did not have the capacity of discernment at the time of the offence". His delegation felt that it had been deemed unnecessary to spell out that rule, which occurred in every legal system, but that it must nevertheless be applied. Both that interpretation and the general principle should therefore be mentioned specifically in the final report.

63. With regard to Article 68, paragraph 2, his delegation would have preferred the clause "in particular, they shall refrain from recruiting them in their armed forces" to have been completed, in conformity with the ICRC draft, by the words "or accepting their voluntary enrolment".

64. As regards Article 39 of draft Protocol I, his delegation was very glad that the words involving a restriction on the protection of aircraft occupants in distress had been deleted, as that would have constituted a serious step backwards and would have run counter to humanitarian principles already established, as had been stressed by his delegation at the third session.

65. Mr. NEMATALLAH (Saudi Arabia) expressed approval of the Rapporteur's statement concerning places of worship. It did not really matter whether that provision appeared in Article 47 or in Article 47 bis, provided such places were protected regardless of the nature of the religion in question. That principle should be clearly expressed in the final version.

66. With regard to Article 21 of Protocol II, he shared the opinion of the delegation of the Federal Republic of Germany that rebellion was an illegal act coming solely under domestic law. The proposed text was too general and too vague. His delegation had therefore abstained in the vote, particularly since rebellions led to massacres and subversive acts which were contrary to humanitarian principles.

67. Mr. CHARRY SAMPER (Colombia) said that the results of the vote on Article 21 of draft Protocol I, and especially the great number of abstentions, might have unfortunate repercussions on the implementation of its provisions. The wording was so vague that it might well give rise to dangerous interpretations. His delegation must, therefore, reserve the right to oppose the adoption of the article in plenary Conference.

68. Mrs. MANTZOULINOS (Greece) said that her delegation would have liked all places of worship as well as all historic monuments and works of art to be spared during hostilities. Unfortunately, as that hope was unrealistic, her delegation, when submitting a proposal on the subject at the first session, had had to restrict itself to cultural objects unique in character, and to historic monuments or works of art intimately associated with the history and culture of a people.

69. Her delegation was very pleased that a consensus had been reached on Article 47, which provided for the protection of places of worship within the context of the protection of civilian objects. However, that was in the nature of a compromise and, according to the understanding of her delegation, the provisions of Article 47 bis concerning the protection of the cultural heritage of peoples applied equally to all world-famed places of worship, which were unique artistic and architectural masterpieces, and consequently formed part of mankind's cultural heritage.

The meeting rose at 5.5 p.m.

SUMMARY RECORD OF THE SIXTIETH (CLOSING) MEETING

held on Friday, 13 May 1977, at 10.20 a.m.

Chairman: Mr. H. SULTAN (Egypt)

ADOPTION OF THE DRAFT REPORT OF COMMITTEE III (CDDH/III/408)

1. The CHAIRMAN invited the Committee to consider the draft report (CDDH/III/408), to which the officers of the Committee had put the finishing touches during the night, and which had just been circulated. He wished to make two comments. First, paragraph 69 had been omitted in the Russian version; he apologized to the delegation of the Union of Soviet Socialist Republics for the omission, and said that the Russian text of the paragraph would be distributed without delay. Secondly, he would ask any delegation that wished to make comments on the translation of the text in a particular language to do so in writing if possible. Such comments would then be taken into account in the final text.

2. Mr. ALDRICH (United States of America), Rapporteur, said that in paragraph 13 the reference to "Part IV" should be "Part III". Moreover, in the same sentence, which had been criticized as somewhat ambiguous, the word "protected" should be followed by the words "against that Party", to make the sentence clearer.

3. The CHAIRMAN indicated that in paragraph 4 on page 1 the blank spaces would be filled in when the Committee had concluded its work. He invited the Committee to consider the draft report (CDDH/III/408) paragraph by paragraph.

Paragraphs 1 to 64

Paragraphs 1 to 64 were adopted without comment

Paragraph 65 (Article 68 - Protection of children)

4. Mr. DI BERNARDO (Italy) said he took it as understood that no one in the Working Group had ever questioned the existence of a general principle to the effect that any person who, at the time when an offence was committed, was incapable of understanding the meaning of his own acts could not be regarded as guilty of the offence. He believed that it would be desirable to refer to that principle in paragraph 65, and proposed that the last sentence should be replaced by the following text:

"The Committee recognized that it was a principle of general international law that no person could be convicted of a criminal offence if, at the time the offence was committed, he was unable to understand the consequences of his act. The Committee nevertheless decided that the application of this principle should be left to national legislation."

5. Mr. ALDRICH (United States of America), Rapporteur, said that the proposed text seemed to him an accurate and clear reflection of the Committee's intentions.

Paragraph 65, as thus amended, was adopted.

Paragraph 66 (Article 69 - Evacuation of children)

6. Miss BOA (Ivory Coast) said that unfortunately she could not agree to the phrase "in view of the possibility of puppet governments", at the end of the penultimate sentence. What had been said was that it was often impossible to obtain the consent of the government authorities, but the expression used in the report was not acceptable and she proposed that the phrase should be deleted.

7. Mr. ALDRICH (United States of America), Rapporteur, said that it was quite possible the term "puppet government" had not been used in a meeting, but that he did not understand why the wording he had proposed in the report was unacceptable. He had merely tried to take account of the misgivings expressed in the course of consultations on the question of Governments that might be established by an Occupying Power.

8. Mr. GENOT (Belgium) said he remembered the expression concerned as having in fact been used in the Working Group, and he believed that the simplest course was to keep the phrase as it stood, since it summed up the situation accurately.

9. Miss BOA (Ivory Coast) said that she was sorry to have to repeat that she could not agree to the phrase. If the expression had indeed been used, she regretted not having indicated her disapproval at the time; if the expression had been used during private consultations, her delegation was entitled to say now that it found the text unsatisfactory.

10. Mr. SHERIFIS (Cyprus) thought the wording used by the Rapporteur was felicitous, since it accurately reflected the misgivings of many representatives about certain situations that unhappily existed at the present day. If the representative of the Ivory Coast could agree to be satisfied merely with the assurance that her statement and the explanations of the Rapporteur would be reported in detail in the summary record of the meeting, his delegation would be in favour of keeping the text of paragraph 66 as drafted by the Rapporteur.

11. Mr. ALDRICH (United States of America), Rapporteur, said he did not consider the words in question essential. In using them he had merely been trying to indicate the Committee's reasons. He asked if the deletion of the words following the word "inadequate" would meet the objections of the Ivory Coast.

12. Miss BOA (Ivory Coast) said that that would be satisfactory.

13. Mr. SHERIFIS (Cyprus) said he could not agree to that solution unless the exchange of views on the question was given in detail in the summary record of the meeting, together with the reasons advanced.

It was so agreed.

Paragraph 66, as thus amended, was adopted.

Paragraphs 67 to 74

Paragraphs 67 to 74 were adopted without comment.

The report of Committee III, as a whole, as amended, was adopted.

CONCLUSION OF THE COMMITTEE'S WORK

14. The CHAIRMAN thanked the delegations that had participated in the Committee's work for their spirit of understanding and co-operation. The Committee had achieved a creative and constructive result, and deserved to stand as an example to all diplomatic conferences. The discussions that had taken place had been at the highest and most admirable level. The political climate, which had been somewhat uncertain at the earlier sessions, had brightened considerably. The Committee deserved congratulations for what it had achieved on behalf of humanitarian law. He also wished to thank all delegations for the kindness and consideration they had shown him.

15. He had much appreciated the support he had received from the Vice-Chairmen, Mr. Herczegh and Mr. Erdembileg. The latter had replaced Mr. Dugersuren, to whom he wished every success in his new position. He also thanked the legal secretaries, the interpreters, the précis-writers, the technical services, the messengers and all the members of the Secretariat, who had one and all helped to ensure the success of the Committee's work.

16. The Committee had had two Rapporteurs, Mr. Baxter, to whom he wished every success in his new duties, and Mr. Aldrich, who deserved all praise for his probity, integrity and impartiality. Mr. Aldrich had always been able to find the right compromise formula to satisfy everyone, and in that respect he had truly achieved miracles.

17. Sir David HUGHES-MORGAN (United Kingdom), speaking on behalf of the Western Group, welcomed the results which the Committee had achieved. It had succeeded in concluding its work on time, as requested by the General Committee, and therefore deserved to be held up as an example to the other Committees.

18. He expressed his sincere thanks to all who had had a part in the successful outcome of the Committee's work, particularly the Chairman and the Rapporteur, for their contributions. He also thanked those whose co-operation had made it possible for the Committee to complete its task, including the legal secretaries, interpreters, précis-writers, messengers and other members of the Secretariat.

19. Mr. FELBER (German Democratic Republic), speaking on behalf of all the delegations of the community of socialist States, thanked the Chairman, the Rapporteur and their colleagues for their important contribution to the successful conclusion of the Committee's work. In many difficult and complicated situations the Chairman and his colleagues had enabled many problems to be dealt with by consensus or had found acceptable solutions that could be adopted.

20. He also thanked the delegations which had worked with those of the Socialist States and had supported their proposals in many cases. He fully agreed with the Chairman's statement concerning the Committee's work.

21. Mrs. MANTZOULINOS (Greece) wished to associate her delegation with the most sincere thanks already expressed to the Chairman, the Rapporteur, the officers and the Secretariat of the Committee. She would add the wish so aptly stated by the dictum of classical antiquity "Aien aristevin", which might be translated as "Always be the best".

22. Mr. MATHANJUKI (Kenya) thanked the Chairman and the Rapporteur, whose combined efforts had led to the successful conclusion of the Committee's work. He particularly welcomed the Committee's adoption of Article 42 as it represented a major breakthrough in international law to which his delegation had always looked forward. Liberation movements would now be able to pursue their struggles in appropriate circumstances. He further thanked the Chairman for having contributed to the adoption by consensus of the new article on mercenaries. The action of mercenaries was a heinous activity. His delegation hoped that States might go even further and prohibit the recruitment of mercenaries in their respective countries.

23. Mr. BRECKENRIDGE (Sri Lanka), speaking on behalf of the non-aligned countries, which formed a large group at the Conference, expressed his sincere thanks and congratulations to the Chairman for the masterly and effective way in which he had conducted the

business of the Committee. His delegation had taken the keenest interest in the Committee's work and welcomed the fact that it had been able to maintain excellent relations throughout with the Chairman and the Rapporteurs, Mr. Baxter and Mr. Aldrich, whom he also thanked for the remarkable work they had done.

24. Mr. GENOT (Belgium) said that he welcomed the opportunity to state that his delegation fully appreciated the remarkable long-term work which the International Committee of the Red Cross had done both effectively and discreetly at the Conference and, more particularly, in Committee III.

25. Miss BOA (Ivory Coast), speaking on a matter concerning the Conference's press services, observed that a misleading report of what had happened in the Committee during the vote on Article 42 had appeared in the daily newspaper Le Monde. The report stated that several African countries had left the conference room during the adoption of Article 42. The Conference's press services should be asked to point out to the newspaper concerned that a number of African countries had not been represented at the fourth session of the Conference and that several others had not been present when the vote had been taken.

26. The CHAIRMAN said that the matter had been brought to the officers' attention and that the appropriate steps had been taken.

27. Mr. BACHIR MOURAD (Syrian Arab Republic) said that while little could be added to the statements of praise already addressed to the Chairman he wished nevertheless to say how pleased his delegation had been to have taken part in work fully in accord with the humanitarian principles to which his country subscribed. The successful outcome of that work, from which he had personally drawn the greatest benefit for his own country both from the legal and from the administrative standpoint, was due to the efforts of the Committee as a whole and to the effectiveness of the Chairman, the Rapporteur and their colleagues at every level, to whom the sincerest congratulations should be addressed.

28. Mr. BAYART (Mongolia) said that he was most happy to join in the expressions of appreciation to the Chairman and the Rapporteur for having created a climate of mutual understanding and respect within the Committee which had enabled it to conclude its work before the other Committees and to have achieved useful results.

29. He wished also to transmit to the Chairman the thanks of Mr. Dugersuren, now Minister for Foreign Affairs of Mongolia, who had been Vice-Chairman of Committee III at the third session, for the kind words which the Chairman had said about him a few weeks earlier.

30. Mr. ALDRICH (United States of America), Rapporteur, said that Mr. Baxter had asked him to express his congratulations to the Committee on the successful conclusion of its work. Mr. Baxter was sorry he had been unable to attend the fourth session of the Conference but would be present on 10 June for the signing of the Final Act.

31. He himself very much appreciated the flattering words addressed to him by members of the Committee, particularly by the Chairman. He thanked them for their kindness, but even more for the spirit of co-operation which they had shown throughout the Committee's work. Looking back at the end of the Conference, everyone would recognize that the essential point, even more than the articles adopted, which would certainly improve the treatment of future victims of armed conflict, was the fact that those who had taken part in the Conference had shown that it was still possible, in the 1970s, in a world in which there were more and more countries with different ideologies and levels of economic development, to meet and reach agreement. Any who might still have misgivings on that score had been triumphantly proved wrong by the Conference.

32. The CHAIRMAN said that Committee III had concluded its work.

The meeting rose at 11.20 a.m.

Part Two

REPORTS OF COMMITTEE III

FIRST SESSION

(Geneva, 20 February - 29 March 1974)

COMMITTEE III

REPORT

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COMMITTEE III

REPORT

I. INTRODUCTION

Election of officers of the Committee

1. At its seventh plenary meeting, on 1 March 1974, the Conference elected the following officers of Committee III:

<u>Chairman:</u>	Mr. H. Sultan	(Arab Republic of Egypt)
<u>Vice-Chairmen:</u>	Mr. G. Herczegh	(Hungary)
	Mr. M. Dugersuren	(Mongolia)
<u>Rapporteur:</u>	Mr. R. Baxter	(United States of America)

2. The post of Secretary of the Committee was assumed by Mr. B. Hediger, jurist, and the International Committee of the Red Cross (ICRC) was represented by Mrs. D. Bindschedler-Robert and Mr. J. Mirimanoff-Chilikine.

II. BASIC PROPOSAL

3. In pursuance of rule 28 of the rules of procedure (CDDH/2/Rev.1), Committee III was entrusted with the discussion of the articles listed in section III of this report of the draft Protocols additional to the Geneva Conventions of 12 August 1949 (CDDH/1), prepared as a basic proposal by the International Committee of the Red Cross. These drafts are the subject of a Commentary by the ICRC (CDDH/3).

III. MEETINGS AND ORGANIZATION OF WORK

4. Committee III held twelve meetings between 8 and 26 March 1974 (CDDH/III/SRs 1 to 12). At the first meeting of the Committee, the Chairman proposed the following work programme (CDDH/III/1/Rev.1) for the Committee in order to permit it to carry on its deliberations in a systematic way:

- (a) General protection of the civilian population against the effects of hostilities

Basic rule and field of application

Articles 43 and 44 of draft Protocol I
Article 24, paragraph 1, of draft Protocol II

Civilians and civilian population

Articles 45 and 46 of draft Protocol I
Articles 25 and 26 of draft Protocol II

Civilian objects

Articles 47 to 49 of draft Protocol I
Articles 27 and 28 of draft Protocol II

Precautionary measures

Articles 50 and 51 of draft Protocol I
Article 24, paragraph 2, of draft Protocol II

Localities under special protection

Articles 52 and 53 of draft Protocol I

Prohibition of forced movement of civilians

Article 29 of draft Protocol II

(b) Methods and means of combat

Articles 33 to 41 of draft Protocol I
Articles 20 to 23 of draft Protocol II

(c) New category of prisoners of war

Article 42 of draft Protocol I

(d) Treatment of persons in the power of a party to the conflict

Articles 63 to 69 of draft Protocol I
Article 32 of draft Protocol II

5. The Chairman proposed that the topics be taken up chapter by chapter in draft Protocol I and that each article of draft Protocol II be considered in connexion with the corresponding article of draft Protocol I. He informed the Committee that there might be some transfer of responsibility for item (d) between Committees as the work progressed and as it became clearer how much work each Committee would have to do.

6. In the ensuing discussion of the proposed work programme, a number of delegations supported the parallel consideration of draft Protocol I and draft Protocol II. Other delegations took the position that it would be difficult to discuss draft Protocol II

without knowing its precise scope and suggested that consideration of that Protocol be postponed until the completion of consideration of draft Protocol I.

7. The Chairman's proposal was then adopted as submitted to the Committee, with the understanding that the corresponding articles of draft Protocol II would be discussed ad referendum. Several delegations wished to be recorded as reserving their positions.

8. Eight meetings of the Committee were devoted to the consideration of articles 43, 44, 45 and 46 of draft Protocol I and of articles 24, paragraph 1, and 25 and 26 of draft Protocol II, together with delegations' amendments thereto.

9. At the fourth meeting of the Committee, the Chairman referred the first of the draft articles discussed in the Committee (article 43) and the various proposals made with respect to it to a Working Group under the chairmanship of the Rapporteur and composed of the delegations sponsoring amendments and such other delegations as might wish to participate. As the preliminary discussion of each article was concluded in the Committee, the Chairman followed the same procedure of referring the article and the proposals made with respect to it to the Working Group.

10. The Working Group submitted proposed texts or alternative texts for articles 43, 44, and 45 of draft Protocol I and for article 24, paragraph 1, and article 25 of draft Protocol II. Article 46 of draft Protocol I and article 26 of draft Protocol II were likewise referred to the Working Group, but the Group was unable to complete its consideration of the two articles in time to permit their further consideration by the Committee.

11. The articles reported upon by the Working Group appear in the following documents:

Draft Protocol I

Article 43:	CDDH/III/29
Article 44:	CDDH/III/54
Article 45:	CDDH/III/66

Draft Protocol II

Article 24, paragraph 1:	CDDH/III/53
Article 25:	CDDH/III/72

12. At the tenth meeting of the Committee, a motion that the Committee merely take note in its report of the discussions in the Committee and in the Working Group and of the texts proposed by

that Group was defeated by 44 votes to 13, with 9 abstentions. The Committee then proceeded to vote on the articles reported upon by the Working Group.

13. The Committee approved the revised article 43, article 44, paragraphs 2 and 3, and article 45 of draft Protocol I and article 24, paragraph 1, and article 25 of draft Protocol II. At the time of voting and during the subsequent discussions, the Chairman made it clear that the voting on the 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 and on the scope of that Protocol. Various delegations expressed the desire to reserve their position on the articles of draft Protocol II voted upon, because no agreement had yet been reached on the scope of that Protocol. Other delegations were of the opinion that the voting on the articles of draft Protocol II did not depend on a decision on the scope of that draft Protocol, since the articles dealt with the protection of the victims of non-international armed conflicts which should be ensured whatever the scope of draft Protocol II might be. One delegation reserved its position on the need for draft Protocol II. It was also understood by the Committee that certain modifications in the articles adopted might be called for at the second session of the Conference in order to adjust them to, or harmonize them with, other articles of the two Protocols subsequently adopted.

14. At its twelfth and final meeting, the Committee approved its report.

15. The disposition of the various articles that were considered within the Committee is dealt with in the following sections.

IV. ACCOUNT OF THE DISCUSSION ON THE ARTICLES EXAMINED

Article 43 of draft Protocol I

16. The following proposals were made with respect to the ICRC text:

Czechoslovakia, German Democratic Republic, Poland:	CDDH/III/9
Romania:	CDDH/III/10
Libyan Arab Republic, Kuwait, Romania, Sudan, Syrian Arab Republic, Madagascar, Mauritania, Morocco, United Arab Emirates:	CDDH/III/14 and Add.1

Ghana: CDDH/III/20

France: CDDH/III/26

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 CDDH/III/10 was withdrawn by its sponsor, who stated his agreement with document CDDH/III/14 and Add.1.

17. General support was expressed in the Committee for the rule set forth in article 43, which was regarded as being the governing principle with respect to the protection of the civilian population. The principal suggestions for its improvement were that express reference should be made to the purpose of ensuring respect for civilian objects as well as the civilian population and that reference to the "destruction or weakening of the military resources of the adversary" should be deleted. Several delegations considered that language of that nature was out of place in a convention relating to the protection of the civilian population rather than the law of war in the strict sense and that "military resources" might provide too wide a basis for attacks in wartime.

18. The convergence of views within the Working Group on the wording of article 43 is reflected in document CDDH/III/29. With an oral amendment providing for the insertion of the word "accordingly" between the words "military objectives and" and "shall direct", the Committee at its tenth meeting adopted the text proposed by the Working Group.

19. Article 43, as adopted, reads as follows

"In order to ensure respect and protection for the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

Article 44 of draft Protocol I

20. The following proposals were made with respect to the ICRC text:

Romania: CDDH/III/10

Belgium, United Kingdom of Great Britain
and Northern Ireland: CDDH/III/16

Arab Republic of Egypt: CDDH/III/19

Australia: CDDH/III/21

Paragraph 1

21. In the discussion of this paragraph in the Committee, a number of delegations pointed out that the words "military operations" or "attacks" should be substituted for the word "warfare" appearing in the English text submitted by the ICRC. Several delegations spoke in favour of deleting the words "on land" so that the protection under section I of part IV of draft Protocol I would be as broad as possible, embracing the protection of the civilian population, individual civilians, and civilian objects at sea and in the air. Other delegations supported the retention of the words "on land" in order to exclude the application of the Protocol to attacks on merchant ships and on civil aircraft, which they asserted to be covered by other bodies of law, such as the law of blockade and of visit and search.

22. The Working Group, to which the article as a whole was referred, was unable to achieve a generally acceptable text for this paragraph and referred back to the Committee in document CDDH/III/54 three questions of substance which it considered that the Committee should decide.

23. The first question was whether the word "warfare" in the ICRC text should be replaced by the words "military operations" or "attacks". The proposal to substitute the word "attacks" was rejected by 53 votes to 10, with 5 abstentions. The words "military operations" were thus adopted.

24. The second question put to a vote was whether the words "against the adversary" should be inserted in the definition. By 31 votes to 22, with 11 abstentions, it was decided to incorporate the words "against the adversary" in the paragraph.

25. The third question was whether to delete the words "on land". By 35 votes to 33, with 4 abstentions, it was decided to retain the words "on land". When it was proposed to submit the entire paragraph to a vote, the Committee was unable to reach agreement on the place in which the words "on land" should be inserted in the paragraph. It was accordingly decided by 41 votes to 21, with 17 abstentions, to return the entire paragraph to the Working Group, with a request that it again study the paragraph.

26. The paragraph resulting from the first votes on the first two questions reads (with the places where "on land" might be inserted or omitted indicated by blanks):

"The provisions contained in the present Section apply to any land, air or sea military operations against the adversary ... which may affect the civilian population, individual civilians or civilian objects ...".

27. The Working Group was of the view that the words "on land" included rivers, canals, and lakes.

Paragraph 2

28. There was relatively little discussion of this paragraph in the Committee. In view of the variety of views expressed in the Working Group about the extent, if any, of the application of Protocol I to a party's own population, the Group decided to submit to the Committee in document CDDH/III/54 the question whether the words "against the adversary" in the ICRC text should be deleted. The Committee decided not to delete the words "against the adversary" by 38 votes to 18, with 10 abstentions. The paragraph was thereafter adopted as a whole by 51 votes to 1, with 18 abstentions.

29. The Committee did not take any decision on whether to move paragraph 2 of article 44 to article 2 of draft Protocol I, as had been recommended by a majority of the Working Group. It was considered that it would be premature to take a decision in this respect and that the question might be left for decision by the Drafting Committee of the Conference.

30. The text of the paragraph, as adopted, reads:

"'Attacks' mean acts of violence committed against the adversary, whether in defence or offence."

Paragraph 3

31. In the discussions of this paragraph in the Committee and in the Working Group, some difficulty was encountered with the word "complementary" (in English), a word which was thought by some to lend a measure of ambiguity to the paragraph. Other delegations considered that the words "complément" in French and "completan" in Spanish had a precise meaning and expressed correctly and in an appropriate manner that the Protocol was intended to supplement the Conventions so that the latter would be applied in future as supplemented by the Protocol. The Working Group recommended the substitution of the words "in addition" for "complementary". A number of delegations were in favour of provisions which did not jeopardize the protection provided by other treaties or by international customary law.

32. The text recommended by the Working Group in document CDDH/III/54 was adopted by 73 votes to none, with 2 abstentions.

33. The paragraph, as adopted, reads:

"The provisions of the present Section are in addition to the rules with respect to humanitarian protection contained in the Fourth Convention, particularly Part II thereof, and in such other international conventions as may be binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, on sea, or in the air, against the effects of hostilities."

Article 45 of draft Protocol I

34. The following proposals were made with respect to the ICRC text:

Finland, Sweden:	CDDH/III/13 and Add.1
Belgium, United Kingdom of Great Britain and Northern Ireland:	CDDH/III/22
Brazil:	CDDH/III/25
Romania:	CDDH/III/30
Australia:	CDDH/III/35

Paragraph 1

35. Some difficulty having been encountered in the Committee and in the Working Group in choosing an apposite form of words to describe the persons covered by the two articles referred to in this paragraph, it was recommended by the Working Group in document CDDH/III/66 that the text merely refer to "persons" instead of "armed forces".

36. On the adoption of article 45 by the Committee, it was pointed out that no decision had yet been reached on article 42 and that it was on that account impossible to give a final formulation to paragraph 1. It was agreed in the Committee that a definitive decision on paragraph 1 of article 45 would therefore have to await a decision on article 42.

Paragraph 2

37. The text of this paragraph as recommended by the Working Group and adopted by the Committee is identical with that in the ICRC proposal. The Working Group encountered a number of

difficulties in connexion with the amendment contained in document CDDH/III/13 and Add.1, and the amendment was not pressed by its sponsors.

Paragraph 3

38. The text of this paragraph as recommended by the Working Group and adopted by the Committee is identical with that in the ICRC proposal. However, drafting changes have been made in the Spanish text.

Paragraph 4

39. There were generally two divergent tendencies in the discussion of this paragraph in the Committee. On the one hand, it was thought desirable by some delegations that the presumption should be retained as drafted by the ICRC in order to preclude unscrupulous belligerents from denying the protection of the Protocol to civilians. On the other hand, several delegations were of the view that the provision should be redrafted in such a way as to make it more readily understandable to the soldier. It was also pointed out in the discussions that there was a possibility of conflict between this presumption and that contained in the second paragraph of article 5 of the Third Geneva Convention of 1949. It was agreed in the Working Group that the concept of presumption gave rise to such difficulties that the word "presumed" should be replaced by the word "considered". The Working Group was also of the view that paragraph 4, as thus amended, would not be inconsistent with article 5 of the Third Geneva Convention of 1949, as the two provisions were intended to apply to different circumstances. On that basis, it was possible to arrive at a convergence of views on the text presented in document CDDH/III/66.

40. Article 45 was adopted with an oral amendment to substitute the words "such person" for "he or she".

41. Article 45, as adopted, reads as follows:

"1. A civilian is anyone who does not belong to one of the categories of persons referred to in article 4(A)(1), (2), (3) and (6) of the Third Convention and in article 42 of the present Protocol.

2. The civilian population comprises all persons who are civilians.

3. The presence, within the civilian population, of individuals who do not fall within the definition of civilians does not deprive the population of its civilian character.

4. In case of doubt as to whether a person is a civilian, such person shall be considered to be a civilian."

42. The Working Group was of opinion that some or all of the paragraphs of article 45 might ultimately be moved to article 2 of draft Protocol I or to some other point in the Protocol. Some combination of the paragraphs might also be undertaken as a drafting matter.

43. It was called to the attention of the Committee and of the Working Group that, in at least one national legal system, the definition contained in paragraph 1 of the article might, if given effect in internal law, alter existing national administrative law with respect to the definition of civilians and members of the armed forces. The Working Group considered that that problem might be dealt with through a reservation or declaration by the State concerned in which it would make clear that the definitions in the article were for the purposes of international humanitarian law only. It was thought desirable to call this matter to the attention of Committee I, so that it might deal with the question in connexion with its consideration of what reservations might be permitted to the Protocols. One delegation stated that persons who were not members of the armed forces or who did not take a direct part in military operations, including militia and guerrilla fighters when they were not engaged in fighting, were civilians.

Article 46 of draft Protocol I

44. The following proposals were made with respect to the ICRC text:

Czechoslovakia, German Democratic Republic, Hungary, Poland:	CDDH/III/8 and Corr.1
Romania:	CDDH/III/10
Finland, Sweden:	CDDH/III/13 and Add.1
Brazil, Canada, Federal Republic of Germany, Nicaragua:	CDDH/III/27
Ghana:	CDDH/III/28
Ghana, Nigeria, Uganda, United Republic of Tanzania:	CDDH/III/38
Australia:	CDDH/III/43/Rev.1

Sweden:

CDDH/III/44

Algeria, Arab Republic of Egypt, Democratic
Yemen, Iraq, Kuwait, Libyan Arab
Republic, Mauritania, Morocco, Sudan,
Syrian Arab Republic, United Arab
Emirates:

CDDH/III/48/Rev.1
and Add.1

Philippines:

CDDH/III/51

Ghana subsequently withdrew the amendment to paragraph 1 of article 46 contained in document CDDH/III/28 in favour of the amendment contained in document CDDH/III/38.

45. The article was discussed in the Committee and then referred to the Working Group, which still had the article under consideration at the time of the final meeting of the Committee.

46. In the discussions of paragraph 1 of the article in the Committee, some delegations called for an interpretation of "methods intended to spread terror" going beyond the attacks referred to in the first sentence of the paragraph. Specific reference was made in this connexion to propaganda. The language of "intended to" also gave rise to some controversy. Some delegations suggested that the substantive element of intent would be too difficult to determine and that methods that in fact spread terror should be prohibited. Other delegations emphasized the problem of imposing responsibility for acts that might cause terror without terror having been intended.

47. Discussion of paragraph 2 centred on the problem of the person who intermittently or occasionally took part in hostilities and how that participation should be defined.

48. While the introductory language of paragraph 3 seemed to have achieved a certain measure of acceptance, a number of delegations thought that sub-paragraph 3(a) was too imprecise to afford a guide of conduct for aviators, while other delegations supported the prohibition concerning "target area" or "carpet" bombardment in the paragraph as an important safeguard for the civilian population. The principle of proportionality in sub-paragraph 3(b) similarly received a mixed reaction. Some delegations considered it a necessary means of regulating the conduct of warfare and of protecting the civilian population. Other delegations rejected that principle as a criterion and asserted that in humanitarian law there should be no condonation of casualties among civilians. Some who took the latter view considered that it would be desirable to delete sub-paragraph 3(b) as a whole, while others of the latter view proposed the deletion of the words "to an extent disproportionate to the direct and substantial military advantage anticipated".

49. In the course of the debate on reprisals, some delegations expressed their support of the ICRC text. Several delegations considered that the prohibition of reprisals against the civilian population should be extended to civilian objects as well. Certain other delegations expressed doubt whether it would be realistic to expect that there would be compliance with the prohibition in paragraph 4 of the ICRC text.

50. The discussion of paragraph 5 was largely directed to the drafting of the first sentence and the desirability of retaining the second sentence.

Article 24, paragraph 1, of draft Protocol II

51. The following proposals were made with respect to the ICRC text:

Romania:	CDDH/III/12
Czechoslovakia, German Democratic Republic, Poland:	CDDH/III/15
United States of America:	CDDH/III/23

52. The discussion of this article in the Committee and in the Working Group followed in general the same lines as the discussion of the corresponding article 43 of draft Protocol I. It was decided in the Working Group to recommend a text (CDDH/III/53) which was identical with that proposed for article 43. With an oral amendment providing for the insertion of the word "accordingly" between the words "military objectives and" and "shall direct" the Committee at its tenth meeting adopted the text proposed by the Working Group.

53. Article 24, paragraph 1, as adopted, reads as follows:

"In order to ensure respect and protection for the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

Article 25 of draft Protocol II

54. The following proposals were made with respect to the ICRC text:

Republic of Viet-Nam:	CDDH/III/2
Romania:	CDDH/III/12

Finland, Sweden:	CDDH/III/13 and Add.1
Brazil:	CDDH/III/31
Arab Republic of Egypt:	CDDH/III/33
Australia	CDDH/III/34
Canada	CDDH/III/36

55. The discussion of this article in the Committee and in the Working Group followed much the same course as the discussion of the corresponding article 45 of draft Protocol I.

56. The Working Group thought it desirable for the language of paragraph 1 to conform to that of the existing article 1 of the draft Protocol so that anyone not a member of the armed forces or "of an organized armed group" would be considered a civilian. Paragraphs 2 and 3 were cast in the same form as the corresponding paragraphs 2 and 3 of article 45 of draft Protocol I. The addition of a paragraph 4 corresponding to paragraph 4 of article 45 was also recommended.

57. The Committee adopted at its tenth meeting the proposal of the Working Group in document CDDH/III/72, with an oral amendment to substitute the words "such person" for "he or she".

58. The Working Group gave some consideration to the problem of those who, in an internal armed conflict, did not bear arms but who lent support to the armed forces or members of armed groups by supplying labour, transporting supplies, serving as messengers, disseminating propaganda, and the like. It was decided that that matter might more appropriately be dealt with in connexion with paragraph 2 of article 26.

59. The text of article 25, as adopted, reads:

"1. A civilian is anyone who is not a member of the armed forces or of an organized armed group.

2. The civilian population comprises all persons who are civilians.

3. The presence, within the civilian population, of individuals who do not fall within the definition of civilians does not deprive the population of its civilian character.

4. In case of doubt as to whether a person is a civilian, such person shall be considered to be a civilian."

60. The observation made in paragraph 43 of this report dealing with article 45 of draft Protocol I, with respect to a possible problem in the incorporation in national law of the definitions of civilians and members of the armed forces, also applies to article 25 of draft Protocol II.

61. The Working Group was of opinion that some or all of the paragraphs of article 25 might ultimately be moved to an article on definition or to some other point in draft Protocol II.

62. The Working Group agreed that a proposal by the Republic of Viet-Nam in document CDDH/III/2, relating to a definition of "civilian objects", would be taken up in connexion with later provisions relating to the protection of "civilian objects".

Article 26 of draft Protocol II

63. The following proposals were made with respect to the ICRC text:

Romania:	CDDH/III/12
Ghana:	CDDH/III/28
Canada:	CDDH/III/36
Australia:	CDDH/III/42
Sweden:	CDDH/III/45
Algeria, Arab Republic of Egypt, Democratic Yemen, Iraq, Kuwait, Lybian Arab Republic, Mauritania, Morocco, Sudan, Syrian Arab Republic, United Arab Emirates	CDDH/III/48/Rev.1 and Add.1
Philippines	CDDH/III/51
Brazil	CDDH/III/68

64. The discussion of this article in the Committee ran along lines similar to those of the discussion of the corresponding article 46 of draft Protocol I. Several delegations proposed that parts of this article were unsuitable in the case of non-international conflicts and that there was a need for simplicity in order to provide a practical Protocol II.

65. The article was referred to the Working Group, which was considering the article when the first session of the Conference ended.

66. A list of other amendments submitted with respect to articles other than the above for which Committee III is responsible is attached as an annex.

ANNEX

Amendments to articles not yet discussed by Committee III

Methods and means of combat

Draft Protocol I

Article 33

Uruguay:	CDDH/III/7
Pakistan:	CDDH/III/11

Article 34

Ghana:	CDDH/III/28
Brazil:	CDDH/III/32

Article 35

Republic of Viet-Nam:	CDDH/III/6
Uruguay:	CDDH/III/7

Article 36

Venezuela:	CDDH/III/75
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Article 38

Uruguay:	CDDH/III/7
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Article 39

Israel:	CDDH/III/69
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Article 41

Ghana:	CDDH/III/28
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Draft Protocol II

Article 23

Venezuela:	CDDH/III/75
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Prisoner of war statusDraft Protocol IArticle 42

Republic of Viet-Nam:	CDDH/III/5
Pakistan:	CDDH/III/11
Ghana:	CDDH/III/28
Madagascar:	CDDH/III/73

Article 42 bis

Israel:	CDDH/III/77
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Measures in favour of childrenDraft Protocol IIArticle 32

Romania:	CDDH/III/12
Ghana:	CDDH/III/28

Civilian objectsDraft Protocol IArticle 47

Romania:	CDDH/III/10
Greece, Jordan, Spain:	CDDH/III/17/Rev.1
Holy See:	CDDH/III/39
France:	CDDH/III/41
Australia:	CDDH/III/49
Sweden:	CDDH/III/52
Netherlands:	CDDH/III/56
Arab Republic of Egypt, Austria, Mexico, Netherlands, Norway, Philippines, Union of Soviet Socialist Republics:	CDDH/III/57

Civilian objects (continued)

Draft Protocol I (continued)

Article 47 (continued)

Czechoslovakia, German Democratic Republic: CDDH/III/58

Arab Republic of Egypt, Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Republic, Mauritania, Morocco, Qatar, Syrian Arab Republic, United Arab Emirates, Yemen: CDDH/III/63

Canada: CDDH/III/79

Article 48

Romania: CDDH/III/10

Finland, Sweden: CDDH/III/13 and Add.1

Ghana: CDDH/III/28

Australia: CDDH/III/49

United States of America: CDDH/III/50

Arab Republic of Egypt, Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Republic, Mauritania, Morocco, Qatar, Syrian Arab Republic, United Arab Emirates, Yemen: CDDH/III/63

Czechoslovakia, German Democratic Republic, Hungary: CDDH/III/64

Belgium, United Kingdom of Great Britain and Northern Ireland: CDDH/III/67

Ukrainian Soviet Socialist Republic: CDDH/III/74

Article 49

Republic of Viet-Nam: CDDH/III/4

Romania: CDDH/III/10

Civilian objects (continued)Draft Protocol I (continued)Article 49 (continued)

Australia:	CDDH/III/49
Belgium, Netherlands:	CDDH/III/59
Arab Republic of Egypt, Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Republic, Mauritania, Morocco, Qatar, Sweden, Switzerland, Sudan, Syrian Arab Republic, United Arab Emirates, Yemen:	CDDH/III/65
Ukrainian Soviet Socialist Republic:	CDDH/III/74
Arab Republic of Egypt, Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Republic, Mauritania, Morocco, Qatar, Sudan, Syrian Arab Republic, United Arab Emirates, Yemen:	CDDH/III/76 and Add.1
Canada:	CDDH/III/79

Article 49 bis
(environment)

Australia:	CDDH/III/60
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General protection of civilian objectsDraft Protocol IIArticle 26 bis

Finland, Sweden:	CDDH/III/13 and Add.1
Sweden:	CDDH/III/52
Arab Republic of Egypt, Iraq, Syrian Arab Republic:	CDDH/III/52/Rev.1 and Corr.1

The above amendments are based on the concept in article 47 of draft Protocol I, which should also be reflected in draft Protocol II.

Civilian objects (continued)

Draft Protocol F (continued)

Article 27

Romania:	CDDH/III/12
Finland, Sweden:	CDDH/III/13 and Add.1
Ghana:	CDDH/III/28
Canada:	CDDH/III/36
Australia:	CDDH/III/47
Arab Republic of Egypt, Iraq, Syrian Arab Republic:	CDDH/III/62/Rev.1 and Corr.1

Article 28

Romania:	CDDH/III/12
Brazil:	CDDH/III/18
Canada:	CDDH/III/36
Finland:	CDDH/III/37
Australia:	CDDH/III/46
Arab Republic of Egypt, Iraq, Syrian Arab Republic:	CDDH/III/62/Rev.1 and Corr.1

Protection of the natural environment

Draft Protocol II

Article 28 bis

Australia:	CDDH/III/55
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Prohibition of forced movement of civiliansDraft Protocol IIArticle 29

Romania: CDDH/III/12
Zimbabwe African People's Union (ZAPU): CDDH/III/40

Precautionary measuresDraft Protocol IArticle 50

Republic of Viet-Nam: CDDH/III/3
Romania: CDDH/III/10
Finland, Sweden: CDDH/III/13 and Add.1
Brazil: CDDH/III/24
Ghana: CDDH/III/28
Canada: CDDH/III/79

Article 51

Romania: CDDH/III/10
Canada: CDDH/III/79

Localities under special protectionDraft Protocol IArticle 52

Pakistan: CDDH/III/11
Uruguay: CDDH/III/61
Brazil: CDDH/III/70
Canada: CDDH/III/79

Article 53

Brazil: CDDH/III/71

Treatment of persons in the power of a party

to the conflict

Draft Protocol I

Article 66

Ghana:

CDDH/III/28

Article 68

Ghana:

CDDH/III/28

Geneva, 20 February - 29 March 1974

REPORT OF THE WORKING GROUP TO COMMITTEE III
ON
ARTICLE 44, PARAGRAPH 1, OF PROTOCOL I

The Working Group was requested by the Committee at its eleventh meeting to give renewed study to Article 44, paragraph 1, of Protocol I. The Working Group devoted three sessions to consideration of this paragraph.

It was not possible to arrive at any convergence of views on the wording of the article or to set up options for the paragraph in the form of variant texts. The Working Group was of the view that an important matter of substance about the territorial scope of application of the section is involved. Until that issue of substance is resolved, it would be difficult to draw up any text. When the issue is resolved, the drafting of an appropriate text should be relatively easy.

The Working Group was unanimously of the view that Protocol I should at least cover military operations on land and military operations from the sea and air against persons and objects on land (notably in the form of bombardment) which affect civilians on land.

Beyond that there was disagreement.

Delegations were of differing views whether the Section should be applicable to operations at sea (e.g. blockade, sinking of merchant ships, etc.) which affect civilians at sea (such as crews and passengers of ships) or on land. It was recognized that naval warfare is now regulated by various conventions and by a body of customary international law, but it was not clear to the Working Group how Protocol I might modify or affect this body of law.

Delegations were also of differing views on whether the Section should be applicable to military operations from land, sea, or air against civilian objects and individual civilians in the air - that is, civil aircraft. Operations within planes, such as hijacking, were similarly in issue.

There was a widespread, but not unanimous, view in the Working Group that there could be no further progress on this paragraph until further study had been given to these questions. It was also recognized that if the Section were to cover air and sea warfare, various delegations might wish to introduce additional proposals with respect to these subjects. Some delegations were of the view that, due to the technical considerations involved, any such proposals might first be formulated or considered by experts.

The proposals with respect to this paragraph, including several additional ones submitted during the course of the discussions in the Working Group, are reproduced in Annex I.

Annex I

Proposals with Respect to Article 44,
paragraph 1, of Protocol I

Romania, CDDH/III/10

Delete the words "on land" at the end of the first paragraph.

Belgium and the United Kingdom, CDDH/III/16

"The provisions contained in the present Section apply to attacks against the adversary on land which may affect the civilian population, individual civilians or civilian objects."

Egypt, CDDH/III/19

In sub-paragraph (1), replace the word "warfare" by "military operations" in the English version.

Australia, CDDH/III/21 and Corr. 1

"The provisions contained in the present Section apply to attacks against the adversary on land which may affect the civilian population, individual civilians or civilian objects."

Belgium in the Working Group

"The provisions contained in the present Section apply to any land, air or sea military operations against the adversary which may cause, on land, casualties among the civilian population or damage to civilian objects."

Brazil in the Working Group

"The provisions contained in the present Section apply to any land, air or sea military operations against the adversary in respect of their effects against the civilian population, individual civilians and civilian objects, as provided for in this Section." *

Rapporteur in the Working Group

"The provisions contained in the present Section apply to any land, air or sea military operations against the adversary which may affect the civilian population, individual civilians

* This paragraph incorporates CDDH/III/78/Add.1/Corr.1.

or civilian objects. They do not modify the existing rules of international law applicable to armed conflict at sea or to aerial warfare, except as to sea and air attacks against objectives on land."

Ghana (being a proposal for the drafting of the entire article)

1. The provisions contained in the present Section apply to any military operations by land, sea or air against the adversary which may cause casualties among the civilian population or damage to civilian objects.
2. "Attacks" means acts of violence committed against the adversary, whether in defence or offence.
3. The provisions of the present Section are in addition to, and not in derogation of, the rules with respect to humanitarian protection contained in the Fourth Convention, particularly Part II thereof, and in such other international conventions as may be binding upon the High Contracting Parties, as well as other rules of international law relating to the protection of civilians and civilian objects on land, on sea, or in the air, against the effects of hostilities.
4. For the purposes of this Article where there is a conflict between the provisions of this Section and any rules or conventions mentioned in paragraph 3 hereof, other than those relating to armed conflict on the sea, the provisions of this section shall prevail.

SECOND SESSION

(Geneva, 3 February - 18 April 1975)

COMMITTEE III

REPORT

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COMMITTEE III

REPORT

I. INTRODUCTION

A. Officers, Secretariat, Experts

1. Officers of the Committee

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

Vice-Chairmen: Mr. G. Herczegh (Hungary)
Mr. M. Dugersuren (Mongolia)

Rapporteur: Mr. R. Baxter (United States of America)
(17 March to 5 April 1975)
Mr. G. Aldrich (United States of America)
(3 February to 15 March and
7 April to 18 April 1975)

2. The Legal Secretaries of the Committee were

Miss C. Turian (3 March to 18 April 1975)

Mr. A. Friedrich (for the entire second
session)

Mr. B. Hediger (3 to 28 February 1975)

3. The International Committee of the Red Cross (ICRC) was represented by Mrs. D. Bindschedler-Robert, Mr. J. de Preux, Mr. J. Mirimanoff-Chilikine and Mr. M. Veuthey.

B. Meetings and organization of work

4. Committee III held twenty-eight meetings between 5 February and 14 April 1975 (CDDH/III/SR.13 to 40). During the same period, a Working Group under the chairmanship of the Rapporteur held over fifty meetings.

5. At the thirteenth meeting of the Committee, on 5 February 1975, (the first at the second session of the Conference), the Chairman recalled that the officers' suggestions concerning the Committee's method of work (CDDH/III/1/Rev.1) had been adopted at the first session. A draft programme of work (CDDH/III/201) for the second session of the Conference was distributed at the same meeting; it outlined the proposed method of work, described the work completed by the end of the first session, enumerated the articles still to be considered and suggested a provisional time-table.

6. Pursuant to rule 28 of the rules of procedure (CDDH/2/Rev.2), Committee III was entrusted with the consideration of certain articles of the draft Additional Protocols to the Geneva Conventions of August 12 1949 (CDDH/1). The articles referred to Committee III were as follows (see CDDH/4/Rev.1, p. 8):

	<u>Draft Protocol I</u>	<u>Draft Protocol II</u>
General protection against effects of hostilities	Articles 43 to 53	Articles 24 to 29
Methods and means of combat	Articles 33 to 41	Articles 20 to 23
New category of prisoners of war	Article 42	
Treatment of persons in the power of a Party to the conflict	Articles 63 to 69	Article 32

7. By the end of the first session, articles 43, 44, paragraphs 2 and 3, and 45 of draft Protocol I had been adopted by the Committee; article 44, paragraph 1, and article 46 had been referred to its Working Group. With regard to draft Protocol II, articles 24, paragraph 1, and article 25 had been adopted ad referendum and article 26 had been referred to the Working Group.

8. Accordingly, the articles remaining for consideration by the Committee at the second session were:

	<u>Draft Protocol I</u>	<u>Draft Protocol II</u>
(a) <u>General protection of the civilian population against the effects of hostilities</u>		
Basic rule and field of application	Article 44, paragraph 1	
Civilians and civilian population	Article 46	Article 26
Civilian objects	Articles 47 to 49	Articles 27 and 28
Precautionary measures	Articles 50 and 51	Article 24, paragraph 2
Localities under special protection	Articles 52 and 53	
Prohibition of forced movement of civilians		Article 29

Draft
Protocol I

Draft
Protocol II

- | | | |
|---|-------------------|-------------------|
| (b) <u>Methods and means of
combat</u> | Articles 33 to 41 | Articles 20 to 23 |
| (c) <u>New category of
prisoners of war</u> | Article 42 | |
| (d) <u>Treatment of persons in
the power of a Party to
the conflict</u> | Articles 63 to 69 | Article 32 |

9. In the course of the current session and at the request of the Chairman of Committee I, articles 63 to 65 and articles 67 to 69 of draft Protocol I, and article 32 of draft Protocol II were transferred to Committee I.

10. With respect to each article to be considered by the Committee, the Chairman set a time limit for the submission of amendments. Amendments submitted after the time limit were circulated as documents of the Committee's Working Group only and were not considered by the Committee itself.

11. Each article was first introduced by an expert of the International Committee of the Red Cross. Thereafter, the amendments were introduced. Amendments submitted by several delegations were introduced by a single sponsor. At the conclusion of the general debate in the Committee, the Committee referred each article, together with the various proposals made with respect to it, to a Working Group under the chairmanship of the Rapporteur and composed of the delegations sponsoring amendments and such other delegations as wished to participate in the work.

12. The topics of draft Protocol I were taken up Chapter by Chapter. The articles of draft Protocol II were, in most cases, considered in connexion with the corresponding articles of draft Protocol I, despite the preference of some delegations to have them considered separately.

13. The proceedings of the Working Group are reported upon by the Rapporteur in documents CDDH/III/224, CDDH/III/264/Rev.1, CDDH/III/275 and Corr.1 and CDDH/III/293.

14. The Working Group submitted to the Committee the texts set forth in the following documents:

Draft Protocol I

Article 33	CDDH/III/290/Rev.1
Article 34	CDDH/III/291
Article 36	CDDH/III/288
Article 37	CDDH/III/289
Article 44, paragraph 1	CDDH/III/227
Article 46	CDDH/III/228 and 246
Article 47	CDDH/III/229
Article 47 <u>bis</u>	CDDH/III/230
Article 48	CDDH/III/247
Article 48 <u>bis</u> and 48 <u>ter</u>	CDDH/III/276
Article 49	CDDH/III/248
Article 50	CDDH/III/249
Article 51	CDDH/III/250
Article 52	CDDH/III/251
Article 53	CDDH/III/252

Draft Protocol II

Article 24, paragraph 2	CDDH/III/278
Article 26	CDDH/III/279
Article 26 <u>bis</u>	CDDH/III/280
Article 28	CDDH/III/281
Article 28 <u>bis</u>	CDDH/III/282
Article 28 <u>ter</u>	CDDH/III/278
Article 29	CDDH/III/283

15. The Committee adopted the twenty-two articles which are discussed in the following section and completed the general debate on all other articles of the ICRC draft before it.

16. The following articles were still pending before the Working Group at the end of the second session: articles 35, 38 to 42 ter, 48 ter (dealing with nature reserves) and article 66 of draft Protocol I and articles 20 to 23 and 27 of draft Protocol II. A proposal concerning the protection of oil and oil facilities (CDDH/III/GT/62 and Add.1 to 3) and a proposal concerning aggression and non-discrimination (CDDH/III/GT/42, reproduced as document CDDH/III/284) are also pending before the Working Group. A number of delegations may wish to have the latter proposal discussed first by the Committee.

17. The Committee decided, in principle, at its thirty-eighth meeting, on 10 April 1975, to establish, in conjunction with Committees I and II, at the beginning of the third session of the Conference, a Joint Working Group on the problem of reprisals as it appears in both Protocols since all three Committees are concerned with that problem. The composition and precise terms of reference of this Working Group will be decided when it is set up. One delegation reserved its position concerning the establishment of such a Joint Working Group.

II. REPORT ON THE ARTICLES ADOPTED BY THE COMMITTEE^{*/}

A. Draft Protocol I

Article 33

18. The following proposals were made with respect to the ICRC text:

Uruguay:	CDDH/III/7
Pakistan:	CDDH/III/11
Finland:	CDDH/III/91
Arab Republic of Egypt, Australia, Czechoslovakia, Finland, German Democratic Republic, Hungary, Ireland, Norway, Yugoslavia, Sudan:	CDDH/III/222
German Democratic Republic:	CDDH/III/225
Australia:	CDDH/III/237
Democratic Republic of Viet-Nam, Uganda	CDDH/III/238 and Add.1

19. The principal difficulties encountered in the formulation of this article, aside from paragraph 3 concerning the environment, arose from the need to reaffirm the existing law and overcome inadequate prior translations which have achieved a certain acceptance through time and usage.

20. With respect to paragraph 1 and to various other provisions in this Section, the term "methods or means of warfare" was preferred to "methods or means of combat" for the reason that "combat" might be construed more narrowly than "warfare". No effort was made, however, to define either term, and the choice of words should, perhaps, be considered further by a Drafting Committee, particularly since the term "methods or means of combat" is used elsewhere in the Protocol.

21. It should also be noted that the phrase "superfluous injury or unnecessary suffering" was chosen as the preferred translation of the French, "maux superflus", which includes both physical and moral injury. 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.

^{*/} The texts of the adopted articles appear in the annex to the present report.

22. It was decided to defer consideration of a number of proposed paragraphs. These included paragraphs 3 and 4 of document CDDH/III/238, until the proposal in document CDDH/III/284, was considered by the Working Group at the third session of the Conference. Some representatives said that the objectives of the two paragraphs were dealt with in part in articles 46, 48, and 48 bis and would be dealt with in part by the proposal in document CDDH/III/284. Other representatives disagreed and urged the inclusion of provisions along the lines of the two paragraphs in article 33 or elsewhere in the Protocol. Also among the paragraphs concerning which consideration was deferred was the additional paragraph proposed in amendment CDDH/III/259 which will be discussed by the Working Group in the context of its discussion of article 42 of draft Protocol I, and amendment CDDH/III/11, concerning meetings for the prohibition or restriction of certain conventional weapons.

23. Paragraph 3 is new, as the protection of the natural environment was not specifically raised in the ICRC draft. Amendments with several co-sponsors (CDDH/III/222 and CDDH/III/238) were tabled calling for a new paragraph forbidding methods and means of warfare or combat which would destroy or disrupt in some large degree the natural or human environment. Because similar proposals were made in connexion with the part of the Protocol providing for protection of the civilian population (e.g., articles 48 and 49) the issue of protection of the environment was first considered in connexion with article 48 bis.

24. The entire question of protection of the environment was referred to an informal Working Group entitled Biotope Group and its report appears in document CDDH/III/GT/35.

25. The Biotope report recommended that there should be separate provisions in article 33 as well as in article 48 bis. In view of the obvious need for these provisions to provide the same standard in substance, if not in words, much effort was made to harmonize them. Drawing on the Biotope report there was a convergence of views on the adoption of the formula "to cause widespread, long-term, and severe damage to the natural environment".

26. The alternative formula of causing damage "to disturb the stability of the ecosystem" was eventually rejected as an operative part of the standard.

27. The three elements of the adopted formula of time or duration of the damage, scope or area affected, and the severity or prejudicial effect of the damage to the civilian population was extensively discussed. The time or duration required (i.e., long-term) was considered by some to be measured in decades.

References to twenty or thirty years were made by some representatives as being a minimum. Others referred to battlefield destruction in France in the First World War as being outside the scope of the prohibition. The Biotope report states that "Acts of warfare which cause short-term damage to the natural environment, such as artillery bombardment, are not intended to be prohibited by the article," and continues by stating that the period might be perhaps for ten years or more. However, it is impossible to say with certainty what period of time might be involved. It appeared to be a widely shared assumption that battlefield damage incidental to conventional warfare would not normally be proscribed by this provision. What the article is primarily directed to is thus such damage as would be likely to prejudice, over a long term, the continued survival of the civilian population or would risk causing it major health problems.

28. Paragraph 3 was adopted by the Committee at its thirty-eighth meeting, on 10 April 1975, by a vote of 57 to 4 with 3 abstentions. The Committee adopted article 33 as a whole at its thirty-eighth meeting by consensus. (See the annex to the present report.)

Article 34

29. The following amendments were submitted with respect to the ICRC text:

Ghana:	CDDH/III/28
Brazil:	CDDH/III/32
Poland:	CDDH/III/92
Netherlands, Norway, Sweden	CDDH/III/226
Byelorussian Soviet Socialist Republic:	CDDH/III/231
Australia:	CDDH/III/235

30. The determination of legality required of States by this article is not intended to create a subjective standard. Determination by any State that the employment of a weapon is prohibited or permitted is not binding internationally, but it is hoped that the obligation to make such determinations will ensure that means or methods of warfare will not be adopted without the issue of legality being explored with care.

31. It should also be noted that the article is intended to require States to analyse whether the employment of a weapon for its normal or expected use would be prohibited under some or all circumstances. A State is not required to foresee or analyse all possible misuses of a weapon, for almost any weapon can be misused in ways that would be prohibited.

32. The Committee adopted article 34 by consensus at its thirty-eighth meeting, on 10 April 1975. (See the annex to the present report.)

Article 36

33. The following amendment was submitted with respect to the ICRC text:

Venezuela:

CDDH/III/75

34. The idea behind this article was easily accepted, but the text proved surprisingly difficult to draft. A number of representatives stated that their Governments could not, in this Protocol, accept an obligation to avoid or prevent improper use of an emblem provided for in a convention to which their Governments were not parties. On the other hand, these Governments could agree that they would not themselves deliberately misuse such an emblem. The second sentence of paragraph 1 was redrafted to express this distinction.

35. When article 36 is reviewed by the Drafting Committee of the Conference, one question that should be examined further is whether, in the first line, the word "distinctive" should be inserted before the words "protective emblem". This form of words has apparently been used by Committee II, based upon the usage in the Conventions themselves, and it seems clear that there should be a harmonization of approaches within the Conference.

36. The Committee adopted article 36 by consensus at its thirty-eighth meeting, on 10 April 1975. (See the annex to the present report.)

Article 37

37. The following amendments were submitted with respect to the ICRC text:

Austria, Finland, Sweden,
Switzerland, United Kingdom
of Great Britain and
Northern Ireland:

CDDH/45

Venezuela:

CDDH/III/239

United States of America:

CDDH/III/240

38. With respect to paragraph 1, it was considered desirable to deal with the question of neutral flags, emblems, etc. separately and in more absolute terms than the question of flags, emblems, etc. of an adverse Party. However, the prohibition in paragraph 1 is not absolute. Neutral flags, emblems, etc. may be used as long

as they are not used "in an armed conflict", that is to say as long as they are not used for the promotion of the interests of a Party to the conflict in the conduct of that conflict. Also, it is clear that article 37 is not intended to prohibit or restrict neutrals - or indeed any States - or their agencies from using their own flags, emblems, etc.

39. A number of representatives pointed out the need to provide better protection for insignia and uniforms of personnel of the United Nations, particularly of peace-keeping forces. It was decided not to try to do that in article 37, but to consider further how such protection could best be provided. It was noted that, quite apart from Protocol I, the United Nations itself could try to improve that protection through agreements concluded with the States concerned with a particular United Nations force.

40. Several representatives pointed out that paragraph 2 could have the effect of increasing the legal vulnerability of escaped spies to subsequent punishment. Although a spy who escapes successfully is not thereafter subject to punishment as a spy, he could still presumably be punished for violations of the laws of war, which, it might be asserted, would include this article. The Committee recognized that it would be of questionable wisdom to make it even marginally safer for spies to disguise themselves as civilians than as military personnel. It is conceivable that this question will be considered further by the Conference in connexion with the articles concerning repression of breaches. In any event, it should be noted that the Committee expressed no intent by means of this article to change the law (particularly Article 31 of The Hague Regulations)^{1/} as it applies to espionage.

41. Article 37 was adopted by the Committee at its thirty-eighth meeting on 10 April 1975, by consensus. (See the annex to the present report.)

Article 44, paragraph 1

42. The following amendments were submitted with respect to the ICRC text:

Romania:	CDDH/III/10
Belgium, United Kingdom of Great Britain and Northern Ireland:	CDDH/III/16
Arab Republic of Egypt:	CDDH/III/19
Australia:	CDDH/III/21

^{1/} Annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land.

43. Paragraph 1 had been the subject of extensive discussion at the first session of the Conference. The Working Group had been unable to reach agreement on a text and in document CDDH/III/54 had referred back to the Committee three questions of substance which it considered that the Committee should decide. The Committee was unable to reach agreement on the wording of the paragraph and was compelled to refer the matter back to the Working Group (see CDDH/50/Rev.1, para. 25). The Working Group was unable to complete its consideration of the question at the first session of the Conference.

44. At the second session of the Conference, the Working Group resumed its consideration of paragraph 1. There was almost complete agreement in the Working Group that it would be both difficult and undesirable in the time available to try to review and revise the law applicable to armed conflict at sea and in the air. It was also widely recognized that care should be taken not to change that body of law inadvertently through this paragraph. The solution was found through a combination of the ICRC text with a sentence which stated clearly that, except for attacks against objectives on land, the law applicable to armed conflict at sea or in the air is unaffected.

45. Several delegations remained dissatisfied with the draft recommended by the Working Group and subsequently adopted by the Committee. They objected to the phrase "on land" in the first sentence and to the second sentence as a whole. They preferred that this Section of the Protocol should affect the law applicable to the conduct of warfare at sea or in the air to the extent that the provisions of this Section would be more favourable to civilians than the existing law.

46. The text recommended by the Working Group (CDDH/III/224 and CDDH/III/227) was submitted to the Committee at its twenty-fourth meeting on 25 February 1975. The questions of whether to include the words "on land" and the part of the second sentence beginning with "but do not ..." and concluding with "... or in the air" were submitted to a separate vote. The term "on land" was adopted by 56 votes to one, with 7 abstentions, and the portion of the second sentence referred to was adopted by 56 votes to one, with 9 abstentions. Paragraph 1 of article 44 was then adopted by 60 votes to none, with 7 abstentions. (See the annex to the present report.)

Article 46

47. The following amendments were submitted with respect to the ICRC text:

Czechoslovakia, German Democratic Republic, Hungary, Poland:	CDDH/III/8 and Corr.1
Romania:	CDDH/III/10
Finland, Sweden:	CDDH/III/13 and Add.1
Brazil, Canada, Federal Republic of Germany, Nicaragua:	CDDH/III/27
Ghana:	CDDH/III/28
Ghana, Nigeria, Uganda, United Republic of Tanzania:	CDDH/III/38
Australia:	CDDH/III/43/Rev.1
Sweden:	CDDH/III/44
Algeria, Arab Republic of Egypt, Democratic Yemen, Iraq, Kuwait, Libyan Arab Republic, Mali, Mauritania, Morocco, Sudan, Syrian Arab Republic, United Arab Emirates:	CDDH/III/48/Rev.1 and Add.1 and 2
Philippines:	CDDH/III/51

Ghana subsequently withdrew amendment CDDH/III/28 in favour of amendment CDDH/III/38.

48. Article 46 was discussed in the Committee (see the report of Committee III (CDDH/50/Rev.1, paras. 44 to 50)) and then referred to the Working Group at the first session of the Conference. The article was under consideration by the Working Group when the first session of the Conference ended.

49. At the second session of the Conference, the Working Group resumed its consideration of article 46. It was possible to draft a text only after prolonged discussions in the Working Group, paragraph 3, dealing with indiscriminate attacks, proved to be particularly difficult to formulate.

50. Article 46 is introduced with a general provision with respect to "dangers arising from military operations". While the numbered paragraphs give effect to this general principle, they are not intended to be limitative in effect. It is for this reason that express reference is made to the fact that these paragraphs are "in addition to other applicable rules of international law", which may be found both in draft Protocol I and in other treaties and rules of customary international law. The rules of article 46, as

well as the other rules of international law, apply to all types of operations, by regular and irregular forces alike, during the course of an armed conflict.

51. Paragraph 1 reproduces in its first sentence the same text as paragraph 1 of the ICRC draft. The prohibition of "acts or threats of violence which have the primary object of spreading terror" is directed to intentional conduct specifically directed toward the spreading of terror and excludes terror which was not intended by a belligerent and terror that is merely an incidental effect of acts of warfare which have another primary object and are in all other respects lawful.

52. Paragraph 2 is basically the same text as that of the ICRC, but the protection enjoyed by civilians is stated to be that provided by this Section of the Protocol rather than by article 46 alone. Civilians lose the protection of the Section only during such time as they actually "take a direct part in hostilities."

53. The term "hostilities" was not defined, but a number of delegations expressed the view that the term included preparations for combat and return from combat. "Hostilities" and "military operations" are among the terms which should engage the close attention of the Drafting Committee in order to ensure consistency of usage and clarity of meaning.

54. Paragraph 3, which was considered by the Working Group at three different stages, was ultimately agreed upon in that Group in its present form.

55. The introductory portion of paragraph 3 proved to be surprisingly troublesome. The main problem was that of defining the term "indiscriminate attacks". There was general agreement that a proper definition would include the act of not directing an attack at a military objective, the use of means or methods of combat which cannot be directed at a specific military objective, and the use of means or methods of combat the effects of which cannot be limited as required by the Protocol. Many but not all of those who commented were of the view that the definition was not intended to mean that there are means or methods of combat whose use would involve an indiscriminate attack in all circumstances. Rather, it was intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in those circumstances would involve an indiscriminate attack.

56. In paragraph 3 (a), "bombardment by any methods or means" refers to all attacks by fire, and the use of any type of projectile except for direct fire by small arms. The sub-paragraph prohibits all types of bombardment which treat as a single military objective a number of objectives separated by some distance which are located in an area where there is a concentration of civilians. Thus, after much deliberation, the Working Group considered it unnecessary to refer to "massive" bombardment, "target area" bombardment, or "carpet bombing", since all are covered by this prohibition, and the use of such expressions might be construed to restrict the protection of civilians from other types of bombardment.

57. Paragraph 3 (b) was drafted only after article 50 had been settled, since both provisions involved the same issue. A simple cross reference commended itself to the Working Group, although it was recognized that the Drafting Committee would ultimately have to decide whether to use a cross reference or the full text and, if the former, whether the text would appear in article 46, paragraph 3, or in article 50.

58. The text of paragraph 4 is as proposed by the ICRC.

59. Paragraph 5 amplifies the language of the first sentence of the ICRC text. There has been added a prohibition of the movement of the civilian population or of civilians to shield military objectives or operations. Finally, paragraph 6 makes it clear that the civilian population is legally protected even if one or the other of the prohibitions has been violated. The precautions in attack prescribed in article 50 must still be observed.

60. Paragraphs 1, 2, 4, 5 and 6 were adopted by consensus at the twenty-fourth meeting of the Committee on 25 February 1975, on the basis of the texts recommended by the Working Group in documents CDDH/III/228 and CDDH/III/224. Paragraph 3, on which the Working Group had been unable to achieve complete agreement, was at that time referred back to the Working Group for further consideration. An agreed text was subsequently submitted to the Committee in document CDDH/III/246 and was adopted by consensus at the thirty-first meeting of the Committee on 14 March 1975. The text of article 46 as a whole was then adopted by consensus. (See the annex to the present report.)

Article 47

61. The following amendments were submitted with respect to the ICRC text:

Romania:	CDDH/III/10
Greece, Holy See, Jordan, Spain, Uruguay, Venezuela:	CDDH/III/17/Rev.2
Holy See:	CDDH/III/39
France:	CDDH/III/41
Australia:	CDDH/III/49
Sweden:	CDDH/III/52
Netherlands:	CDDH/III/56
Arab Republic of Egypt, Austria, Mexico, Netherlands, Norway, Philippines, Union of Soviet Socialist Republics:	CDDH/III/57
Czechoslovakia, German Democratic Republic:	CDDH/III/58
Arab Republic of Egypt, Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Republic, Mauritania, Morocco, Qatar, Saudi Arabia, Syrian Arab Republic, United Arab Emirates, Yemen:	CDDH/III/63 and Add.1
Canada:	CDDH/III/79

Canada subsequently withdrew amendment CDDH/III/79 and stated that it supported the Netherlands amendment (CDDH/III/56). Amendment CDDH/III/39 was subsequently modified and incorporated in amendment CDDH/III/17/Rev.2.

62. Following the introduction of the amendments, an unsuccessful attempt was made in a Co-ordination Group of the Committee to secure one agreed amendment to article 47. A general debate then took place in the Committee, and the article was referred to the Working Group. The Working Group reached very broad agreement on a text, with the exception of two phrases.

63. Paragraph 1, in conformity with the orientation of this Section toward the protection of the civilian population forbids making civilian objects the object of attack or of reprisals. The matter of reprisals was the subject of extensive debate. Some delegations were of the view that the prohibition of reprisals against civilians in paragraph 4 of article 46 should be extended in article 47 to cover all civilian objects. Other delegations contended that, whereas prohibitions of reprisals against specially protected civilian objects such as are found in article 47 bis, article 48,

and article 49 are acceptable; ordinary civilian objects should not be immune to reprisals, which could serve as a means of enhancing compliance with the law. The Committee supported the former view by voting to include the words "nor of reprisals".

64. Paragraph 2 is a somewhat revised version of the ICRC text. Account is taken of the fact that military objectives include objectives other than military objects - such as troops, their equipment, and ground - and of the fact that objects may be neutralized or captured as well as destroyed. Extensive discussion took place before agreement was reached on the word "definite" in the phrase "definite military advantage". Among the words considered and rejected were "distinct", "direct", "clear", "immediate", "obvious", "specific", and "substantial".

65. Paragraph 3 creates a new presumption in the law. The Committee rejected a possible exception to the presumption "in contact zones where the security of the armed forces requires a derogation from this presumption".

66. It should be noted that several delegations proposed to include in this article, as well as in articles 46 and 47 bis provisions forbidding pillage of these objects and their removal without consent from the territory of the State in which they were found. It was ultimately agreed that these ideas could most usefully be considered in the context of article 65 and article 66 concerning protection of persons and objects in the power of a Party to the conflict.

67. At its twenty-fourth meeting on 25 February 1975, the Committee voted on article 47. Paragraph 1, including the words "nor of reprisals" was adopted by 58 votes to 3 with 9 abstentions. Paragraph 2 was adopted by consensus. After deletion of the words "except in contact zones where the security of the armed forces requires a derogation from this presumption", paragraph 3 of article 47 was adopted by 64 votes to none with 6 abstentions. (See the annex to the present report.)

Article 47 bis

68. This article arose out of an amendment to article 47 submitted by Greece, the Holy See, Jordan, Spain, Uruguay, and Venezuela in document CDDH/III/17/Rev.2. The Working Group considered that the subject was of sufficient importance to justify the inclusion of the amendment as a separate article of the Protocol.

69. The text of paragraph (a) as submitted to the Committee incorporated two formulations:

"to commit any acts of hostility directed against
/historic monuments, places of worship, or works of art/
/places of worship, and those historic monuments or works of
art/ which constitute the cultural heritage of peoples;"

The alternatives represented a split between those delegations which wished to extend the special protection of this article to all places of worship and those which wished to limit the special protection to such places of worship as constitute part of the cultural heritage of peoples, in the words of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Those who wished to limit the objects protected by this article to objects of considerable historical, cultural, and artistic importance argued that the immunity of these objects would inevitably be undermined if all local places of worship were included.

70. When the matter was presented to the Committee at its twenty-fourth meeting on 25 February 1975, the second version was withdrawn on the understanding, accepted by the Committee, that article 47 bis would extend to places of worship and historic monuments, even when they were renovated and restored - the consideration that had prompted that version. Article 47 bis was then adopted by consensus. (See the annex to the present report.)

Article 48

71. The following amendments were submitted with respect to the ICRC text:

Romania:	CDDH/III/10
Finland, Sweden:	CDDH/III/13 and Add.1
Ghana:	CDDH/III/28
Australia:	CDDH/III/49
United States of America:	CDDH/III/50
Arab Republic of Egypt, Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Republic, Mauritania, Morocco, Qatar, Saudi Arabia, Syrian Arab Republic, United Arab Emirates, Yemen:	CDDH/III/63 and Add.1

Hungary, German Democratic Republic, Czechoslovakia:	CDDH/III/64
Belgium, United Kingdom of Great Britain and Northern Ireland:	CDDH/III/67
Ukrainian Soviet Socialist Republic:	CDDH/III/74

72. Article 48 was the subject of prolonged discussion and considerable amendment. Thus, it was a source of considerable satisfaction to the Committee that it was ultimately able to adopt the article by consensus. Nevertheless, several representatives believed the text to be less than fully satisfactory from the standpoint of drafting and considered that it needed further polishing by the Drafting Committee.

73. Paragraph 1 was accepted after considerable discussion as a useful statement of the basic principle from which the rest of the article flows and as an important addition to the law protecting civilians. The scope of the principle will be defined by the remainder of the article and by the other relevant articles in the Protocol, particularly those dealing with relief actions, which have not yet been considered by Committee II. The fact that the paragraph does not change the law of naval blockade is made clear by article 44, paragraph 1.

74. In paragraph 2, drafting problems were posed by the fact that two of the objects listed - food-producing areas and irrigation works - might be useful to combatants for purposes other than directly for sustenance. Thus, the phrase in paragraph 2 "for the purpose of denying them as such" was designed to cover both the denial of food and drink as sustenance and the denial of food producing areas and irrigation works for their contribution to the production of sustenance. On the other hand, it was not intended to cover their denial to the enemy for other purposes, including the general purpose of preventing the enemy from advancing. Thus, bombarding an area to prevent the advance through it of an enemy is permissible, whether or not the area produces food, but the deliberate destruction of food-producing areas in order to prevent the enemy from growing food on them is forbidden. Similarly, destroying a field of crops in order to clear a field for fire or to prevent the enemy from using it for cover is permissible, but destroying it to prevent the enemy from consuming the crops is forbidden. This is a heavy burden of meaning to be carried by the two words "as such", and several representatives expressed the hope that the Drafting Committee would ultimately find a clearer form of words.

75. Another confusion in paragraph 2 is caused by the interplay of purpose and motive. The only attack, destruction, etc., that is prohibited by this paragraph is that which is done for the purpose of denying the objects to the adverse Party or to the civilian population. In principle that is fairly clear, but the sentence does not read easily, because that statement is followed by the words "whatever the motive that produced that purpose, whether to starve out civilians, to cause them to move away, or any other motive."

76. The phrasing of paragraph 3 is only slightly more satisfying than that of paragraph 2. Here the drafter continues to be plagued by the necessity of distinguishing between uses of the objects as sustenance and other uses. Paragraph 2 (a) was intended to apply only to those objects which clearly are assigned solely for the sustenance of the armed forces. The term "civilian population" referred to in paragraph 2 (b) was not intended to mean the civilian population of a country as a whole, but rather of an immediate area, although the size of the area was not defined.

77. Finally, article 48 raised the question whether the prohibitions in paragraph 2 other than that on attack (which by definition is against the adversary) apply to acts by a State against objects under its control and within its own national territory. A number of representatives expressed the view that it was not intended to have such an effect and that an express reservation of rights within one's own territory was unnecessary. At the suggestion of the Rapporteur, it was agreed to review subsequently the extent to which the provisions of this Section were intended to have such an effect within a State's own territory and reflect the conclusions of the Group in some appropriate way in the text. It is apparent that some provisions, for example article 46, paragraph 5, on movement of civilians to shield military operations, are intended to apply to a State within its own territory. This review will be made in the context of article 66.

Article 48 bis

78. The following proposals were made for a new article on protection of the natural environment:

Czechoslovakia, German
Democratic Republic, Hungary: CDDH/III/64
Australia (article 49 bis): CDDH/III/60

79. There was no disagreement in principle that efforts should be made to protect the natural environment and there was wide support for a provision setting out specific requirements or prohibitions to be included in Protocol I.

80. Although some representatives urged the advisability of delaying action on proposals to adopt provisions on protection of the natural environment until the third session of the Conference so that they could be studied more fully, it was decided to complete Committee action at the second session.

81. Article 48 bis is directed at protection of the natural environment. The article prohibits the employment of methods and means of warfare which are intended or expected to cause widespread, long-term, and severe damage. The Committee thus approved here the same standard or criteria as is found in article 33, paragraph 3, with the addition of material concerning the civilian population.

82. Because article 48 bis was inserted in the context of protection of the civilian population, the particular prohibition is linked to the survival of that population. The word "population" was used without the usual adjective "civilian" because it was thought that the future survival is that of the population in general, without regard to combatant status. The term "health" was used in a broad sense in connexion with survival to indicate actions which could be expected to cause such severe effects that, even if the population survived, it would have serious health problems, such as congenital defects which produced deformed or degenerate persons. Temporary or short-term effects were not contemplated within the prohibitions of this article.

83. The Committee at its thirty-eighth meeting on 10 April 1975, adopted article 48 bis by consensus. (See the annex to the present report.)

Article 49

84. The following amendments were submitted with respect to the ICRC text:

Republic of Viet-Nam:	CDDH/III/4
Romania:	CDDH/III/10
Australia:	CDDH/III/49
Belgium and the Netherlands:	CDDH/III/59/Rev.1
Arab Republic of Egypt, Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Republic, Mali, Mauritania, Morocco, Qatar, Sudan, Sweden, Switzerland, Syrian Arab Republic, United Arab Emirates, Yemen:	CDDH/III/65 and Add.1 and Corr.1

Ukrainian Soviet Socialist Republic: CDDH/III/74

Arab Republic of Egypt,
Democratic Yemen, Iraq,
Jordan, Kuwait, Lebanon,
Libyan Arab Republic,
Mauritania, Morocco, Qatar,
Sudan, Syrian Arab Republic,
United Arab Emirates, Yemen: CDDH/III/76 and Add.1

Canada: CDDH/III/79

United States of America: CDDH/III/202

85. Article 49 proved quite difficult and required considerable time and effort before general agreement was reached. It was only when a decision was taken to limit the special protection of the article to dams, dykes, nuclear power stations, and other military objectives in the vicinity of these objects that it was possible to produce a generally acceptable text. That limitation made it possible to be more specific in describing the circumstances in which the special protection was lost, which had been the most difficult part of the drafting task.

86. It should be noted that article 49 provides a special protection to these objects and objectives which, although important, is only one of a number of layers of protection. First, if a dam, dyke, or nuclear power station does not qualify as a legitimate military objective under article 47, it is a civilian object and cannot be attacked. Second, if it does qualify as a military objective or if it has military objectives in its vicinity, it receives special protection under this article. Third, if, pursuant to the terms of this article, it may be attacked or a military objective in its vicinity may be attacked, such attack is still subject to all the other relevant rules of this Protocol and general international law; in particular, the dam, dyke, or nuclear power plant or other military objective could not be attacked if such attack would be likely to cause civilian losses excessive in relation to the anticipated military advantage, as provided in article 50. In the case of a dam or dyke, for example, where a great many people would be killed and much damage done by its destruction, immunity would exist unless the military reasons for destruction in a particular case were of an extraordinarily vital sort.

87. In paragraph 1 the Committee decided to retain the qualifying phrase "where such attack may cause the release of dangerous forces and consequent severe losses among the civilian population" in order to avoid granting immunity from attacks of a kind not likely to release the dangerous forces.

88. Paragraph 2 provides that the special protection accorded to a dam or dyke by paragraph 1 ceases only "if it is used for other than its normal function" and in support of military operations. This phrase, "normal function" may be less clear than is desirable, and perhaps a Drafting Committee may be able to find a better term. The term means the function of holding back, or being ready to hold back, water. Thus, if a dam or dyke is used for no purpose other than holding back water or being ready to hold back water, e.g., it is not made part of a fortified line or used as a road, the immunity from attack provided in paragraph 1 cannot be lost. Even if it is used for a function in addition to its normal function, the immunity is not lost unless it is used in regular, significant, and direct support of military operations and if the only feasible way to terminate the support is by attack on the dam or dyke.

89. In addition, it must always be recognized that an attack is not justified unless the military reasons for the destruction in a particular case are of such extraordinary and vital interest as to outweigh the severe losses which may be anticipated. Nevertheless, it should be noted that some representatives remain concerned about the problems that may arise from the use of dykes for roadways.

90. It should be noted that the use of water stored by a dam for hydro-electric generating facilities cannot justify making the dam itself an object of attack, but the generating facilities could become "other military objectives located at or in the vicinity of these works or installations". If such a generating facility does become a military objective, it may not be attacked unless it is "used in regular, significant, and direct support of military operations" and, even then, only if "such attack is the only feasible way to terminate such support". Certainly, the greater the distance between hydro-electric generating facilities and the dam, the less risk there would be of collateral damage to the dam, in the event the hydro-electric generating facility were used for military purposes, in such a way as to become a legitimate military objective.

91. It should also be noted that the standard used in paragraph 2, "regular, significant, and direct support of military operations" is a higher standard than is used in article 47, i.e., "effective contribution to military action". Without trying to define the phrase in article 49, it seems clear that production of arms, ammunition and military equipment would qualify as direct support of military operations, but the production of civilian goods which may also be used by the armed forces probably would not qualify in the absence of most unusual circumstances.

92. Even when attack on one of these objects is justified under all the applicable rules, the second sentence of paragraph 3 requires the combatants to take "all practical precautions" to avoid releasing the dangerous forces. Given the array of arms available to modern armies, this requirement should provide real protection against the catastrophic release of these forces.

93. With respect to paragraph 5, there was considerable discussion about the question of the types of armament to be permitted to the defensive installations. Ultimately, it was thought impractical to include any limitation other than that implied by the phrase "weapons capable only of repelling hostile action against the protected works or installations". Thus, the use of weapons capable of attacking enemy forces passing at some distance from the protected work or installation is prohibited.

94. With respect to paragraph 7, in view of the fact that some representatives stated their disagreement with the proposal in the ICRC draft to use the protective sign authorized by the Geneva Conventions for hospital zones to indicate the objects protected by this article, this question was left for decision at a later stage of the Conference.

95. The Committee adopted article 49 by consensus at its thirty-first meeting on 14 March 1975. (See the annex to the present report.)

Article 50

96. The following amendments were submitted with respect to the ICRC text:

Republic of Viet-Nam:	CDDH/III/3
Romania:	CDDH/III/10
Finland, Sweden:	CDDH/III/13 and Add.1
Brazil:	CDDH/III/24
Ghana:	CDDH/III/28
Canada:	CDDH/III/79
German Democratic Republic:	CDDH/III/83
Australia:	CDDH/III/203/Rev.1
Arab Republic of Egypt, Jordan, Kuwait, Libyan Arab Republic, Mauritania, Qatar, Sudan, United Arab Emirates:	CDDH/III/205
United Kingdom of Great Britain and Northern Ireland:	CDDH/III/207

97. Paragraph 2 (a) of article 50 required much time and effort to work out, but the other paragraphs were fairly quickly agreed upon. The so-called rule of proportionality in paragraph 2 (a) iii was found ultimately to be acceptable when it was preceded by paragraph 2 (a) i and paragraph 2 (a) ii which prescribe additional precautions and phrased in terms of losses "excessive in relation to the concrete and direct military advantage anticipated", and was supplemented by paragraph 5 to make clear that it may not be construed as authorization for attacks against civilians.

98. Referring to the use of the word "feasible" in paragraph 2 (a) i and ii, it was preferred by most representatives to the word "reasonable", and it was intended to mean that which is practicable or practically possible.

99. In recognition of the limitation of the scope of this Section, as set forth in article 44, paragraph 1, on the effect on the law applicable to armed conflict at sea or in the air, paragraph 4 was added to article 50 to ensure that all reasonable precautions would nevertheless be taken in the conduct of armed conflict at sea and in the air.

100. Article 50 was adopted at the thirty-first meeting of the Committee on 14 March 1975, by 66 votes to none, with 3 abstentions. (See the annex to the present report.)

Article 51

101. The following amendments were submitted to the ICRC text:

Romania:	CDDH/III/10
Canada:	CDDH/III/79
Australia:	CDDH/III/204
Arab Republic of Egypt, Kuwait, Libyan Arab Republic, Mauritania, Qatar, Sudan, United Arab Emirates:	CDDH/III/206
Canada and Ireland:	CDDH/III/208

102. Agreement was reached fairly quickly on the text after it was revised to have the phrase "to the maximum extent feasible" modify all paragraphs. This revision reflected the concern of a number of representatives that small and crowded countries would find it difficult to separate civilians and civilian objects from military objectives. Other representatives pointed out that even large countries would find such separation difficult or impossible to arrange in many cases.

103. It was clearly understood that article 51 applies to all territory under the effective de facto control of a party, that is, including both its own national territory which is under its control and any foreign territory which it occupies.

104. The phrase in paragraph 1, "without prejudice to article 49 of the fourth Convention," was chosen to make it clear that the provisions of the paragraph are not intended to amend in any way that article. This paragraph, on the contrary is intended to stand on its own in all cases except where action proposed to be taken under it would be contrary to article 49 of the fourth Geneva Convention of 1949; in that rare case, article 49 would govern.

105. In paragraph 3 the word "dangers" was retained from the ICRC draft after some discussion of possible alternatives. It was pointed out that article 18, paragraph 5 of the fourth Geneva Convention of 1949 refers in a similar way to "the dangers to which hospitals may be exposed".

106. The Committee adopted article 51 by consensus at its thirty-first meeting on 14 March 1975. (See the annex to the present report.)

Article 52

107. The following amendments were submitted to the ICRC text:

Pakistan:	CDDH/III/11
Uruguay:	CDDH/III/61
Brazil:	CDDH/III/70
Poland:	CDDH/III/96
Spain:	CDDH/III/211
Federal Republic of Germany:	CDDH/III/218
Canada:	CDDH/III/219

108. The text, which was adopted by the Committee by consensus at its thirty-first meeting, on 14 March 1975, resulted from a compromise among five tendencies: (1) those who wished to see non-defended localities established by unilateral declaration; (2) those who wished to see them established only by agreement; (3) those who wished to limit them to in area in or near the contact zone; (4) those who wished to permit them also in the hinterland; and (5) 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 is an article that permits unilateral declaration of

non-defended localities near or in a contact zone which are open for occupation by an adverse Party and meet the other prescribed conditions and which requires agreement for the establishment of zones not meeting the geographical or other requirements. Several delegations supported the view that in case of a dispute between the Parties to the conflict regarding the 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. (For the text of article 52 as adopted, see the annex to the present report.)

Article 53

109. The following amendments were submitted to the ICRC text:

Uruguay:	CDDH/III/61
Brazil:	CDDH/III/71
German Democratic Republic:	CDDH/III/84 CDDH/III/85
Poland:	CDDH/III/97
Spain:	CDDH/III/212

110. One of the most controversial issues posed by article 53 was its title. The terms "neutralized zone", "demilitarized zone", and "non-militarized zone" were all considered, and each had its proponents. The term finally chosen - "demilitarized zone" - is understood to cover both zones from which military forces have been withdrawn so as to comply with the conditions prescribed by this article and by the agreement establishing them, and zones in which no military forces were stationed in the first place and otherwise satisfied the conditions prescribed by the article and by the agreement establishing them.

111. Article 53 is intended to permit the establishment both of zones that must remain demilitarized no matter which party controls the area in which they are located and also zones that may lose their demilitarized character if occupied by the adverse Party. It was thought that this flexibility would give the maximum encouragement to the creation of such zones. This is the reason why the phrase, "if such extension is contrary to the terms of these agreements", is included in paragraph 1 and why the phrase, "if the Parties to the conflict have so agreed", is included in paragraph 6. Similarly, the phrase "shall normally be" was inserted in paragraph 3 to permit the parties to agree upon zones which do not fulfil all the conditions of that paragraph. Although such agreement might be rare, it was thought that it should not be discouraged by the text of article 53.

112. The Committee adopted article 53 by consensus at its thirty-first meeting on 14 March 1975. (See the annex to the present report.)

B. Draft Protocol II

Article 24

Paragraph 1

113. At the first session of the Conference, this paragraph had been adopted ad referendum (See CDDH/50/Rev.1, paras. 51 to 53), pending the solution of the question of the scope of application of Protocol II. That question having been decided (CDDH/I/274), the Committee adopted the text by consensus at its thirty-seventh meeting on 4 April 1975 (See the annex to the present report). One representative 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, in view of the subsequent adoption of article 1 of draft Protocol II.

Paragraph 2

114. The following amendments were submitted with respect to the ICRC text:

United States of America:	CDDH/III/23
Finland:	CDDH/III/106

115. A basic choice was posed between a short and a long form of article on the precautions to be taken in military operations in order to protect the civilian population. The short form was article 24, paragraph 2, as originally presented by the ICRC. The long form was a new article, pursuant to the Finnish amendment; this drew upon article 50 of draft Protocol I, as adopted by the Committee (CDDH/III/268). The differing approaches reflect basic differences about the role and the scope of application of Protocol II.

116. The argument for the longer form of article was based on the threshold of application established for Protocol II in article 1, as adopted by Committee I (CDDH/I/274). The level of application, according to some delegations, made Protocol II applicable in conflicts of substantial duration in which relatively large numbers of persons were involved in military operations over areas of some size. Indeed, the intensity of non-international armed conflicts may well be greater than that of some international armed conflicts.

It would therefore be desirable to provide protection to the civilian victims of war at the same level and with the same specificity of legal prescription as in Protocol I. This would call, at least so far as the protection of the civilian population is concerned, for the inclusion in Protocol II of articles corresponding in substance and in wording to those in Protocol I. Deviations from the language of Protocol I, it was argued, could be construed to permit an a contrario argument that conduct prohibited by Protocol I but not referred to in Protocol II would be lawful. Also, although some of the provisions on the protection of the civilian population in Protocol II might not be applicable in all internal armed conflicts, they would control conduct in any non-international armed conflict which reached the requisite level.

117. Other delegations contended, however, that there was a certain amount of ambiguity in article 1 of draft Protocol II, and that each attempt to import the detailed provisions of 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 assumed the scale of requiring application of all or most of the provisions of Protocol I concerning international armed conflicts. The complexity and onerousness of the obligations might deter States from signature, ratification, or application of Protocol II. Rebels might refuse to comply with the Protocol because they would be unable to reach the standards set by it, while the authorities in power might use the inability of the insurgents to comply with the detailed provisions of the Protocol as an excuse for not complying with it. An approach placing emphasis on the protection of human rights, rather than on the conduct of military operations, should, it was argued, 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 do not have to be read together; each would be complete and self-contained.

118. In other articles, it was possible to reconcile these two views to a certain extent through the presentation by the Working Group of a text that would incorporate some but not all of the language of the corresponding article of Protocol I. But this did not prove possible in connexion with the subject matter of article 24, paragraph 1, and article 27.

119. It was pointed out by several representatives that at some point or other the relationship between the texts of the two Protocols should be clarified, so as to prevent dispute about the application of the a contrario principle.

120. The Working Group agreed to submit to the Committee the two texts set forth in document CDDH/III/278. At its thirty-seventh meeting on 4 April 1975, the Committee rejected the longer version in the form of a draft article 28 ter by a vote of 24 to 4, with 31 abstentions. Article 24, paragraph 2, was then adopted by 50 votes to none with 11 abstentions. (See the annex to the present report.)

Article 25

121. At the first session of the Conference, article 25 was adopted ad referendum (see CDDH/50/Rev.1, paras. 54 to 62), pending solution of the question of the scope of application of Protocol II. That question having been decided (CDDH/I/274), the Committee adopted this text by consensus at its thirty-seventh meeting. (See the annex to the present report.)

Article 26

122. The following amendments were submitted with respect to the ICRC text:

Romania:	CDDH/III/12
Ghana:	CDDH/III/28
Canada:	CDDH/III/36
Australia:	CDDH/III/42
Sweden:	CDDH/III/45
Algeria, Arab Republic of Egypt, Democratic Yemen, Iraq, Libyan Arab Republic, Mali, Mauritania, Morocco, Kuwait, Sudan, Syrian Arab Republic, United Arab Emirates:	CDDH/III/48/Rev.1 and Add.1 and 2
Philippines:	CDDH/III/51
Brazil:	CDDH/III/68
German Democratic Republic:	CDDH/III/88

123. Article 26 is the counterpart of article 46 of draft Protocol I, as adopted in Committee (CDDH/III/272); and its structure and much of its language are derived from that article. There had again been a difference of views in the Working Group about the desirability of a long as against a short version of this article.

124. The introductory paragraph is the same as the corresponding language of article 46 of draft Protocol I, with the omission of the words "in addition to other applicable rules of international law". These words were deleted in view of the fact that there is very little conventional international law with respect to non-international armed conflicts other than Article 3 common to the four Geneva Conventions of 1949, which contains no provisions pertinent to the subject matter of this article of draft Protocol II. This paragraph was adopted by consensus at the thirty-seventh meeting of the Committee, on 4 April 1975, when article 26 as a whole was considered.

125. The language of paragraphs 1 and 2 is the same as that of paragraphs 1 and 2 of article 46 of draft Protocol I. Paragraph 1 was adopted by consensus. In paragraph 2, a proposal to delete the words "and for such time as" was defeated at the thirty-seventh meeting by 28 votes to 5, with 29 abstentions.

126. The Working Group submitted two drafts for the first part of paragraph 3. The Committee rejected the Canadian proposal to delete the paragraph by 27 votes to 13, with 21 abstentions. The introductory language of paragraph 3 is the same as that of paragraph 3 of the ICRC text, a proposal to substitute a longer text based on paragraph 3 of article 46 of draft Protocol I having been defeated by a vote of 29 in favour of the ICRC text, 15 in favour of the longer text based on Protocol I, with 16 abstentions. By a vote of 25 to 13, with 24 abstentions, it was decided to retain a provision on "An attack by bombardment by any methods or means ...". The phrase "The employment of means of combat and any methods ... are prohibited" should be examined by the Drafting Committee, as the language is not consistent with terminology used elsewhere in the Protocols and does not in any event seem to be intrinsically correct.

127. It was agreed to postpone a vote on the question of reprisals in this article until the question had been resolved for draft Protocols I and II in general.

128. Paragraph 5, identical to the like-numbered paragraph of article 46 of draft Protocol I, was adopted by consensus.

129. The Working Group agreed to the deletion of paragraph 6. The sentiment seemed to be that its deletion would simplify and shorten the article somewhat.

130. At its thirty-seventh meeting on 4 April 1975, the Committee adopted article 26 as a whole by 44 votes to none with 22 abstentions. (See the annex to the present report.)

Article 26 bis

131. The following amendments were submitted with respect to the addition to draft Protocol II of a new article concerning the general protection of civilian objects:

Finland, Sweden:	CDDH/III/13 and Add.1
Sweden:	CDDH/III/52
Arab Republic of Egypt, Iraq, Mali, Syrian Arab Republic:	CDDH/III/62/Rev.1 and Add.1 and Corr.1

132. There having been substantial support in the Committee for the addition of an article on this subject, corresponding to article 47 of draft Protocol I, the amendments were referred to the Working Group. The Working Group submitted to the Committee the text set forth in document CDDH/III/280.

133. The text submitted to the Committee was a simplified form of article 47 of draft Protocol I, as adopted by the Committee (CDDH/III/263). Reference to "military objectives" was deleted in article 26 bis because a number of delegations were of the view that the term was inappropriate for use in connexion with non-international armed conflicts, both because it evoked the idea of large-scale hostilities and because the objectives attacked in non-international conflicts might not necessarily be "military" ones. Instead, it was decided that attacks should be limited to "those objects which by their own nature, location, purpose, or use make an effective contribution to the armed action of the parties to the conflict", and the article was so drafted. "Armed action" was substituted for "military action", because of the unwillingness of some to use the term "military" in a limitative way in internal armed conflicts. Several representatives suggested that the Drafting Committee should consider whether "armed action" was the apposite phrase to use in draft Protocol II in place of "military operations" or "warfare" and urged that the terminology be made consistent throughout draft Protocol II.

134. At its thirty-seventh meeting on 4 April 1975, the Committee adopted the present text, as recommended by the Working Group, by 35 votes to 8, with 17 abstentions. (See the annex to the present report.) It was agreed to postpone a vote on the question of reprisals until the matter had been resolved for draft Protocols I and II in general.

Article 28

135. The following amendments were submitted with respect to the ICRC text:

Romania:	CDDH/III/12
Brazil:	CDDH/III/18
Canada:	CDDH/III/36
Finland:	CDDH/III/37
Australia:	CDDH/III/46
Arab Republic of Egypt, Iraq, Mali, Syrian Arab Republic:	CDDH/III/62/Rev.1 and Add.1 and Corr.1

136. The Working Group submitted to the Committee a text which was a shortened version of article 49 of draft Protocol I, as adopted by the Committee (CDDH/III/267).

137. The proposal of the Working Group (CDDH/III/281) was an agreed text, with the exception of two different formulations of paragraph 1. These were:

"Works or installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations, shall not be made the object of attack /, even where these objects are military objectives/, when such attack may cause the release of dangerous forces and consequent severe losses among the civilian population."

or

"Dams and dykes containing dangerous forces and nuclear electrical generating stations shall not be made the object of attack /, even where these objects are military objectives/."

138. The two options reflected two different approaches: the first was that the standard with respect to the protection of works or installations containing dangerous forces should be cast in the same terms as in international armed conflicts. This option reproduced the language of paragraph 1 of article 49 of draft Protocol I. The second approach was that the protection of these installations in internal armed conflicts should be absolute and not subject to the qualification that "such attack may cause the release of dangerous forces and consequent severe losses among the civilian population". It was necessary to bracket the language "even where these objects are military objectives" because some delegations were of the view that this expression, found in article 49 of draft Protocol I, should also appear here so that no negative inference could be drawn from the absence of that expression.

139. At the thirty-seventh meeting of the Committee on 4 April 1975, the amendment of Canada to delete the article having been defeated by a vote of 26 to 10 with 25 abstentions, the Committee voted to accept the first option by 39 votes to 2 with 22 abstentions. The Committee then decided by a vote of 26 to 15, with 21 abstentions not to delete the bracketed phrase regarding military objectives.

140. Paragraph 2 of article 28 is the same as the ICRC text, with the addition of a sentence about armed guards. It was pointed out that such installations, particularly nuclear generating stations, are often guarded in time of peace and would certainly be guarded in time of non-international armed conflict and that such works or installations should not lose their immunity of that account. Paragraph 2 was adopted by consensus by the Committee at its thirty-seventh meeting.

141. It was agreed to postpone a vote on paragraph 3, relating to reprisals, until the question of reprisals had been solved for draft Protocols I and II.

142. The language of paragraph 7 of article 49 of Protocol I was carried over into paragraph 4 of article 28. The provision permits, but does not require, marking and such markings might in any event already have been applied in connexion with an international armed conflict in which the State may have been involved.

143. Article 28 as a whole was then adopted by the Committee at its thirty-seventh meeting on 4 April 1975 by 43 votes to none with 21 abstentions. (See the annex to the present report.)

Article 28 bis

144. The following proposal was made for a new article:

Australia:

CDDH/III/55

145. A number of representatives considered that it was desirable to include in Protocol II an article on the protection of the natural environment with the same restriction as that provided in article 33, paragraph 3 of draft Protocol I.

146. Although several representatives were of the view that such a provision was inappropriate in a non-international conflict, the Committee at its thirty-eighth meeting on 10 April 1975, adopted the article by 49 votes to 4, with 7 abstentions. (See the annex to the present report.)

Article 29

147. The following amendments were submitted with respect to the ICRC text:

Romania:	CDDH/III/12
Zimbabwe African People's Union:	CDDH/III/40
Canada:	CDDH/III/220

148. The Working Group submitted to the Committee the text set forth in CDDH/III/283.

149. Paragraph 1 is the same text as that proposed by the ICRC, with the addition of the words "for reasons relating to that conflict".

150. Displacement may be necessary in certain cases of epidemic, natural disasters, and the like, and such displacements would not come within the scope of paragraph 2. The additional language of paragraph 2 relating to cases in which civilians may be compelled to leave their own territory reflected the concern of a number of delegations that the article should not interfere with the operation of certain municipal legal systems which permit such action. It was pointed out that it may be more humanitarian to require or allow an individual to leave the territory of a State than to require him to serve out a prison sentence within the State concerned. Extradition would also be effected in the normal way, as in time of peace.

151. Paragraph 3, which appears in bracketed form in document CDDH/III/283 was added to the text because, in the view of some delegations, it would be desirable to have a prohibition on some forms of transfer of property out of a State, to serve as a counterpart to the provision on the displacement of persons. The paragraph is drafted in these terms, borrowed in part from language used with respect to the protection of the environment, in order to preserve the right of a State to send cultural property abroad for safe-keeping and to maintain the right to operate a general export trade in time of non-international armed conflict.

152. At the thirty-seventh meeting of the Committee on 4 April 1975, a Canadian amendment to delete the article as a whole was defeated by 30 votes to 7 with 25 abstentions. Paragraph 1 was then adopted by consensus. It was voted to incorporate the exceptions in paragraph 2 by 17 votes to 16, with 33 abstentions. No vote was taken on paragraph 3, because it was considered that the matter should be taken up in the context of general protection of the population, particularly article 66 of draft Protocol I. Article 29 as a whole was then adopted by 40 votes to none with 28 abstentions. (See the annex to the present report.)

153. Amendment CDDH/III/40 was not acted upon, as the subject-matter did not seem germane to article 29.

III. ADOPTION OF THE REPORT OF COMMITTEE III

154. At its fortieth meeting, on 14 April 1975, the Committee adopted this report as amended.

ANNEX

ARTICLES ADOPTED BY COMMITTEE III
(First and second sessions)

Draft Protocol I,
Part III, Section I

Article 33 - Basic rules*

1. In any armed conflict, the right of Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is forbidden to employ weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is forbidden to employ methods or means of warfare which are intended or may be expected to cause widespread, long-term, and severe damage to the natural environment.

* Paragraph 3 was adopted by 57 votes to 4 with 3 abstentions at the thirty-eighth meeting on 10 April 1975. At the same meeting article 33 as a whole was adopted by consensus. See paragraphs 18 to 28 of the present report.

Draft Protocol I,
Part III, Section I

Article 34 - New weapons*

In the study, development, acquisition, or adoption of a new weapon, means, or method of warfare a High Contracting Party is under an obligation to determine whether its employment would, under some or all circumstances be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

* Adopted by consensus at the thirty-eighth meeting, on 10 April 1975. See paragraphs 29 to 32 of the present report.

Draft Protocol I,
Part III, Section I

Article 36 - Recognized emblems*

1. It is forbidden to make improper use of the protective emblem of the Red Cross, Red Crescent, and Red Lion and Sun, or other emblems, signs, or signals provided for by the Conventions or by the present Protocol. It is also forbidden to misuse deliberately in armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.
2. It is forbidden to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

* Adopted by consensus at the thirty-eighth meeting on 10 April 1975. See paragraphs 33 to 36 of the present report.

Draft Protocol I,
Part III, Section I

Article 37 - Emblems of nationality*

1. It is forbidden to make use in an armed conflict of the flags or military emblems, insignia, or uniforms, of neutral or other States that are not Parties to the conflict.
2. It is forbidden to make use of the flags or military emblems, insignia, or uniforms of adverse parties while engaging in attacks or in order to shield, favour, protect, or impede military operations.
3. Nothing in this article shall affect the existing generally recognized rules of international law applicable to the use of flags in the conduct of armed conflict at sea.

* Adopted by consensus at the thirty-eighth meeting on 10 April 1975. See paragraphs 37 to 41 of the present report.

Draft Protocol I,
Part IV, Section I

Article 43 - Basic rule*

In order to ensure respect and protection for the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

* Adopted by consensus at the tenth meeting, on 21 March 1974.
See the report of Committee III (first session) (CDDH/50/Rev.1, paras. 16 to 19).

Draft Protocol I,
Part IV, Section I

Article 44 - Field of application*

1. The provisions contained in the present Section shall apply to any land, air, or sea warfare which may affect the civilian population, individual civilians, or civilian objects on land. They shall further apply to all attacks from the sea or the air against objectives on land but do not otherwise affect the existing generally recognized rules of international law applicable to armed conflict at sea or in the air.

2. "Attacks" mean acts of violence committed against the adversary, whether in defence or offence.

3. The provisions of the present Section are in addition to the rules with respect to humanitarian protection contained in the Fourth Convention, particularly Part II thereof, and in such other international conventions as may be binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, on sea, or in the air, against the effects of hostilities.

* Article 44, paragraph 2 was adopted by 51 votes to one, with 18 abstentions at the eleventh meeting on 21 March 1974. Paragraph 3 was adopted at the same meeting by 73 votes to none with 2 abstentions. See the report of Committee III (first session) (CDDH/50/Rev.1, paras. 20 to 33). Paragraph 1 was adopted by consensus at the twenty-fourth meeting on 25 February 1975. See paragraphs 42 to 46 of the present report.

Draft Protocol I,
Part IV, Section I

Article 45 - Definition of civilians and civilian population*

1. A civilian is anyone who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the third Convention and in article 42 of the present Protocol.
2. The civilian population comprises all persons who are civilians.
3. The presence, within the civilian population, of individuals who do not fall within the definition of civilians does not deprive the population of its civilian character.
4. In case of doubt as to whether a person is a civilian, such person shall be considered to be a civilian.

* Adopted by consensus at the tenth meeting on 21 March 1974. See the report of Committee III (first session) (CDDH/50/Rev.1, para. 40).

Draft Protocol I,
Part IV, Section I

Article 46 - Protection of the civilian population*

The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, in addition to other applicable rules of international law shall be observed in all circumstances:

1. The civilian population as such, as well as individual civilians, shall not be made the object of attack. Acts or threats of violence which have the primary object of spreading terror among the civilian population are prohibited.
2. Civilians shall enjoy the protection afforded by this Section of the Protocol unless and for such time as they take a direct part in hostilities.
3. Indiscriminate attacks are prohibited. Indiscriminate attacks are those which are not directed at a specific military objective; or those which employ a method or means of combat which cannot be directed at a specific military objective, or the effects of which cannot be limited as required by this Protocol, and consequently are of a nature to strike military objectives and civilians or civilian objects without distinction. Among others, the following types of attacks are to be considered as indiscriminate:
 - (a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village, or other area containing a concentration of civilians or civilian objects; and
 - (b) An attack of the type prohibited by article 50 (2) (a) (iii).

* Paragraphs 1,2,4,5 and 6 were adopted by consensus at the twenty-fourth meeting on 25 February 1975. Paragraph 3 was adopted by consensus at the thirty-first meeting on 14 March 1975. At the same meeting article 46 as a whole was adopted by consensus. See paragraphs 47 to 60 of the present report.

Draft Protocol I,
Part IV, Section I

Article 46 - Protection of the civilian population (continued)

4. Attacks against the civilian population or civilians by way of reprisals are prohibited.

5. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. Parties to a conflict also shall not direct the movement of the civilian population or individual civilians in attempts to shield military objectives from attack or to shield military operations.

6. Any violations of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to those civilians, including the precautionary measures provided for in the article 50.

Draft Protocol I,
Part IV, Section I

Article 47 - General protection of civilian objects*

1. Civilian objects shall not be the object of attack nor of reprisals. Civilian objects are all objects which are not military objectives, as defined in paragraph 2.

2. Attacks shall be strictly limited to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their own nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

* Paragraph 1 was adopted by 58 votes to 3, with 9 abstentions at the twenty-fourth meeting on 25 February 1975. At the same meeting paragraph 2 was adopted by consensus and paragraph 3 by 64 votes to none with 6 abstentions. At the same meeting article 47 as a whole was adopted by consensus. See paragraphs 61 to 67 of the present report.

Draft Protocol I,
Part IV, Section I

Article 47 bis - Protection of cultural objects and
of places of worship*

Without prejudice to the provisions of the Hague Convention on the Protection of Cultural Property of 14 May 1954, and other relevant international instruments, it is forbidden:

- (a) to commit any acts of hostility directed against historic monuments, places of worship, or works of art which constitute the cultural heritage of peoples;
- (b) to use such historic monuments or places of worship in support of the military effort; and
- (c) to make such objects the object of reprisals.

* Adopted by consensus at the twenty-fourth meeting on 25 February 1975. See paragraphs 68 to 70 of the present report.

Draft Protocol I,
Part IV, Section I

Article 48 - Objects indispensable to the survival
of the civilian population*

1. Starvation of civilians as a method of warfare is prohibited.
2. It is forbidden to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population, such as, foodstuffs and food producing areas, crops, livestock, drinking water installations and supplies, and irrigation works, for the purpose of denying them as such to the civilian population or to the adverse party, whatever the motive that produced that purpose, whether to starve out civilians, to cause them to move away, or any other motive.
3. The prohibition provided by the preceding paragraph shall not apply to such of the objects covered by it as are used by an adverse party:
 - (a) as sustenance, solely for the members of its armed forces; or
 - (b) if not as sustenance, then in direct support of military action; provided, however, that actions against these objects shall in no event be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.
4. These objects shall not be made the object of reprisals.

* Adopted by consensus at the thirty-first meeting on 14 March 1975. See paragraphs 71 to 77 of the present report.

Draft Protocol I,
Part IV, Section I

Article 48 bis - Protection of the natural environment*

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. Such care includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisal are prohibited.

* Adopted by consensus at the thirty-eighth meeting on 10 April 1975. See paragraphs 78 to 83 of the present report.

Draft Protocol I,
Part IV, Section I

Article 49 - Works and installations containing
dangerous forces*

1. Works or installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, where such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack where such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.
2. The special protection against attack provided by paragraph 1 shall cease for a dam or a dyke only (a) if it is used for other than its normal function and in regular significant and direct support of military operations, and (b) if such attack is the only feasible way to terminate such support. The special protection against attack provided by paragraph 1 shall cease for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support. The special protection against attack provided by paragraph 1 shall cease for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.
3. In all cases, the civilian population and individual civilians shall remain entitled to all the protections accorded them by international law, including the precautionary measures provided by article 50. In the event the protection ceases and any of the works, installations, or objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid releasing the dangerous forces.
4. It is prohibited to make any of the works, installations, or objectives mentioned in paragraph 1 the object of reprisals.

* Adopted by consensus at the thirty-first meeting on 14 March 1975. See paragraphs 84 to 95 of the present report.

Draft Protocol I,
Part IV, Section I

Article 49 - Works and installations containing
dangerous forces (continued)

5. The parties to a conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they do not participate in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and are limited in their armament to weapons capable only of repelling hostile action against the protected works or installations.

6. The High Contracting Parties and parties to a conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

7. In order to facilitate their identification, parties to a conflict may mark the objects protected by this article with a special sign consisting of . . . **. Absence of such marking in no way relieves any party to a conflict from its obligations under this article.

**To be determined.

Draft Protocol I,
Part IV, Section I

Article 50 - Precautions in attack*

1. In conducting military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall

- i. do everything feasible to verify that the objectives to be attacked are neither civilian nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of article 47 and that it is permissible to attack them under the rules of this Protocol;
- ii. take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects; and
- iii. refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

* Adopted by 66 votes to none with 3 abstentions at the thirty-first meeting on 14 March 1975. See paragraphs 96 to 100 of the present report.

Draft Protocol I,
Part IV, Section I

Article 50 - Precautions in attack (continued)

- (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one, or that is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - (c) effective advance warning shall be given of attacks which may affect the civilian population unless circumstances do not permit.
3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that which may be expected to cause the least danger to civilian lives and to civilian objects.
4. In the conduct of armed conflict at sea or in the air, each party to a conflict shall, consistent with its rights and duties under the rules of international law applicable to such armed conflict, take all reasonable precautions to avoid losses in civilian lives and damage to civilian objects.
5. No provision of this article may be construed as authorization for any attacks against the civilian population, civilians, or civilian objects.

Draft Protocol I,
Part IV, Section I

Article 51 - Precautions against the effects of attacks*

The Parties to the conflict shall, to the maximum extent feasible:

1. Without prejudice to article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians, and civilian objects under their control from the vicinity of military objectives; and
2. avoid locating military objectives within or near densely populated areas;
3. take the other necessary precautions to protect the civilian population, individual civilians, and civilian objects under their control against the dangers resulting from military operations.

* Adopted by consensus at the thirty-first meeting on 14 March 1975. See paragraphs 101 to 106 of the present report.

Draft Protocol I,
Part IV, Section I

Article 52 - Non-defended localities*

1. It is forbidden for the Parties to a conflict to attack, by any means whatsoever, non-defended localities:

2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse party. Such a locality shall fulfil the following conditions.

- (a) armed forces and all other combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
- (b) no hostile use shall be made of fixed military installations or establishments;
- (c) no acts of warfare shall be committed by the authorities or by the population, and
- (d) no activities in support of military operations shall be undertaken.

3. The presence, in this locality, of specially protected persons under this Protocol and the Conventions and the presence of police forces retained for the sole purpose of maintaining law and order is not contrary to the conditions in this article.

4. The declaration shall be addressed to the adverse Party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The Party to the conflict, to whom the declaration is addressed shall acknowledge its receipt and shall treat the locality as a non-defended locality unless the conditions required by paragraph 2 do not in fact exist, in which event it shall immediately so inform the Party making the declaration. Even when the conditions required by paragraph 2 are not met, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other applicable rules of international law.

* Adopted by consensus at the thirty-first meeting on 14 March 1975. See paragraphs 107 and 108 of the present report.

Draft Protocol I,
Part IV, Section I

Article 52 - Non-defended localities (continued)

5. The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not meet the requirements of paragraph 2. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality; should the need arise, it may lay down the methods of supervision.

6. The Party in whose power a locality subject to such an agreement lies shall mark it, so far as possible, by such means as may be agreed with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and its limits and on highways.

7. A locality will lose its status as a non-defended locality if it no longer fulfils the conditions prescribed by paragraph 2 or by the agreement referred to in paragraph 5. If such a situation occurs, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other applicable rules of international law.

Draft Protocol I,
Part IV, Section I

Article 53 - Demilitarized zones*

1. It is forbidden for the Parties to a conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone if such extension is contrary to the terms of these agreements.

2. This shall be an express agreement, which may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian body, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peace time, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, should the need arise, lay down the methods of supervision.

3. The subject of such an agreement shall normally be any zone which fulfils the following conditions.

- (a) armed forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
- (b) no hostile use shall be made of fixed military installations or establishments;
- (c) no acts of warfare shall be committed by the authorities or by the population, and
- (d) any activity linked to the military effort must have ceased.

The Parties to the conflict shall agree upon the interpretation to be given to the condition prescribed in sub-paragraph (d) and upon persons to be admitted to the demilitarized zone other than those mentioned in paragraph 4.

* Adopted by consensus at the thirty-first meeting on 14 March 1975. See paragraphs 109 to 112 of the present report.

Draft Protocol I,
Part IV, Section I

Article 53 - Demilitarized zones (continued)

4. The presence, in this zone, of specially protected persons under this Protocol and the Conventions and the presence of police forces retained for the sole purpose of maintaining law and order is not contrary to the conditions prescribed in this article.

5. The Party in whose power such a zone lies shall mark it, so far as possible, by such means as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and its limits and on high-ways.

6. If the fighting draws near to a demilitarized zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally repeal its status.

7. If one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 or 6, the other Party shall be released from the obligations incumbent upon it under the agreement or the treaty conferring upon a zone the status of demilitarized zone. If such a situation occurs, the zone shall lose its status but shall continue to enjoy the protection provided by this Protocol and by other rules of international law.

Draft Protocol II,
Part V, Chapter I

Article 24 - Basic rules*

1. In order to ensure respect and protection for the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and shall direct their operations only against military objectives.

2. Constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects. This rule shall, in particular, apply to the planning, deciding or launching of an attack.

* Paragraph 1 was adopted by consensus at the thirty-seventh meeting on 4 April 1975. Paragraph 2 was adopted by 50 votes to one with 11 abstentions at the same meeting. At the same meeting article 24 as a whole was adopted by consensus. See paragraphs 113 to 120 of the present report.

Draft Protocol II,
Part V, Chapter I

Article 25 - Definition*

1. A civilian is anyone who is not a member of the armed forces or of an organized armed group.
2. The civilian population comprises all persons who are civilians.
3. The presence, within the civilian population, of individuals who do not fall within the definition of civilians does not deprive the population of its civilian character.
4. In case of doubt as to whether a person is a civilian, he or she shall be considered to be a civilian.

* Adopted by consensus at the thirty-seventh meeting on 4 April 1975. See paragraph 121 of the present report.

Draft Protocol II,
Part V, Chapter I

Article 26 - Protection of the civilian population*

The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances:

1. The civilian population as such, as well as individual civilians, shall not be made the object of attack. Acts or threats of violence which have the primary object of spreading terror among the civilian population are prohibited.
2. Civilians shall enjoy the protection afforded by this Chapter of the Protocol unless and for such time as they take a direct part in hostilities.
3. The employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives are prohibited.

An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separate and distinct military objectives located in a city, town, village, or other area containing a concentration of civilians or civilian objects is to be considered as indiscriminate.

(4.)*

5. The Parties to the conflict shall not use the civilian population or civilians in attempts to shield military objectives from attacks.

* Adopted by 44 votes to none with 22 abstentions at the thirty-seventh meeting on 4 April 1975. See paragraphs 122 to 130 of the present report.

** Final decision on this paragraph must await decision on the problem of reprisals in general in draft Protocols I and II.

Draft Protocol II,
Part V, Chapter I

Article 26 bis - General protection of civilian objects*

Civilian objects shall not be made the object of attack /or of reprisals 7**. Attacks shall be strictly limited to those objects which by their own nature, location, purpose, or use make an effective contribution to the armed action of the parties to the conflict.

* Adopted by 35 votes to 8, with 27 abstentions at the thirty-seventh meeting on 4 April 1975. See paragraphs 131 to 134 of the present report.

** A decision on the bracketed words depends on the outcome of the deliberations on the handling of reprisals in draft Protocols I and II.

Draft Protocol II,
Part V, Chapter I

Article 28 - Protection of works and installations
containing dangerous forces*

1. Works or installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, when such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

2. The Parties to a conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, an armed guard may be placed over such works or installations without prejudice to the protected status that they enjoy under paragraph 1.

(3.)**

4. In order to facilitate their identification, parties to a conflict may mark the objects protected by this article with a special sign consisting of . . . ***. Absence of such markings in no way relieves any party to a conflict from its obligations under this article.

* Adopted by 43 votes no none with 21 abstentions at the thirty-seventh meeting on 4 April 1975. See paragraphs 135 to 143 of the present report.

** Final decision on this paragraph is to await solution of the problem of reprisals in general in Protocols I and II.

*** To be determined.

Draft Protocol II,
Part V, Chapter I

Article 28 bis* - Protection of the natural environment**

It is forbidden to employ methods or means of combat which are intended or may be expected to cause widespread, long-term, and severe damage to the natural environment.

* This article is referred to as article 28 bis for ease of reference only. If adopted, it should be inserted as a paragraph of article 20.

** Adopted by 49 votes to 4 with 7 abstentions at the thirty-eighth meeting on 10 April 1975. See paragraphs 144 to 146 of the present report.

Draft Protocol II,
Part V, Chapter I

Article 29 - Prohibition of forced movement of civilians*

1. The displacement of the civilian population shall not be ordered by a Party to the conflict for reasons relating to that conflict unless the security of the civilians involved or imperative military reasons so demand. Should a Party to the conflict undertake such displacements, they shall take all possible measures in order that the civilian population be received under satisfactory conditions of hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict except in cases in which individuals finally convicted of crimes are required to leave that territory or having been offered the opportunity of leaving the territory, elect to do so, or individuals are extradited in conformity with law.

(3.)**

* Adopted by 40 votes to none, with 28 abstentions at the thirty-seventh meeting on 10 April 1975. See paragraphs 147 to 153 of the present report.

** Final decision on this paragraph must await decision on the problem of reprisals in general in Protocols I and II.

REPORT TO COMMITTEE III
ON THE WORK OF THE WORKING GROUP

Submitted by the Rapporteur

The Working Group held a series of 16 meetings, during the period January 31 - February 21, 1975. It completed its work on Article 44, paragraph 1, Article 46, Article 47, and Article 47 bis. These articles were thoroughly discussed by the Working Group, and, even though there are some points on which consensus could not be obtained, it is reasonable to expect that the necessary decisions can be taken and the articles adopted by Committee III without extensive further debate. This report will attempt to explain some of the problems encountered and to present clearly the issues remaining for decision. To the extent that it fails in that task, the fault rests with the Rapporteur; time did not permit consideration of this report by the Working Group, so it should be understood as simply the report of the Rapporteur on the work of the group.

Article 44(1)

Broad agreement was reached on the following text:

"1. The provisions contained in the present Section shall apply to any land, air, or sea warfare which may affect the civilian population, individual civilians, or civilian objects on land. They shall further apply to all attacks from the sea or the air against objectives on land but do not otherwise affect the existing generally recognized rules of international law applicable to armed conflict at sea or in the air."

Discussions in the Working Group showed almost complete agreement that it would be both difficult and undesirable in the time available to try to review and revise the laws applicable to armed conflict at sea and in the air. Moreover, it was clear that we should be careful not to revise that body of law inadvertently through this article. The solution was found by combining the ICRC text with a sentence which stated clearly that, except for attacks against objectives on land, the law applicable to armed conflict at sea or in the air is unaffected.

During the search for agreement on this Article in the Working Group, the Rapporteur proposed for consideration an additional paragraph to Article 50 (CDDH/III/GT/DT/7), the essence of which was that, in the conduct of armed conflict at sea or in the air which was beyond the scope of this Section, each Party to the conflict would be obligated, consistent with its rights and duties under the law applicable to such armed conflict, to take all reasonable precautions to avoid harm to civilians and civilian objects. This proposal was received with interest but will not be examined in detail until the Working Group reaches Article 50.

Several delegates wish it recorded here that they remain dissatisfied with this draft. They object to the phrase "on land" in the first sentence and to the second sentence as a whole. These delegates would prefer to have this Section of the Protocol affect the law applicable to the conduct of warfare at sea or in the air to the extent that the provisions of this Section would be more favourable to civilians than the existing law.

The Rapporteur recommends that the Commission adopt the text quoted above for Article 44, paragraph 1.

Article 46

With a few exceptions as shown by the bracketed provisions, broad agreement was reached on the following text:

"The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, in addition to other applicable rules of international law, shall be observed in all circumstances:

1. The civilian population as such, as well as individual civilians, shall not be made the object of attack. Acts or threats of violence which have the primary object of spreading terror among the civilian population are prohibited.

2. Civilians shall enjoy the protection afforded by this Section of the Protocol unless and for such time as they take a direct part in hostilities.
3. Indiscriminate attacks are prohibited. Indiscriminate attacks are those which are not directed at a specific military objective or which employ methods or means of combat of a nature to strike military objectives and civilians or civilian objects without distinction. Among others, the following types of attacks are prohibited as indiscriminate:
 - (a) An attack by any means of bombardment which treats as a single military objective a number of /widely separated/ /distinct/ military objectives located in a city, town, village, or other area containing a concentration of civilians or civilian objects /unless the objectives are too close together to be capable of being attacked separately/.
 - (b) An attack directed against a military objective which, because of the methods or means of combat chosen or for any other reason, may be expected to cause incidental losses or injury among the civilian population or losses or damage to civilian objects or a combination of both to an extent disproportionate to the direct or substantial military advantage anticipated. This prohibition is without prejudice to other prohibitions on attacks, in particular those prohibiting attacks against civilians and civilian objects, as mentioned in paragraph 1 above.
4. Attacks against the civilian population or civilians by way of reprisals are prohibited.
5. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks, or to shield, favour or impede military operations. Parties to a conflict also shall not direct the movement of the civilian population or individual civilians in attempts to shield military objectives from attack or to shield military operations.
6. Any violations of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to those civilians, including the precautionary measures provided for in the Article 50."

From the prolonged discussion of this Article in the Working Group the Rapporteur believes it useful to note here only a few of the many problems that arose. In the introductory paragraph, several delegates questioned the phrase, "To give effect to this protection". It was pointed out that there were also other rules in this Protocol and in other

there were also other rules in this Protocol and in other instruments which helped give effect to the protection and that the phrase might conceivably import a limitation of the protections to military operations. In the end, however, it was decided that the sentence is satisfactory because it states clearly that there are other applicable rules of law and that these rules must be observed in all circumstances and in all types of operations, by regular and irregular forces alike, during the course of an armed conflict.

Several delegations expressed a wish to have it noted in the record that they understand the word "hostilities" in paragraph 2 as including preparations for combat and return from combat. The Rapporteur notes that words like "hostilities" and "military operations" will be among those which should engage the close attention of the Drafting Committee at a later stage of the Conference to ensure consistency of use among articles and maximum clarity of meaning.

With respect to subparagraph 3(a) there was considerable discussion of the meaning of the term "bombardment". The Rapporteur understands that the phrase chosen, "any means of bombardment", was intended to cover all attacks by fire, except for direct fire by small arms, and the use of any type of projectile.

The bracketed phrases in subparagraph 3(a) represent two basic alternatives. Some delegates object to the phrase "unless the objectives are too close together to be capable of being attacked separately". They believed that the inclusion of this phrase would tend to encourage area attacks, because only the attacking forces could decide whether, with the weapons available and in the circumstances, individual targets were too close together to be capable of being attacked separately. There was, however, no intent to immunize such targets. Many of those delegates also preferred the word "distinct" to the phrase "widely separated". Other delegates could accept the deletion of the final phrase only if the phrase "widely separated" were adopted. The Rapporteur doubts that consensus can be reached on any basis that includes the final phrase of the subparagraph, and suggests that efforts be continued in the Commission to obtain broad support for the phrase "widely separated", or a similar phrase.

Subparagraph 3(b) is in brackets because a number of delegates were not prepared to accept it in advance of the consideration and adoption of a text for Article 50, which contains a similar paragraph. The Rapporteur believes it was the general feeling of most delegates that a text for Article 46(3)(b) would be much easier to agree upon if discussed together with Article 50. The prohibition of attacks which may be expected to cause disproportionate civilian losses is of such significance for the protection of the civilian population and the responsible

development of the law that the Rapporteur recommends that the text of this subparagraph not be voted on now but rather be put aside until Article 50 is considered by the Working Group and broad agreement can hopefully be reached on texts of the rule for both Articles.

With respect to paragraph 4 of this Article, several delegations asked to have it recorded that they would have preferred wording that prohibited reprisals, rather than attacks by way of reprisals. In this connection, the Rapporteur notes that reprisals by belligerent occupants are dealt with elsewhere.

Article 47

With the exception of the two phrases shown in brackets, the Working Group reached very broad agreement on the following text:

"1. Civilian objects shall not be the object of attack /nor of reprisals/. Civilian objects are all objects which are not military objectives, as defined in paragraph 2.

2. Attacks shall be strictly limited to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their own nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used /except in contact zones where the security of the armed forces requires a derogation from this presumption/."

The question of reprisals produced a sharp split among the delegates. Some delegates argued that the prohibition of reprisals against civilians contained in Article 46, paragraph 4 should be extended in Article 47 to cover all civilian objects. Other delegates argued that, whereas prohibitions of reprisals against specially protected civilian objects, such as are found in Articles 47(bis), 48, and 49 are acceptable, ordinary civilian objects should not be immune to reprisals. These delegates expressed the view that, if any reprisals were to be permitted, reprisals against ordinary civilian objects should be permitted, and they asserted the importance of retaining at least a limited right of reprisal as a means of enhancing compliance with the law.

The Rapporteur suggests that the Commission not adopt the phrase "nor of reprisals" in paragraph 1. More fundamentally, however, the Rapporteur believes that the whole question of the scope of permitted reprisals - which

will also be considered by Commission I - be the subject of a special study by a small group (perhaps open to participation by all delegations) drawn from both Commissions I and III. The Rapporteur suggests consultations between the chairmen of the two commissions for the purpose of establishing such a small study group.

In paragraph 2 of Article 47, extensive discussion was required before agreement was reached on the word "definite" in the phrase "definite military advantage". Among the words considered and rejected were "distinct", "direct", "clear", "immediate", "obvious", "specific", and "substantial". The Rapporteur is unable to draw any clear significance from this choice.

In paragraph 3 the bracketed phrase which would provide an exception to the normal presumption of civilian use for objects in contact zones, was defended on the grounds that infantry soldiers could not be expected to place their lives in great risk because of such a presumption and that, in fact, civilian buildings which happen to be in the front lines usually are used as part of the defensive works. The phrase was criticized by other delegates on the ground that it would unduly endanger civilian objects to permit any exceptions to the presumption.

The Rapporteur recommends adoption of the phrase in brackets. The presumption created by this paragraph will be a significant new addition to the law, and it is of the greatest importance that it be respected in practice. It would be unfortunate to draft the provision so that it requires something we know in advance is unlikely to be lived up to.

Finally, it should be noted that several delegations proposed to include in this Article, as well as in Articles 46 and 47(bis), provisions forbidding pillage of those objects and their unconsented removal from the territory of the State in which they are found. Ultimately, it was agreed that these ideas could most usefully be considered in the context of Articles 65 and 66 concerning protections of persons and objects in the power of a party to the conflict. The Rapporteur recommends that this suggestion be transmitted by the Chairman of Commission III to the Chairman of Commission I and that the interested delegations be encouraged to submit appropriate amendments to Articles 65 or 66.

Article 47(bis) - Protection of Cultural Objects and of Places of Worship.

The Working Group believed that this subject deserved to be dealt with in a separate article, rather than simply in a paragraph of Article 47. Aside from one substantive disagreement, which is shown by the bracketed alternative phrases in paragraph (a), broad agreement was reached on the following text:

"Without prejudice to the provisions of the Hague Convention on the Protection of Cultural Property of 14 May 1954, and other relevant international instruments, it is forbidden:

- (a) to commit any acts of hostility directed against /historic monuments, places of worship, or works of art/ /places of worship, and those historic monuments or works of art/ which constitute the cultural heritage of peoples;
- (b) to use such historic monuments or places of worship in support of the military effort; and
- (c) to make such objects the object of reprisals.

The alternatives represent a split between those delegates who wished to extend the special protection of this Article to all places of worship and those who wished to limit the special protection to such places of worship as constitute part of the cultural heritage of peoples, in the words of the Hague Convention of 1954. Those who wish to include all places of worship adduced both religious reasons and traditions of immunity and asylum to support their proposal. Those who wished to limit the objects protected by this Article to objects of considerable historical, cultural, and artistic importance argued that the immunity of these latter objects would inevitably be undermined if all local churches and other places of worship were included. They pointed out that such churches frequently had been utilized in the past for military purposes when they became part of the front lines, and that they could not be immunized from hostile action in such circumstances.

The Rapporteur recommends that, in the interest of stronger protection for the priceless cultural monuments of mankind, the special protection of this Article be limited to "historic monuments, places of worship, and works of art which constitute the cultural heritage of peoples".

In summary, the Rapporteur recommends the adoption of Articles 44(1), 46, 47, and 47(bis), with the exception of subparagraph 3(b) of Article 46, action on which should be deferred until the text of Article 50 is ready for adoption.

MIXED GROUP REPORT

MARCH 1975

The Chairman, Committee II
The Chairman, Committee III

Sirs,

1. At your joint request, a mixed working group from members of Committee II and Committee III consisting of:

<u>Chairman:</u>	Mr. E. Rosenblad, Sweden	(Committee II)
<u>Members:</u>	Mr. S. Modisi, Botswana	"
	Mr. V. N. Denisov, Ukraine SSR	"
	Comdt. S. F. Agudo Lopez, Spain	(Committee III)
	Brig. L. A. Kermose, <u>Rapporteur</u> , New Zealand	"
	Brig. El Misbah El Sadig, Sudan	"
	Col. D. T. Starling, Brazil	"

(in attendance Mr. F. de Mulinen, ICRC),

met during the period 24 February to 13 March 1975 with the aim of recommending:

- (a) terms that should be used to cover the various military situations that are envisaged in some of the articles contained in the Draft Additional Protocols I and II to the Geneva Conventions of 12 August 1949; and
- (b) definitions of the terms recommended.

2. As Chairman of this Group I have much pleasure in submitting our report.

3. The terms recommended, together with their definitions, are attached as Annex A. For your convenience it is produced in English, French, Russian and Spanish.

4. At the beginning of its deliberations the Group decided to try:

- (a) to keep the number of terms to be recommended to the minimum possible;
- (b) to recommend only terms that, as far as possible, could be understood and accepted by both civilians and military persons and could be translated with the minimum difficulty and ambiguity into the various languages to be used for the Protocols;
- (c) to avoid special military terms wherever possible, and to use the language of the Protocols.

5. In arriving at its recommendations this Group

First; agreed upon a diagrammatic display of a classical ground forces disposition. This was done so that all members could agree as to what area was being referred to. (Copy is attached as Annex B).

Second; made a comprehensive list of the various terms that had so far been used when drafting the Articles of Protocols I and II. (Copy is attached as Annex C).

6. Amongst the military members of the Group it was generally agreed that the total area in any armed conflict over which military activity extends, can conveniently be divided into three distinct zones or areas, namely:

- (a) the total area of the conflict, which includes the area of all military or para-military units taking a direct or even indirect part in the conflict;
- (b) that area of a conflict where fighting on any scale is taking place;
- (c) that limited area of the fighting where the opposing forces are in direct, and at times physical, contact with each other.

7. Once the terms and the definitions covering these three zones or areas were agreed upon by this Group, the instances where military situations had been envisaged in the articles (see Annex C) were examined to see if the terms recommended would be appropriate. They were found to be so.

8. The Group did not deem it appropriate to suggest where in the articles, each one of the terms recommended should be employed. This choice, it believed, should be made by Committees II or III because they would be the best judges of what military situation was referred to in the articles it would be debating.

9. The term "Combat Area" would seem to cover most situations, but the other terms are also submitted since this Group, when it examined the relevant articles of the Draft Protocols, could foresee situations where these terms might be required.

10. The terms "at sea", "on land", or "in the air", have been avoided in the definitions, because this Group believes that the substance of each individual article will clarify this aspect.

11. The terms recommended, together with their definitions (see Annex A), are proposed for the purposes of Protocols I and II only.

(Signed) Esbjörn Rosenblad

Annex A to Mixed Group Report of March 1975

For the purposes of Protocols I and II the following terms are recommended:

Zone of Military Operations means, in an armed conflict, the territory where the armed forces of the adverse Parties taking a direct or an indirect part in current military operations, are located.

Combat Area means, in an armed conflict, that area where the armed forces of the adverse Parties actually engaged in combat, and those directly supporting them, are located.

Contact Area means, in an armed conflict, that area where the most forward elements of the armed forces of the adverse Parties are in contact with each other.

Annexe A à un Rapport d'un Groupe Mixte mars 1975

Aux fins des Protocoles I et II les termes suivants sont recommandés :

Zone de combat - Dans un conflit armé, cette expression désigne la zone où les forces armées des parties adverses réellement engagées dans le combat, et où sont situées celles qui les soutiennent directement.

Zone de contact - Dans un conflit armé, cette expression désigne les zones où les éléments les plus avancés des forces armées des parties adverses sont au contact les unes des autres.

Zone des opérations militaires - Dans un conflit armé, cette expression signifie le territoire où se trouvent les forces armées qui participent directement ou indirectement aux opérations militaires en cours.

Приложение А к докладу смешанной
группы, март 1975 г.

Для целей Протоколов I и II рекомендуются следующие термины:

Зона военных операций означает в вооруженном конфликте территорию, где располагаются вооруженные силы враждебных сторон, принимающие прямое или косвенное участие в проводимых военных операциях.

Район боевых действий означает в вооруженном конфликте район, в котором располагаются вооруженные силы враждебных сторон, фактически участвующие в боевых действиях, и тыловые части, непосредственно их обеспечивающие.

Район соприкосновения означает в вооруженном конфликте район, в котором наиболее передовые части вооруженных сил враждебных сторон находятся в соприкосновении друг с другом.

Anexo A al Informe del Grupo Mixto, marzo, 1975

Para los fines de los Protocolos I y II, se recomiendan los términos siguientes:

Zona de operaciones militares

Significa, en un conflicto armado, el territorio donde están ubicadas las fuerzas armadas que toman parte directa o indirecta en las operaciones militares en curso.

Area de combates

Significa, en un conflicto armado, aquella área donde están ubicadas las fuerzas armadas de las partes adversarias empeñadas realmente en combate.

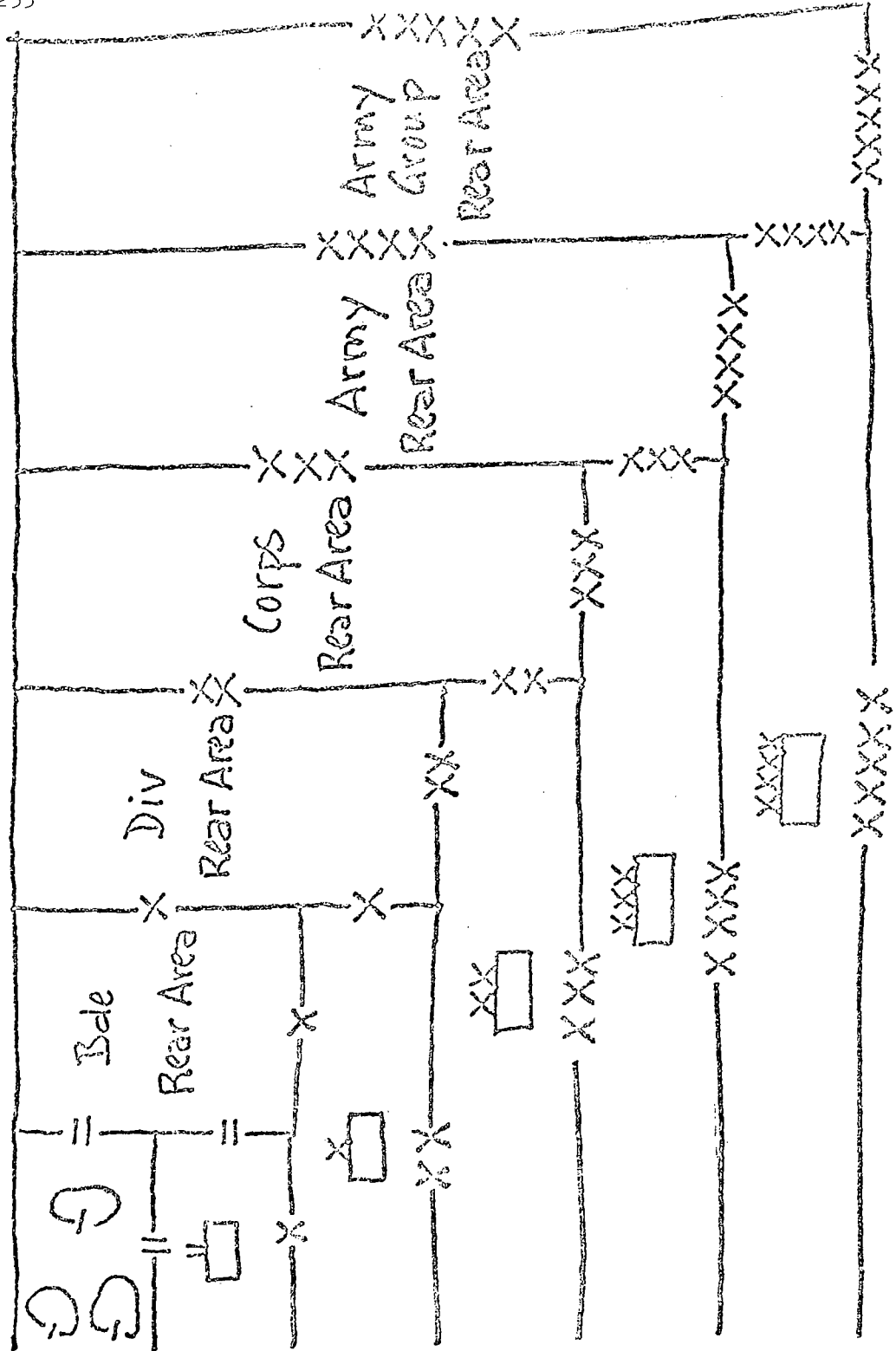
Area de contacto

Significa, en un conflicto armado, aquella área donde los elementos más avanzados de las fuerzas de las partes adversarias están en contacto entre sí.

Annex B to Mixed Group Report of March 1972

DIAGRAMATIC DISPLAY OF

ARMED FORCES ORGANIZATION ON LAND



Annex C to Mixed Group Report of March, 1975

TERMS USED IN THE GENEVA CONVENTIONS OF 1949 AND THE
DRAFT ADDITIONAL PROTOCOLS I AND II

- C III/47/2 If the combat zone (le front - la linea de fuego) draws closer to a camp, the prisoners of war in the said camp
- C IV/127/4 If the combat zone (le front - la linea de combate) draws close to a place of internment,
- C III/23/1 No prisoner of war at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, (zone de combat - al fuego de la zona de combate) nor may his presence be used to render certain points or areas immune from military operations.
- C III/19/1 Prisoners of war shall be evacuated as soon as possible after their capture, to camps situated in an area far enough from the combat zone (zone de combat - la zona de combate) for them to be out of danger.
- P I/15/3 All possible help shall be afforded medical personnel in the combat zone.(zone de combat - la zona de combate)
- P II/8/3 d places of internment and detention shall not be set up close to the combat zone (zone de combat - zona de combate)
- P II/13/2 Whenever circumstances permit, local arrangements shall be concluded by the parties to the conflict for the removal of the wounded and the sick from the combat zone (zone de combat - zona de combate) or from a besieged or encircled area.
- P II/32/2 c (The parties to the conflict shall) take measures, if necessary and with the consent of their parents or persons responsible for their care, to remove children from the area of combat (zone de combat - zona de combate)
- C IV/20/2 In occupied territory and in zones of military operations, (zones d'opérations militaires - zonas de operaciones militares) the above personnel (hospital staff) shall be recognisable by means of an identity card
- C IV/28 The presence of a protected person may not be used to render certain points or areas immune from military operations. (régions à l'abri des opérations militaires o regiones al abrigo operaciones militares)

- P I/55/1 In zones of military operations (zones d'operations militaires - zonas de operaciones militares), the civilian bodies which are established or recognized by their governments and are assigned to the discharge of the tasks mentioned in Article 54 shall be respected and protected.
.....
- C IV/49/5 The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war (région particulièrement exposée aux dangers de la guerre - regiones singularmente expuestas a peligros de guerra) unless the security of the population or imperative military reasons so demand.
- C IV/83/1 The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war. (régions particulièrement exposées aux dangers de la guerre - regiones particularmente expuestas a los peligros de la guerra)
- C IV/38/1/4 (The non repatriated protected persons :) if they reside in an area particularly exposed to the dangers of war, (région particulièrement exposée aux dangers de la guerre - regiones particularmente expuestas a peligros de la guerra) they shall be authorized to move from that area to the same extent as the nationals of the State concerned.
- C IV/15/1 Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, (les régions où ont lieu les combats - regiones donde tengan lugar los combates) neutralized zones intended to shelter from the effects of war the following persons,
- C III/19/3 Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone. (zone de combat - zona de combate)
- P I/27/1 In any parts of a land or sea contact zone effectively controlled by national or allied troops, (zone de contact effectivement contrôlée - zona de contacto efectivamente controlados) and in those areas the control of which is not clearly established, the only guarantee of protection for medical aircraft is an agreement reached between the local military authorities of the Parties to the conflict. No particular form of such agreement is prescribed.

- P I/52/2 the Parties to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact. (zone où les forces armées sont en contact - zona donde las fuerzas armadas están en contacto) Armed forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated from that locality ; no hostile use shall be made of fixed military installations or establishments ; no acts of warfare shall be committed by the authorities or the population.
- P I/53/3 (Neutralized localities) the subject of such an agreement may be any inhabited place situated outside a zone where armed forces are in contact. (zone où les forces armées sont en contact - zona donde las fuerzas armadas están en contacto) Armed forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated from that locality ; no hostile use shall be made of fixed military installations or establishments ; no acts of warfare shall be committed by the authorities or the population ; any activity linked to the military effort must have ceased.
- C III/19/2 Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone. (zone dangereuse - zona peligrosa)
- P I/Ann./
6/2 As far as possible, medical personnel removing casualties from the battle area (champ de bataille - campo de batalla) shall wear headgear and clothing bearing distinctive emblems.
- P I/26 Subject to Article 27, the medical aircraft of a Party to the conflict may fly over areas of land or sea controlled by itself or by its allies, (secteurs qu'elle ou ses alliés contrôlent - sectores controlados por dicha Parte o por sus aliados) without the prior agreement of the adverse Party. However, for greater safety, a Party to the conflict so using its medical aircraft may inform the adverse Party or its allies of such flights.

Geneva, 3 February - 18 April 1975

Draft Protocol I, Part IV,
Section I, Articles 46(3) and 48 to 53

REPORT TO COMMITTEE III
ON THE WORK OF THE WORKING GROUP
SUBMITTED BY THE RAPPORTEUR

Articles 46(3) and 48 to 53

The Working Group held a series of meetings during the period February 24 - March 13, 1975. It completed its work on article 46, paragraph 3 and articles 48-53, with the exception of article 48 bis concerning the environment. Although there remain a few differences which the Committee should decide, a very large measure of agreement was reached on these articles. As was the case with the previous report by the Rapporteur, CDDH/III/224, dated February 24, 1975, this report has not been approved by the Working Group and should be understood simply as the report of the Rapporteur on the work of the group.

Article 46(3)

The Working Group agreed to submit to the Committee the text set forth in document CDDH/III/246, dated 14 March 1975. This paragraph, which was discussed in the previous report of the Rapporteur, document CDDH/III/224, dated 24 February 1975, was one of the most difficult for the Working Group to work out. Sub-paragraph (a) was formulated along the lines foreseen by the Rapporteur in his previous report.

Sub-paragraph (a) prohibits all types of bombardment, by whatever means or methods, which treat as a single military objective a number of objectives separated by some distance which are located in an area where there is a concentration of civilians. Thus, after deliberation, the Working Group considered it unnecessary to refer to "massive" bombardment, "target area" bombardment, or "carpet bombing", since all are covered by this prohibition, and use of such expressions might be construed to restrict the protection of civilians from other types of bombardment.

Sub-paragraph (b) was drafted only after article 50 had been settled, since both involved the same issue. A simple cross reference, rather than repetition, commended itself to the Working Group, although it was recognized that the Drafting Committee would ultimately have to decide whether to use a cross reference or the full text and, if the former, whether the text should appear in article 46(3) or in article 50.

The introductory sub-paragraph of paragraph 3 proved surprisingly troublesome. The main problem was that of defining the term "indiscriminate attacks". There was general agreement that a proper definition would include the act of not directing an attack at a military objective and both the use of means or methods of combat which cannot be directed at a specific military objective and those the effects of which cannot be limited as required by the Protocol. Formulation of the text proved, however, a stubborn task.

Article 48

The Working Group approved for transmission to the Third Committee the text contained in document CDDH/III/247, dated 14 March 1975. The Rapporteur believes that this text, which was accepted only after prolonged discussion and considerable amendment, could profit more than most of the articles sent to the Committee by refinement and polishing by a drafting committee. The following comments may assist any such committee in the future.

Paragraph 1 was accepted after considerable discussion as a useful statement of the basic principle from which the rest of the article flows. This principle should be an important addition to the law protecting civilians. Some concern was expressed about the scope of the principle, but the Rapporteur believes that the scope will be defined by the remainder of the article and by the other relevant articles in the Protocol,

particularly those dealing with relief actions. That the paragraph does not change the law of naval blockade is made clear by Article 44, paragraph 1.

In paragraph 2, drafting problems were posed by the fact that two of the objects listed, food producing areas and irrigation works, are useful to combatants only for purposes other than directly for sustenance. Thus, the phrase in paragraph 2 "for the purpose of denying them as such" was designed to cover both the denial of food and drink as sustenance and the denial of food producing areas and irrigation works for their contribution to the production of sustenance. On the other hand, it was not intended to cover their denial to the enemy for other purposes, including the general purpose of preventing the enemy from advancing. Thus, bombarding an area to prevent the advance through it of an enemy is permissible, whether or not the area produces food, but the deliberate destruction of food producing areas in order to prevent the enemy from growing food on them is forbidden. Similarly, cutting down a field of crops in order to clear a field of fire or to prevent the enemy from using it for cover is permissible, but cutting it down to prevent the enemy from consuming the crops is forbidden. This is a heavy burden of meaning to be carried by the two words "as such", and it is to be hoped that the drafting Committee will ultimately find a clearer form of words.

Another confusion in paragraph 2 is caused by the interplay of purpose and motive. The only attack, destruction, etc., that is prohibited by this paragraph is that which is done for the purpose of denying the objects to the adverse party or to the civilian population. In principle that is fairly clear, but the sentence does not read easily, because that statement is followed by the words "whatever the motive that produced that purpose, whether to starve out civilians, to cause them to move away, or any other motive". There seems to be surplussage here, but the Working Group was unable to come to an agreement on how to simplify it. The Rapporteur hopes the drafting Committee will have better luck.

The phrasing of paragraph 3 is only slightly more satisfying than that of paragraph 2. Here the drafter continues to be plagued by the necessity of distinguishing between uses of the objects as sustenance and other uses. The Rapporteur understands 3(a) to mean only those objects which clearly are assigned solely for the sustenance of the armed forces. The Rapporteur points out that the "civilian population" referred to in 3(b) was clearly not intended to mean the civilian population of a country as a whole, but rather of an immediate area, although the Working Group made no attempt to define how large an area that might be.

Finally, article 48 raised the question whether the prohibitions in paragraph 2 other than that on attack (which by definition is against the adversary) apply to acts by a State against objects under its control and within its own national territory. A number of representatives expressed the view that it was not intended to have such an effect and that an express reservation of rights within one's own territory was unnecessary. At the suggestion of the Rapporteur, it was agreed to review subsequently the extent to which the provisions of this Section were intended to have such an effect within a State's own territory and reflect the conclusions of the Group in some appropriate way in the text. It is apparent that some provisions for example article 46(5) on movement of civilians to shield military operations, are intended to apply to a State within its own territory. The Working Group has not yet made this review.

Article 49

The Working Group approved for transmission to the Committee the text contained in document CDDH/III/248 dated March 14, 1975. The Working Group found article 49 a difficult task. It was only when a decision was taken to limit the special protection of the article to dams, dykes, nuclear power stations, and other military objectives in the vicinity of these objects that it was possible to produce a generally acceptable text. That limitation made it possible to be more specific in describing the circumstances in which the special protection was lost, which had been the most difficult part of the drafting task. In the end, there remained certain elements of disagreement, shown by bracketed provisions, on which the decisions by the Committee will be required.

The Rapporteur wishes to emphasize that article 49 provides a special protection to these objects and objectives which, although important, is only one of a number of layers of protection. First, if a dam, dyke, or nuclear power station does not qualify as a legitimate military objective under article 47, it is a civilian object and cannot be attacked. Second, if it does qualify as a military objective or if it has military objectives in its vicinity, it receives special protection under this article. Third, if, pursuant to the terms of this article, it may be attacked or a military objective in its vicinity may be attacked, such attack is still subject to all the other relevant rules of this Protocol and general international law; in particular, the dam, dyke, or nuclear power plant or other military objective could not be attacked if such attack would be likely to cause civilian losses excessive in relation to the anticipated military advantage, as provided in article 50. In the case of a dam or dyke, for example, where a great many people would be killed and much damage done by its destruction, immunity would exist unless the military reasons for destruction in a particular case were of an extraordinarily vital sort.

The brackets in paragraph 1 present two issues for decision. One is whether these objects should enjoy the special protection of this article against all attacks or only against those which would be likely to cause the release of the dangerous forces and consequent grave or severe losses among the civilian population. Assuming that the object in question becomes a military objective, the Rapporteur cannot see why it should be immune from attacks of a kind not likely to release the dangerous forces (which would presumably include infantry assaults), but complete agreement was not possible on this question, so it is referred to the Committee. The other issue is the choice between the phrase "would be likely to" and the word "may".

Paragraph 2 provides that the special protection accorded to a dam or dyke by paragraph 1 ceases only "if it is used for other than its normal function" and in support of military operations. This phrase, "normal function" may be less clear than is desirable, and perhaps a drafting committee may be able to find a better term. The Rapporteur understands the term to mean the function of holding back, or being ready to hold back, water. Thus, if a dam or dyke is used for no purpose, other than holding back water or being ready to hold back water, e.g., it is not made part of a fortified line or used as a road, the immunity from attack provided in paragraph 1 cannot be lost. Even if it is used for a function in addition to its normal function, the immunity is not lost unless it is used in "regular", significant, and direct support of military operations and if the only feasible way to terminate the support is by attack on the dam or dyke.

Additionally, it must always be recognized that an attack is not justified unless the military reasons for the destruction in a particular case are of such extraordinary and vital interest as to outweigh the severe losses which may be anticipated. Nevertheless, it should be noted that some representatives remain concerned about the problems that may arise from the use of dykes for roadways.

The Rapporteur wants to point out that the use of water stored by a dam for hydro-electric generating facilities cannot justify making the dam itself an object of attack, but the generating facilities could become "other military objectives located at or in the vicinity of these works or installations". If such a generating facility does become a military objective, it may not be attacked unless it is "used in regular, significant, and direct support of military operations" and, even then, only if "such attack is the only feasible way to terminate such support." Certainly, the greater the distance between hydro-electric generating facilities and the dam, the less risk there would be of collateral damage to the dam, in the event the hydro-electric generating facility were used for military purposes, in such a way as to become a legitimate military objective.

The Rapporteur also wishes to draw to the attention of the Committee the fact that the standard used in paragraph 2, "regular, significant, and direct support of military operations" is a higher standard than is used in article 47, i.e., "effective contribution to military action". Without trying to define the phrase in article 49, it seems clear that production of arms, ammunition, and military equipment would qualify as direct support of military operations, but the production of civilian goods which may also be used by the armed forces probably would not qualify in the absence of most unusual circumstances.

In the view of the Rapporteur, the second sentence of paragraph 3 is one of the most important contributions of this article. Even when attack on one of these objects is justified under all the applicable rules, this provision requires the combatants to take "all practical precautions" to avoid releasing the dangerous forces. Given the array of arms available to modern armies, this requirement should provide real protection against the catastrophic release of these forces.

With respect to paragraph 5, there was considerable discussion about the question of the types of armament to be permitted to the defensive installations. Ultimately, it was thought impractical to include any limitation other than that implied by the phrase "weapons capable only of repelling hostile action against the protected works or installations." The Rapporteur understands the intent of that limitation to be that weapons capable of attacking enemy forces passing at some distance from the protected work or installation are prohibited.

With respect to paragraph 7, the Working Group did not attempt to decide what sign should be used to indicate the objects protected by this article, although some representatives stated their disagreement with the proposal in the ICRC draft to use the sign authorized by the Geneva Conventions for hospital zones. This question will obviously have to be considered at a later stage of the Conference.

Finally, it should be noted that some representatives requested the inclusion in this article of special protection for oil rigs, petroleum storage facilities, and oil refineries. It was agreed that these were not objects containing dangerous forces within the meaning of this article and that, if these objects are to be given any special protection by the Protocol, it should be done by another article, perhaps by a special article for that purpose. The Rapporteur has agreed to consult further with interested representatives on this question.

Article 50

The Working Group decided to submit the text in document CDDH/III/249, dated March 14, 1975, to the Committee. Paragraph 2(a) of this article required much time and effort to work out, but the other paragraphs were fairly quickly agreed upon. Certain words created problems, particularly the choice between "feasible" and "reasonable" in 2 (a) (i) and 2 (a) (ii). The Rapporteur understands "feasible", which was the term chosen by the Working Group, to mean that which is practicable, or practically possible. "Reasonable" struck many representatives as too subjective a term.

The Working Group was unable to reach agreement on the choice of phrase, "cause" or "create a risk of" in sub-paragraphs 2 (a) (iii) and 2 (b). In fact, the Rapporteur is unable to illuminate the difference in meaning of the two terms, but each has its supporters, and the Committee will have to decide.

Similarly, the Committee will have to choose between the two bracketed phrases in sub-paragraph 2 (c). The difference here is one of nuance whether to imply that warning will usually be possible or that it will only sometimes be possible.

Article 51

The Working Group agreed to send to the Committee the text set forth in document CDDH/III/250, dated March 14, 1975. Agreement was reached fairly quickly on this draft after it was revised to have the phrase "to the maximum extent feasible" modify all sub-paragraphs. This revision reflected the concern of a number of representatives that small and crowded countries would find it difficult to separate civilians and civilian objects from military objectives.

Other representatives pointed out that even large countries would find such separation difficult or impossible to arrange, in many cases.

It was clearly understood in the Working Group that this article applies to all territory under the effective defacto control of a party, that is, including both its own national territory which is under its control and any foreign territory which it occupies.

In sub-paragraph 3 the word, "dangers", was retained from the ICRC draft after some discussion of possible alternatives. It was pointed out that article 18, paragraph 5 of the Fourth Geneva Convention of 1949 refers in a similar way to "the dangers to which hospitals may be exposed."

The phrase in sub-paragraph 1, "without prejudice to article 49 of the Fourth Convention," was chosen to make it clear that the provisions of the sub-paragraph are not intended to amend in any way that article. This sub-paragraph, on the contrary is intended to stand on its own in all cases except where action proposed to be taken under it would be contrary to article 49 of the Fourth Convention; in that rare case, article 49 would govern.

Article 52

The Working Group approved for transmission to the Committee the text contained in document CDDH/III/251 dated March 14, 1975. This text resulted from a compromise among five tendencies: (1) those who wished to see non-defended localities established by unilateral declaration; (2) those who wished to see them established only by agreement; (3) those who wished to limit them to an area in or near the contact zone; (4) those who wished to permit them also in the hinterland; and (5) 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 is an article that permits unilateral declaration of non-defended localities near or in a contact zone which are open for occupation by an adverse party and meet the other prescribed conditions and which requires agreement for the establishment of zones not meeting the geographical or other requirements.

Article 53

The Working Group approved for transmission to the Committee the text contained in document CDDH/III/252, dated March 14, 1975. One of the most controversial issues posed by this article was its title. The terms "neutralized zone", "demilitarized zone", and "non-militarized zone" were all considered, and each had its proponents. The Rapporteur even suggested the term, "civilized zone", but his idea, not surprisingly, received no support. The negative implications for the rest of the world outside of these zones were too stark to be tolerable.

The term finally chosen, "demilitarized zone" is understood to cover both zones from which military forces have been withdrawn so as to comply with the conditions prescribed by this article and by the agreement establishing them, and zones which had no military forces in them in the first place and otherwise satisfy the conditions prescribed by the article and by the agreement establishing them.

The article is intended to permit the establishment both of zones that must remain demilitarized no matter which party controls the area in which they are located and also zones that may lose their demilitarized character if occupied by the adverse party.

It was thought that this flexibility would give the maximum encouragement to the creation of such zones. This is the reason why the phrase, "if such extension is contrary to the terms of these agreements", is included in paragraph 1 and why the phrase, "if the parties to the conflict have so agreed", is included in paragraph 6. Similarly, the phrase "shall normally be" was inserted in paragraph 3 to permit the parties to agree upon zones which do not fulfil all the conditions of that paragraph. Although such agreement might be rare, it was thought that it should not be discouraged by the text of article 53.

Geneva, 3 February - 18 April 1975

Draft Protocol I,
Articles 48 bis, 48 ter, 33 (3)

Draft Protocol II, Articles 24 (2),
26, 26 bis, 28, 28 bis, 28 ter, 29.

REPORT TO COMMITTEE III
ON THE WORK OF THE WORKING GROUP
SUBMITTED BY THE RAPPORTEUR

Articles 48 bis; 48 ter; and 33, paragraph 3, of Protocol I
Articles 24, paragraph 2; 26; 26 bis; 28; 28 bis; 28 ter; and 29
of Protocol II

The Working Group held a series of meetings during the period 17 March to 2 April 1975. It completed its work on Articles 48 bis; 48 ter; and 33, paragraph 3, of Protocol I and Articles 24, paragraph 2; 26; 26 bis; 28; 28 bis; 28 ter; and 29 of Protocol II. The reporting out of these articles completes consideration by the Working Group of Part V, Chapter I (General protection against effects of hostilities), of Protocol II, with the exception of Article 27. That Article is the counterpart of Articles 48 and 66 of Protocol I, the latter of which has not yet been taken up in Committee. It was thought that consideration of Article 27 of Protocol II should await the discussion of Article 66 of Protocol I.

As in the past, some areas of disagreement remain, and these must be resolved by the Committee.

A number of amendments to articles in Protocol II corresponding to articles of Protocol I were withdrawn or not pressed by their sponsors because the Committee had adopted texts for Protocol I and the Working Group as a whole thought it desirable, whenever possible, to use the same formulation and language in Protocol II that had been employed in Protocol I.

Like previous reports by the Rapporteur, CDDH/III/224, dated 24 February 1975, and CDDH/III/264, dated 13 March 1975 this report has not been approved by the Working Group and should be understood simply as the observations of the Rapporteur on the work of the group.

Article 48 bis and Article 33, paragraph 3,
of Protocol I

The Working Group agreed to submit to the Committee the texts set forth in documents CDDH/III/276, dated 4 April 1975, and CDDH/III/277, dated 4 April 1975. It was understood that, if the Committee should desire to include a provision on the environment in Protocol I, it might vote to approve either Article 48 bis or Article 33, paragraph 2, or both.

As this is the first occasion on which an attempt has been made to provide in express terms for the protection of the environment in time of war, it is not surprising that the question should have given a great deal of difficulty to the Working Group. Important theoretical questions about the relation of man and nature lay below the surface of the attempt to draft suitable language for what was generally agreed to be a highly desirable objective.

The Working Group was assisted in its work by the report of the Group Biotope, an unofficial working group formed in response to the request of the Rapporteur. Delegates from ten countries and representatives of the ICRC and of the United Nations Environment Programme participated in the work of the Group. Although the Working Group did not adopt the texts recommended by the Group Biotope or by the Rapporteur, these proposals provided an extremely valuable point of departure for the further discussions of this subject in the Working Group.

There were two views in the Working Group about the basic reason for the protection of the environment. Some delegates were of the view that the protection of the environment in time of war is an end in itself, while others considered that the protection of the environment has as its purpose the continued survival or health of the civilian population. The

proposed text of paragraph 3 of Article 33 reflects the first of these two approaches; the proposed text of Article 48 bis the second. The first approach points toward the inclusion of a provision on the environment in Article 33, which already contains provisions with respect to the prohibition of certain types of methods and means of warfare. The second looks to the inclusion of an article in Chapter III of Part IV, dealing with the protection of civilian objects.

The Committee might wish to adopt both proposed articles. Mindful of this, members of the Working Group alluded to the desirability of consistency between the two texts. If two articles were desired, that consistency is secured through adoption of the formula "to cause widespread, long-term and severe damage to the natural environment" in Article 33, so as to reflect the convergence of views observed in the Working Group with respect to the first sentence of paragraph 1 of Article 48 bis. *

It was recognized in the Working Group that environmental change or disturbances of the ecosystem might be on a very low scale. Trees may be cut down or destroyed as the result of normal artillery fire. Artillery fire also causes cratering. As the Group Biotope put it, "Acts of warfare which cause short-term damage to the natural environment, such as artillery bombardment, are not intended to be prohibited by the Article." That thought lies behind both proposed texts.

It was pointed out that there are a number of ecosystems in the natural environment, and the precise meaning attached to "the ecosystem" was left somewhat unclear. *

* This paragraph incorporates CDDH/III/275/Corr.1.

Because Article 48 bis would be inserted in a context of protection of the civilian population, the prohibition contained in that article was linked to prejudice to the health or survival of the population. The word "population" was used without its usual qualifier of "civilian" because the future survival or health of the population in general, whether or not combatants, might be at stake. The population might be that of today or that of tomorrow, in the sense that both short-term and long-term survival was contemplated. The bracketed term 'health' reflected the consideration that it would not be enough that the civilian population survived; impairment of the health of the civilian population in general could not be tolerated. *

In Article 48 bis, the first sentence enjoining the taking of care lays down a general norm, which is then particularized in the second sentence. Care must be taken to protect the natural environment against the sort of harm specified even if the health or survival of the population is not prejudiced. An instance would be environmental harm which is widespread, long-term and severe but in an unpopulated area.

Both the expressions "may be expected" and "are intended" are included out of an abundance of caution. The term "are intended" refers to deliberate harm directed at the natural environment as a method or means of warfare, such as the destruction of natural resources. "May be expected" imports an objective standard of what the state or the individual does realize or ought to realize would have the effects described.

Article 48 ter of Protocol I

The inclusion of this article came as the result of a recommendation from the Group Biotope. It is shown in brackets in the text because it did not receive the support of all of the members of that Group or of the Working Group. A requirement that the reserves be "publicly recognized" was added to the text submitted by the Group Biotope in order to assure that the establishment of such areas would come only from governmental action.

While the desirability of protecting such reserves both in time of peace and of war was recognized, a number of delegates expressed concern that nature reserves might be designated with the express purpose of impeding the military operations of the enemy.

* This paragraph incorporates CDDH/III/275/Corr.1.

Article 24, paragraph 2, and Article 28 ter

The Working Group agreed to submit to the Committee the texts set forth in documents CDDH/III/278, dated 4 April 1975. It was understood that a choice was involved and that the Committee would probably not wish to adopt both provisions.

A basic choice is posed here between a short and a long form of article on the precautions to be taken in military operations in order to protect the civilian population. The short form is Article 24, paragraph 2, which is the ICRC text as originally presented; the long form is a new Article 28 ter, which draws upon Article 50 of Protocol I, as adopted by the Committee (CDDH/III/268, dated 26 March 1975). The differing approaches reflect basic differences in the Working Group about the role and the scope of application of Protocol II, which may be worth recording here.*

The argument for the longer form of the article was based on the threshold of application established for Protocol II in Article 1, as adopted in Committee I (CDDH/I/274, dated 26 March 1975). That level of application, according to some, made Protocol II applicable to conflicts of substantial duration in which relatively large numbers of persons would be involved in military operations over areas of some size. Indeed, the intensity of non-international armed conflicts may well be greater than that of some international armed conflicts. It would therefore be desirable to provide protection to the civilian victims of war at the same level and with the same specificity of legal prescription as in Protocol I. This would call, at least so far as to the protection of the civilian population is concerned, for the inclusion in Protocol II of articles corresponding in substance and in wording to those in Protocol I. Deviations from the language of Protocol I would also permit an a contrario argument that conduct prohibited in Protocol I but not referred to in Protocol II would be lawful. Also, although some of the provisions on the protection of the civilian population in Protocol II might not have application in all internal armed conflicts, they would control conduct in any non-international armed conflict which reached the requisite level of violence.

Others argued, however, that there was a certain range of ambiguity in Article I 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,

* This paragraph incorporates CDDH/III/275/Corr.1.

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.

In other articles, it was possible to reconcile these two views to a certain extent through the presentation of a text that would incorporate some but not all of the text used in Protocol I. But this did not prove possible in connection with the subject-matter of these two draft articles.

It seems desirable that at some point or other the relationship of the texts of the two Protocols should be spelled out, so as to foreclose dispute about the application of the a contrario principle. This might be done by express language in the texts, by a statement in committee reports, or by a provision in the Final Act of the Diplomatic Conference.

Article 28 ter (the precise location of which will be subject to later adjustment) was drafted as a counterpart to Article 50 in Protocol I, but with certain omissions. The terminology of "military objectives" has not been used in this Part of Protocol II because some of the objectives attacked in a non-international armed conflict, especially at the lower ranges of intensity, are not readily described in the terminology used for international armed conflicts. Therefore the language of subparagraph 2(a)(i) of Article 50 beginning with the words "but are military objectives" has been omitted, there being in any event no literal counterpart in Protocol II to Article 47 of Protocol I. *

There was general agreement that the introductory language of subparagraph 2 (b) should be retained in principle but with the wording changed to "an attack shall be cancelled or suspended if it becomes apparent

* This paragraph incorporates CDDH/III/275/Corr.1.

that the object is not a permitted one under Article 26 bis or that the object is subject to special protection," because the term "military objective" is not generally used in Protocol II and a simple reference to the prohibition in Article 26 bis must therefore suffice.

Article 26 of Protocol II

The Working Group agreed to submit to the Committee the text set forth in document CDDH/III/279, dated 4 April 1975.

This article is the counterpart of Article 46 of Protocol I, as adopted in Committee (CDDH/III/272, dated 26 March 1975); and its structure and much of its language are derived from that article. However, there were differing views in the Working Group about the degree of detail that there should be in this article and much of the language is bracketed to reflect this lack of agreement. In essence, the choice to be made is one between a long or a short form of this article.

The introductory paragraph was agreed upon in the Working Group. It is the same text as in the introductory paragraph of Article 46 of Protocol I, with the omission of the words "in addition to other applicable rules of international law." Those words were deleted in view of the fact that the only general international law with respect to non-international armed conflicts is Article 3 common to the four Geneva Conventions of 1949, which contains no provision pertinent to the subject-matter of this article of Protocol II.

The Working Group agreed on the language of paragraph 1, which is the same as that of paragraph 1 of Article 46 of Protocol I. Agreement was also reached on the text of paragraph 2, which is likewise cast in the language of Article 46, but some delegates were of the view that the bracketed language "and for such time as" is not appropriate in a non-international armed conflict in which there may be a greater likelihood that combatants will be part-time.

With respect to paragraph 3, two formulations are presented. Some delegates expressed a preference for the text appearing in paragraph 3 of the original ICRC text. Others favoured the more elaborated text of paragraph 3 of Article 46 of Protocol I, but without the reference to "(b) An attack of the type Prohibited by Article 50 (2)(a)(iii)." Yet other delegations were of the view that no paragraph 3 was needed at all, on the ground that the intermingling of civilians and combatants in non-international

armed conflicts makes a rule against methods or means of combat which affect civilians indiscriminately or a rule against indiscriminate attacks unsuitable for application in an internal armed conflict. The sentence beginning "An attack by bombardment by any methods or means" was bracketed for separate consideration by the Committee because it was thought that delegations voting for one or the other of the preceding formulations might wish to have this sentence included. "The employment of means of combat, and any methods . . . are prohibited" should be examined by the Drafting Committee, as the language is not consistent with terminology used elsewhere in the Protocols and does not in any event appear to be internally correct.

It was agreed to bracket paragraph 4 about reprisals until the question of reprisals has been resolved for Protocols I and II.

The Working Group agreed to the inclusion of paragraph 5, identical to the like-numbered paragraph of Article 46 of Protocol I. It was agreed to delete paragraph 6. The view seemed to be taken that its deletion would simplify and shorten the article somewhat.

Article 26 bis of Protocol II

The Working Group agreed to submit to the Committee the text set forth in document CDDH/III/280, dated 4 April 1975. The article was the subject of general agreement in the Working Group. The bracketed language concerning reprisals is, as in other instances, an indication that a decision must await the resolution of the entire question of reprisals in the two Protocols.

This article corresponds to Article 47 of Protocol I, as adopted by the Committee (CDDH/III/263, dated 26 March 1975). Reference to "military objectives" was deleted in Article 26 bis because a number of delegations considered that the term was inappropriate for use in connexion with non-international armed conflicts, both because it evokes large-scale hostilities and because the objectives attacked in non-international conflicts may not necessarily be "military" ones. Instead, it was decided that attacks should be limited to "those objects which by their own nature, location, purpose, or use make an effective contribution to the armed action of the parties to the conflict," and the Article was so drafted. "Armed action" was substituted for "military action," because of the unwillingness of some to use the term "military" in a limitative way in internal armed conflicts. It is recommended that the Drafting Committee consider whether "armed action" is the apposite phrase to use in Protocol II in place of "military operations" or "warfare" and that the terminology be made consistent throughout Protocol II.*

* This paragraph incorporates CDDH/III/275/Corr.1.

Article 26 bis is thus a compressed version of its counterpart Article 47 in Protocol I.

Article 28 of Protocol II

The Working Group agreed to submit to the Committee the text set forth in document CDDH/III/281, dated 4 April 1975.

This article corresponds to Article 49 of Protocol I, as adopted by the Committee (CDDH/III/267, dated 26 March 1975), but with the text substantially shortened, even when account is taken of the bracketed language.

The two options which are presented for paragraph 1 reflect two different approaches: the first is that the standard with respect to the protection of works or installations containing dangerous forces should be cast in the same terms as in international armed conflicts. This option reproduces the language of paragraph 1 of Article 49 of Protocol I. The second approach is that the protection of these installations in internal armed conflicts should be absolute and not subject to the qualification that "such attack may cause the release of dangerous forces and consequent severe losses among the civilian population." The Working Group appeared generally to be in agreement that one or the other formulation of paragraph 1 should be included in Protocol II, although some interventions in the discussions were directed to the point that articles parallel to those in Protocol I on the protection of the civilian population are not needed in Protocol II.

The bracketed language "even where these objects are military objectives" reflected the view of some delegations that this expression, found in Article 49 of Protocol I, should also appear here so that no negative inference could be drawn from the absence of the expression.

Paragraph 2 is the language of the ICRC text, with the addition of a sentence about armed guards. It was pointed out that such installations, particularly nuclear generating stations, are often guarded in time of peace and would certainly be guarded in time of a non-international armed conflict and that such works or installations should not lose their immunity on that account.

The bracketed language of paragraph 3 is yet another instance in which final action will have to await resolution of the general problem of reprisals.

The language of paragraph 7 of Article 49 of Protocol II was carried over into paragraph 4 of this Article. The provision permits but does not require conduct, and such markings might in any event already have been applied in connection with an international armed conflict in which the state may have been involved.

The remaining paragraphs and language of Article 49 of Protocol II were generally felt to be too detailed for inclusion in Protocol II, although there have been some delegations which would have preferred to have had much more of Article 49 incorporated in the present Article.

Article 28 bis of Protocol II

The Working Group agreed to submit to the Committee the text set forth in document CDDH/III/282, dated 4 April 1975. This provision, if adopted, properly belongs as a paragraph of Article 20.

Article 28 bis corresponds to Article 48 bis and Article 33, paragraph 3, of Protocol I, as set forth in documents CDDH/III/276, dated 4 April 1975, and CDDH/III/277, dated 4 April 1975. However, it generally adopts the approach of Article 33, paragraph 3, and should appear in the context of restriction on types of weapons employed in Article 20, rather than in that of the protection of the civilian population. Presumably the same standard that appears in Article 33 should appear in Article 20 of Protocol II as well.*

There was widespread support for the idea that there should be an article on the protection of the environment in Protocol II, although some delegations were opposed to the idea. Several delegations were of the view that there needed to be, especially for non-international conflicts, some express relationship between the standard "widespread, long-term, and severe damage to the natural environment", and the survival of the civilian population. There was no objection to the suggestion by one delegation which was specifically agreed to by others, that this report should reflect that widespread, long-term and severe damage to the natural environment would constitute such damage as to jeopardize the survival of the civilian population.*

* This paragraph incorporates CDDH/III/275/Corr.1.

Article 29 of Protocol II

The Working Group agreed to submit to the Committee the text set forth in document CDDH/III/283, dated 4 April 1975.

Paragraph 1 is the same text proposed by the ICRC, with the addition of the words "for reasons relating to a non-international armed conflict" and a reference to the "circumstances under which this provision is operative".

Displacement may be necessary in certain cases of epidemic, natural disasters, and the like, and such displacements would not come within the scope of paragraph 2.

The bracketed language in paragraph 2 incorporates certain exceptions thought to be desirable in the view of some delegations.

Paragraph 3, which appears in bracketed form, has been added to the text because, in the view of some delegations, it would be desirable to have a prohibition on certain forms of transfer of property out of a state, to serve as a counterpart to the prohibition on the displacement of persons. The paragraph is drafted in these terms, borrowed in part from the language used with respect to the protection of the environment, in order to preserve the right of a state to send cultural property abroad for safekeeping and to maintain the right to operate a general export trade in time of non-international armed conflict.

Geneva, 3 February - 18 April 1975

Draft Protocol I, Part III
Section I, Articles 33, 34, 36 and 37.

REPORT TO COMMITTEE III
ON THE WORK OF THE WORKING GROUP
SUBMITTED BY THE RAPPORTEUR

The Working Group held a series of meetings during the period April 3-9, 1975. It completed its work on Articles 33, 34, 36 and 37. With the exception of one bracketed phrase in Article 33, general agreement was reached on the texts of each of these articles. As with the previous reports, this report has not been approved by the Working Group and should be understood simply as the report of the Rapporteur on the work of the group.

Article 33

The Working Group agreed to submit to the Committee the text set forth in document CDDH/III/290, dated April 10, 1975. The principal difficulties encountered by the Working Group arose from the need to reaffirm the existing law and overcome inadequate prior translations which have achieved a certain acceptance through time and usage.

With respect to paragraph 1 and to various other provisions in this Section, the term "methods or means of warfare" was preferred to "methods or means of combat" for the reason that "combat" might be construed more narrowly than "warfare". No effort was made, however, to define either term, and the choice of words should, perhaps, be considered further by a drafting committee.

The Committee should decide whether or not to include the phrase "and methods of warfare", which is in brackets. A large majority of those who spoke in the Working Group favoured retention of the phrase. Those who wished it deleted asserted that it would make an important change in the law and that this should not be done without further careful consideration.

It should also be noted that the phrase "superfluous injury or unnecessary suffering" was chosen by the Working Group as the preferred translation of the French, "maux superflus", which includes both physical and moral injury. One delegate wished to have it recorded that he 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.

The Working Group decided to defer consideration of proposed paragraphs numbered 3 and 4 in CDDH/III/238, dated 25 February 1975, until the proposal in document CDDH/III/284, dated 4 April 1975, is considered at the next session of the Conference. Some representatives stated the view that the objectives of these two paragraphs were dealt with in part in Articles 46, 48 and 48 bis and would be dealt with in part by the proposal in CDDH/III/284. Other representatives disagreed and urged the inclusion of provisions along the lines of these two paragraphs in Article 33 or elsewhere in the Protocol.

Paragraph 3 of this Article is the paragraph recommended by the Working Group on April 3, 1975 in the Rapporteur's Report, document CDDH/III/275, voting on which was deferred at the last session of the Committee. It was not rediscussed by the Working Group and is incorporated unchanged in the text in CDDH/III/290.

Article 34

The Working Group approved for transmission to the Committee the text contained in document CDDH/III/291, dated 10 April 1975.

In the first place, it should be noted that the determination of legality required of States by this article is not intended to create a subjective standard. Determination by any State that the employment of a weapon is prohibited or permitted is not binding internationally, but it is hoped that the obligation to make such determinations will ensure that means or methods of warfare will not be adopted without the issue of legality being explored with care.

It should also be noted that the article is intended to require States to analyse whether the employment of a weapon for its normal or expected use would be prohibited under some or all circumstances. A State is not required to foresee or analyse all possible misuses of the weapon, for almost any weapon can be misused in ways that would be prohibited.

Article 36

The Working Group approved for transmission to the Committee the text contained in document CDDH/III/288, dated 10 April 1975. The idea behind this article was easily accepted by the Working Group, but the text proved surprisingly difficult to formulate. A number of representatives stated that their governments could not, in this Protocol, accept an obligation to avoid or prevent improper use of an emblem provided for in a convention to which their governments were not parties. On the other hand, these governments could agree that they would not themselves deliberately misuse such an emblem. This distinction was expressed ultimately in the words of the second sentence of paragraph 1 of CDDH/III/288.

When this article is reviewed by the Drafting Committee, one question that should be examined is whether, in the first line, the word "distinctive" should be inserted before the words "protective

emblem". This form of words has apparently been used by Committee II, and it seems clear that there should be a harmonization of approaches within the Conference.

Article 37

The Working Group approved for transmission to the Committee the text contained in document CDDH/III/289, dated 10 April 1975.

With respect to paragraph 1, the Working Group considered it desirable to deal with the question of neutral flags, emblems, etc. separately and in more absolute terms than the question of flags, emblems, etc. of an adverse party. Still, the prohibition in paragraph 1 is not absolute. Neutral flags, emblems, etc. can be used so long as they are not used "in an armed conflict", that is to say so long as they are not used in a way to promote the interests of a party to the conflict in the conduct of that conflict. Also, it is clear that this article does not prohibit neutrals ... or indeed any States ... or their agencies from using their own flags, emblems, etc.

A number of representatives pointed out the need to provide better protection for insignia and uniforms of personnel of the United Nations, particularly of peacekeeping forces. It was decided not to try to do that in this article but to consider further how such protection could best be provided. The Rapporteur pointed out that, quite apart from this Protocol, the United Nations itself could try to improve that protection through agreements concluded with the States concerned with a particular U.N. force.

Several representatives pointed out that paragraph 2 would have the effect of increasing the legal vulnerability of escaped spies to subsequent punishment. Although a spy who escapes successfully is not thereafter subject to punishment as a spy, he could still presumably be punished for violations of the laws of war, including this article. Certainly it seems questionable wisdom to make it even marginally safer for spies to disguise themselves as civilians than as military personnel. It is conceivable that this question will be considered further by the Conference in connection with the articles concerning repression of breaches. In any event, the Rapporteur notes that there was not in the Working Group any apparent intent to change the law as it applies to espionage by means of this article.

Finally, several representatives wished to record their view that, if more exceptions are developed in the Protocol in order to avoid affecting the law of naval warfare, they would wish to see these exceptions brought together in a single provision.

THIRD SESSION

(Geneva, 21 April - 11 June 1976)

COMMITTEE III

REPORT

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COMMITTEE III

REPORT

I. INTRODUCTION

A. Officers of the Committee, Secretariat, Experts

1. Officers of the Committee

Chairman: Mr. H. Sultan (Egypt)

Vice-Chairmen: Mr. G. Herczegh (Hungary)
Mr. M. Dugersuren (Mongolia)

Rapporteurs: Mr. G. Aldrich (United States of America)
Mr. R. Baxter (United States of America)

2. The Legal Secretaries of the Committee were

Mr. J. E. Combe
Mr. P. Gasser

3. The International Committee of the Red Cross (ICRC) was represented by Mrs. D. Bindschedler-Robert, Mr. J. de Preux, Mr. J. J. Surbeck and Mr. M. Veuthey.

B. Meetings and organization of work

4. Committee III held thirteen meetings between 22 April 1976 and 10 June 1976 (CDDH/III/SR.41 to SR.53). During the same period a Working Group under the chairmanship of the Rapporteur held over forty meetings.

5. Committee III was entrusted with the consideration of certain articles of the draft additional Protocols to the Geneva Conventions of 12 August 1949 (CDDH/1). The articles referred to Committee III were as follows (see CDDH/4/Rev.1, p.8):

	<u>Draft Protocol I</u>	<u>Draft Protocol II</u>
General protection against effects of hostilities	Articles 43 to 53	Articles 24 to 29

	<u>Draft Protocol I</u>	<u>Draft Protocol II</u>
Methods and means of combat	Articles 33 to 41	Articles 20 to 23
New category of prisoners of war	Article 42	
Treatment of persons in the power of a Party to the conflict	Articles 63 to 69	Article 32

6. By the end of the second session (report of Committee III, CDDH/215/Rev.1), the following articles had been adopted by Committee III:

<u>Draft Protocol I</u>	<u>Draft Protocol II</u>
Articles 33 and 34	Articles 24 to 26
Articles 36 and 37	New article 26 <u>bis</u>
Articles 43 to 47	Article 28
New article 47 <u>bis</u>	New article 28 <u>bis</u>
Article 48	Article 29
New article 48 <u>bis</u>	
Articles 49 to 53	

7. Accordingly, the articles remaining for consideration by the Committee at the third session were:

	<u>Draft Protocol I</u>	<u>Draft Protocol II</u>
(a) <u>General protection of the civilian population against the effects of hostilities</u>		
Protection of objects indispensable to the survival of the civilian population		Article 27
(b) <u>Methods and means of combat</u>	Articles 35 and 38 to 41	Articles 20 to 23

	<u>Draft Protocol I</u>	<u>Draft Protocol II</u>
(c) <u>New category of prisoners of war</u>	Article 42	
(d) <u>Treatment of persons in the power of a party to the conflict</u>	Article 66	

8. It was decided by the Conference at its thirty-first plenary meeting (CDDH/SR.31) to transfer back to Committee III responsibility for articles 63, 64, 65, 67, 68 and 69 of draft Protocol I and article 32 of draft Protocol II, which had previously been transferred from Committee III to Committee I.

9. The Committee continued to follow the same procedure with respect to the consideration of articles as was described in paragraphs 10 to 12 of its report on the second session (CDDH/215/Rev.1).

10. The proceedings of the Working Group are reported upon by the Rapporteur in documents CDDH/III/338 and CDDH/III/353.

11. The Working Group submitted to the Committee the texts set forth in the following documents:

Draft Protocol I

Article 35	CDDH/III/330
Article 38	CDDH/III/331
New article 38 <u>bis</u>	CDDH/III/332
Article 39	CDDH/III/333
Article 40	CDDH/III/334
Article 41	CDDH/III/335
New article 42 <u>bis</u>	CDDH/III/337
New article 64 <u>bis</u>	CDDH/III/345

Draft Protocol II

Article 20	CDDH/III/346
New article 20 <u>bis</u>	CDDH/III/347
Article 21	CDDH/III/348
Article 22	CDDH/III/349
New article 22 <u>bis</u>	CDDH/III/350
Article 23	CDDH/III/351
Article 27	CDDH/III/352

12. The Committee adopted the fourteen articles which are discussed in the following section. Article 21 has been transferred back to the Working Group for further consideration.

13. The following articles were still pending before the Working Group at the end of the third session: article 42, articles 63 and 64 and articles 65 to 69 of draft Protocol I and articles 21 and 32 of draft Protocol II. A proposal concerning "General principles for the protection of oil and of installations for its extraction, storage, transport and refining" (CDDH/III/GT/62/Rev.1); a proposal concerning aggression and non-discrimination (CDDH/III/GT/42, reproduced as document CDDH/III/284) and a proposal concerning mercenaries (CDDH/III/GT/82) are also pending before the Working Group. The Committee will also have to consider further the question of reprisals as requested in document CDDH/I/320/Rev.2.

II. REPORT ON THE ARTICLES ADOPTED BY THE COMMITTEE^{*/}

A. Draft Protocol I

Article 35 - Prohibition of perfidy (CDDH/III/336^{*})

14. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/III/7	Uruguay (para. 2)
CDDH/III/SR.6	para. 6
CDDH/III/80	Norway (para. 1)
CDDH/III/81	Norway (new para. 3)
CDDH/III/93	Poland (para. 1)
CDDH/III/SR.23	para. 31
CDDH/III/223	Belgium (whole article)
CDDH/III/232	Indonesia (para. 1(c))
CDDH/III/233	Canada, Ireland, United Kingdom of Great Britain and Northern Ireland (whole article)
CDDH/III/234	Australia (para. 2)

^{*/} The texts of the adopted articles appear in annex I to the present report.

CDDH/III/236	Democratic Republic of Viet-Nam (para. 1(c))
CDDH/III/SR.27	paras. 57 to 82
CDDH/III/SR.28	paras. 1 to 53
CDDH/III/SR.29	paras. 6 and 7
CDDH/III/SR.30	paras. 3, 9, 11, 12, 14, 22, 33, 48
CDDH/III/SR.32	paras. 12 to 14
CDDH/III/SR.33	paras. 68 and 76
CDDH/III/SR.35	paras. 45 and 51
CDDH/III/SR.36	paras. 25 and 32
CDDH/215/Rev.1	Report of Committee III, para. 16
CDDH/III/330	Proposal by the Rapporteur
CDDH/III/338	Report on the work of the Working Group
CDDH/III/SR.47	paras. 4 and 5, 39 to 41, 43, 49, 60, 70, 78
CDDH/III/SR.48	paras. 3, 9, 18, 20

15. The Committee, after a brief discussion, agreed to utilize for its work the ICRC text, as amended by the proposal by Canada, Ireland, and the United Kingdom of Great Britain and Northern Ireland in document CDDH/III/233, dated 25 February 1975. The initial effort was directed toward finding an appropriate, general definition of perfidy. The key suggestion in this connexion came from the aforementioned tripartite amendment, which proposed to define "confidence" in terms of whether one was entitled to, or obliged to accord, protection under international law. The Committee agreed that confidence could not be an abstract confidence, but must be tied to something more precise and should not be tied to internal or domestic law. In the end, it was decided to refer to confidence in protection under "international law applicable in armed conflicts", by which was meant the laws governing the conduct of armed conflict which were applicable to the conflict in question. The Committee rejected reference to international law in general out of concern that that phrase might include such general matters as the Charter of the United Nations and such specific matters as bilateral, local arrangements.

16. It should be noted that article 35 does not prohibit perfidy, per se, but merely "to kill, injure or capture an adversary by resort to perfidy". Additionally, it should be noted that, in order to be perfidy, an act must be done "with intent to betray" the confidence created. That was intended to mean that the requisite intent would be an intent to kill, injure or capture by means of the betrayal of confidence. Thus, acts such as feigning death, which were intended merely to save one's life would not be perfidy; whereas feigning death in order to kill an enemy once he turned his back would be perfidy.

17. With respect to the list of examples of perfidy, the Committee decided to limit itself to a brief list of particularly clear examples. Examples that were debatable or involved borderline cases were avoided.

18. A number of representatives expressed reservations concerning paragraph 1 (c). It was generally agreed that paragraph 1 (c) was a valid example of perfidy, but there were some expressions of concern that it might be misused to punish some combatants who would be entitled to prisoner-of-war status under article 42. Certainly it seems indisputable that no combatant could legitimately be accused of perfidy under paragraph 1 (c) with respect to actions which comply with the requirements of article 42, paragraph 3. Ultimately, the Committee agreed to accept paragraph 1 (c) on the understanding that the Rapporteur would include a sentence to that effect in his next draft of article 42. It should also be noted that the reference to neutral emblems in paragraph 1 (d) was not intended to affect the law governing the uses of neutral flags in warfare at sea. In that connexion, the Committee suggests that the Drafting Committee consider the question whether article 37, paragraph 3, might not be made applicable specifically to article 35, as well as to article 37, so that no doubt could arise on this question. Furthermore with respect to paragraph 1 (d), it should be noted that the misuse of United Nations signs, emblems or uniforms would be perfidious in cases where the United Nations and its personnel enjoyed a neutral protected status, but not, of course, in situations where the United Nations forces were involved as combatants in a conflict.

19. The Committee adopted article 35 by consensus at its forty-seventh meeting on 31 May 1976 (see annex I to the present report).

Article 38 - Quarter (CDDH/III/339*) and
New article 38 bis - Safeguard of an enemy
hors de combat (CDDH/III/340*)

20. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/III/7	Uruguay (para. 1)
CDDH/III/SR.10	para. 8
CDDH/II/SR.17	para. 41
CDDH/III/214	Brazil (para. 1)
CDDH/III/SR.26	para. 5
CDDH/III/241	Afghanistan (para. 3)
CDDH/III/242 and Corr.1	Belgium, Ireland, United Kingdom of Great Britain and Northern Ireland (whole article)
CDDH/III/243	Canada, New Zealand, United States of America (para. 2)
CDDH/III/SR.29	paras. 30 to 75
CDDH/III/SR.30	paras. 1, 8, 11 to 14, 17, 20
CDDH/III/SR.32	para. 19
CDDH/I/SR.32	paras. 47, 53 to 56, 62
CDDH/215/Rev.1	Report of Committee III, para. 16
CDDH/III/331	Proposal by the Rapporteur (art. 38)
CDDH/III/332	Proposal by the Rapporteur (art. 38 <u>bis</u>)
CDDH/III/338	Report on the work of the Working Group
CDDH/III/SR.47	paras. 6, 7 to 10, 44, 61, 64

21. The ICRC proposal for an article on quarter and safeguard of an enemy hors de combat was fairly quickly divided into two articles - one on each subject. Article 38 on quarter posed no drafting problems. Article 38 bis on hors de combat proved considerably more difficult.

22. A preliminary question was whether the concept of being hors de combat should include persons who had already fallen into the power of the enemy. In this connexion, a number of proposals were made to prohibit torture or other ill-treatment of such persons, as well as attacks against them. In the end, the Committee decided to include such persons within the definition of hors de combat but to leave to other provisions (e.g. the third Geneva Convention of 1949 and article 65 of draft Protocol I) the protection from mistreatment of persons in the power of the enemy.

23. The Committee changed the prohibition contained in the ICRC draft (and, indeed, all the amendments) from "kill or injure" to "make the object of attack". This change was designed to make clear that what was forbidden was the deliberate attack against persons hors de combat, not merely killing or injuring them as the incidental consequence of attacks not aimed at them per se. In this connexion, the Committee limited the prohibition to attacks directed against persons who are "recognized or, under the circumstances, should be recognized" as hors de combat. This change was intended to make clear that the prohibition extended only to attacks directed against persons who were, in fact, recognized to be hors de combat and those who, under the circumstances, should have been recognized by a reasonable man as hors de combat.

24. Paragraph 3 dealing with the release of prisoners who could not be evacuated proved quite difficult. The phrase "unusual conditions of combat" was intended to reflect the fact that that circumstance would be abnormal. What, in fact, most representatives referred to was the situation of the long distance patrol which is not equipped to detain and evacuate prisoners. The requirement that all "feasible precautions" be taken to ensure the safety of released prisoners was intended to emphasize that the detaining power, even in those extraordinary circumstances, was expected to take all measures that were practicable in the light of the combat situation. In the case of the long distance patrol, it need not render itself ineffective by handing the bulk of its supplies over to the released prisoners, but it should do all that it reasonably can do, in view of all the circumstances, to ensure their safety.

25. Several proposals which were not accepted by the Committee may require consideration by other Committees. Committee II should be asked to consider whether article 17, which it has already

adopted, should be amended by adding a reference to the protection of persons hors de combat. Certainly it seems that such persons should be respected by the civilian population. The Committee believes that the proper place for this to be stated is article 17, rather than article 38 bis. A question was also raised whether article 38 bis should make clear that persons hors de combat who have not fallen into the power of an adverse party by the close of general hostilities remain entitled to the protection of article 38 bis. This question might arise, for example, with respect to wounded stragglers who find themselves behind enemy lines at the close of hostilities. It was the view of the Committee that such persons would still be protected pursuant to article 3, paragraph 2 as adopted by Committee I. This question should, however, be brought to the attention of Committee I so that if it disagrees with that interpretation, it can consider amending article 3 accordingly.

26. The Committee adopted articles 38 and 38 bis by consensus at its forty-seventh meeting on 31 May 1976 (see annex I to the present report).

Article 39 - Aircraft occupants (CDDH/III/341*)

27. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/III/69	Israel (new para.)
CDDH/III/SR.6	paras. 5, 10, 16, 29
CDDH/II/SR.17	para. 41
CDDH/III/SR.27	para. 58
CDDH/III/SR.28	para. 30
CDDH/III/244	Egypt, Kuwait, Libyan Arab Republic, Mauritania, Sudan, United Arab Emirates (whole article)
CDDH/III/SR.30	paras. 1 to 27, 52
CDDH/215/Rev.1	Report of Committee III, para. 16
CDDH/III/333	Proposal by the Rapporteur
CDDH/III/338	Report on the work of the Working Group
CDDH/III/SR.47	paras. 11 to 28, 42, 49, 50, 51, 52, 65, 67, 68, 69, 71, 74, 79
CDDH/III/SR.48	paras. 1, 4, 5, 7, 10, 12 to 17, 19, 21

28. The discussions in the Committee resulted in a significant narrowing of the scope of the draft article proposed by the ICRC. Whereas that proposal would have covered persons within aircraft descending in distress, the Committee decided to limit the article to persons descending by parachute from aircraft in distress. This decision was taken in order to avoid the difficulties inherent in trying to protect aircraft which might or might not crash.

29. With respect to airmen descending by parachute, there were three principal problems: What should be done about paratroops? Does it matter who controls the territory into which the airman in question is descending? In what circumstances should the airman, once he is on the ground, be given an opportunity to surrender? The first was solved by explicitly excepting airborne troops from the protection of the article even if they were forced to leave their aircraft. As regards the second problem, some delegations argued that immunity from attack during descent would be unrealistic in a case where it was clear that the airman would return to his armed forces by landing in territory controlled by them or by an ally. Other delegations argued, on the contrary, that an airman descending by parachute should be considered temporarily hors de combat for humanitarian reasons until he reached the ground. Other delegations abstained for reasons they considered to be of a legal nature. The problem was resolved by vote within the Committee, in which it was decided to retain the phrase in paragraph 1, "unless it is apparent that he will land in territory controlled by the party to which he belongs or by an ally of that party." In view of the relative closeness of that vote, the number of abstentions, and particularly the expressions of dissatisfaction by many representatives, some delegations expressed the view that the question should be reconsidered at the fourth session of the Conference.

30. The third question, the opportunity to surrender, was resolved by limiting the provision to airmen who reached the ground in territory controlled by their enemy and by further restricting it by the phrase "unless it is apparent that he is engaging in a hostile act." The Committee decided not to try to define what constituted a hostile act, but there was considerable support for the view that an airman who was aware of the presence of enemy armed forces and tried to escape was engaging in a hostile act. On the other hand, merely moving in the direction of his own lines would not, by itself, mean that he should not be given an opportunity to surrender, for he might not know in which direction he was going or that he was visible to enemy armed forces.

31. The Committee adopted article 39 by a vote of 47 to 6, with 15 abstentions at its forty-seventh meeting on 31 May 1976 (see annex I to the present report).

Article 40 - Independent missions (CDDH/III/342*)

32. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/III/SR.6	para. 31
CDDH/II/SR.19	para. 43
CDDH/III/213	Spain (whole article)
CDDH/III/217	Brazil (paras. 1 and 2)
CDDH/III/SR.27	para. 58
CDDH/III/SR.28	paras. 8, 9, 16, 18
CDDH/III/245	Democratic Republic of Viet-Nam (paras. 1 and 2)
CDDH/III/SR.30	paras. 28 to 34, 48, 52
CDDH/III/SR.33	paras. 68 and 76
CDDH/III/SR.34	para. 25
CDDH/215/Rev.1	Report of Committee III, para. 16
CDDH/III/334	Proposal by the Rapporteur
CDDH/III/338	Report on the work of the Working Group
CDDH/III/SR.47	paras. 29 to 33, 45, 46, 62, 66, 72, 80

33. It will immediately be noticed that, whereas the ICRC draft dealt both with espionage and sabotage, the proposal adopted by the Committee confines itself to espionage. That change resulted from the relation of the article with articles 41 and 42. Since the latter articles are now so structured that a captured member of armed forces is or is not entitled to be a prisoner of war, depending upon his compliance with the standards of those articles, it was unnecessary to deal separately with sabotage. The Committee noted that it would make no sense for a combatant to keep his right to prisoner-of-war status if he killed people, but lose it if he destroyed property.

34. The case of a spy, however, was recognized to be different, and paragraph 1 was designed to state the general rule that, notwithstanding any other provision, a member of armed forces captured while engaging in espionage has no right to be a prisoner of war and may be treated as a spy.

35. Paragraph 2 is designed to make clear that a member of the armed forces cannot, under any conditions, be considered a spy if he is acting in the uniform of his armed forces. There was no intent to define what constituted a uniform, but any customary uniform which clearly distinguished the member wearing it from a non-member should suffice. The paragraph refers to territory controlled by the enemy as that is the only place this question could arise. The Committee expressed no intention to change the law regarding espionage as set out in Articles 29, 30 and 31 of The Hague Regulations respecting the Laws and Customs of War on Land annexed to the Hague Convention no. IV of 1907 concerning the Laws and Customs of War on Land. It should further be mentioned that the Committee did not discuss espionage in sea warfare.

36. Paragraph 3 developed slowly in the Committee, as there was gradual recognition of the fact that a special rule was needed to protect residents of occupied territory. Those persons would almost necessarily in their everyday life come across information of value to the armed forces to which they belonged, and that should not make them spies or serve as a pretext for denying them protection as prisoners of war. On the other hand, it was agreed that, if they disguised themselves in order to gain access to secret information or in other ways used false pretences or deliberate clandestine acts in order to obtain such information, they would be spies. For example, the resident who observed military movements while walking along the street or who took photographs from his residence would not be engaged in espionage; whereas the resident who used a forged pass to enter a military base or who, if lawfully on the base, illegally brought a camera with him, would be engaging in espionage.

37. A second limitation on the vulnerability of residents of occupied territory to be treated as spies is contained in the last sentence of paragraph 3. Whereas the spy who entered enemy territory in order to gather information remained vulnerable to punishment as a spy until he had rejoined his own forces (a rule restated in paragraph 4), the spy who was a resident of occupied territory might be considered as rejoining his forces whenever he ceased to engage in espionage. Although no attempt had been made by the Committee to define more precisely when a resident might be considered as engaging in espionage, several representatives

suggested that each act of espionage would end when the information obtained had been transmitted by the spy to his armed forces. That approach was commended, as it would reduce the possibility that an occupying Power could improperly deprive captured members of underground armed forces of their rights to be prisoners of war by asserting that they were captured while engaging in espionage.

38. There is, of course, a question of who is to be considered to be a "resident" of occupied territory. The Committee devoted little attention to that question, but several delegations expressed the view that the term should be limited to "usual" or "ordinary" residents, that is, excluding anyone who was sent into the territory in order to engage in espionage. Whether it would exclude someone sent in to engage in hostilities, rather than to spy, is less certain, and it would seem that the burdens of proof in such cases might prove insuperable.

39. Finally, the Committee wishes to point out that, as a result of the changed composition of articles 40, 41 and 42, it would be advisable for the Drafting Committee to consider whether article 40 might not be better placed immediately following article 42.

40. The Committee adopted article 40 by consensus at its forty-seventh meeting on 31 May 1976 (see annex I to the present report).

Article 41 - Organization and discipline
(CDDH/III/343*)

41. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/III/324 (replacing CDDH/III/28)	Ghana
CDDH/III/SR.6	para. 31
CDDH/III/210	Spain
CDDH/III/SR.27	para. 58
CDDH/III/SR.28	paras. 8, 9, 16, 18, 29
CDDH/III/SR.30	paras. 35 to 52
CDDH/III/SR.33	paras. 22, 27, 43, 68, 70, 76
CDDH/III/SR.34	para. 18

CDDH/III/SR.35	paras. 45 and 51
CDDH/III/SR.36	paras. 25, 26, 29, 32, 34
CDDH/215/Rev.1	Report of Committee III, para. 16
CDDH/III/335	Proposal by the Rapporteur
CDDH/III/338	Report on the work of the Working Group
CDDH/III/SR.47	paras. 34, 35, 47, 72
CDDH/III/SR.48	paras. 2 and 22

42. The Committee decided to expand the concept of ICRC draft article 41 to cover not only the requirements of organization and discipline, but also the definition of armed forces, the definition of those who had a right to be combatants, and the possibility of incorporating police forces into the armed forces. The resulting text is relatively clear and requires little explanation. It should, however, be noted that the term "members of the armed forces" is all-inclusive and includes both combatants and non-combatants and that, as elsewhere in the Protocol, the term "Party to a conflict" includes national liberation movements, by virtue of article 1, paragraph 2, of draft Protocol I.

43. The Drafting Committee should note that the last sentence of paragraph 1 of the article sets forth at least a partial definition of the phrase, "the rules of international law applicable in armed conflict". That phrase occurred in a number of articles, and it might be well if it could be defined in article 2 of draft Protocol I. In that event, the Drafting Committee could delete the last sentence of paragraph 1 of article 41.

44. With respect to the requirement of notification of incorporation of police forces, the Committee recognized that, where a State had a law providing for the automatic incorporation of such forces into its armed forces in time of war, the notice requirement might be satisfied by notification to all Parties to the Protocol, through the depositary.

45. The Committee adopted article 41 by consensus at its forty-seventh meeting on 31 May 1976 (see annex I to the present report).

New article 42 bis (CDDH/III/344*)
New article 42 bis (a) - Protection of
prisoners of war

46. The symbols of the amendments submitted and of the relevant documents are as follows:

CDDH/III/77	Israel
CDDH/III/254 and Corr.1	Democratic Republic of Viet-Nam
CDDH/III/SR.33	paras. 7 to 76
CDDH/III/SR.34	paras. 1 to 93
CDDH/III/SR.35	paras. 1 to 83
CDDH/III/SR.36	paras. 1 to 46
CDDH/215/Rev.1	Report of Committee III, para. 16

New article 42 bis (b) - Protection of persons taking
part in hostilities

47. The symbols of the amendments submitted and of the relevant documents are as follows:

CDDH/III/260 and Add.1	Belgium, Canada, Egypt, Ghana, Greece, Ireland, Italy, Netherlands, New Zealand, Norway, Sudan, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America
CDDH/III/SR.33	paras. 7 to 76
CDDH/III/SR.34	paras. 1 to 93
CDDH/III/SR.35	paras. 1 to 83
CDDH/III/SR.36	paras. 1 to 46
CDDH/215/Rev.1	Report of Committee III, para. 16
CDDH/III/307	Austria, Belgium ^{1/}
CDDH/III/337	Proposal by the Rapporteur
CDDH/III/338	Report on the work of the Working Group
CDDH/III/SR.47	paras. 36, 37, 53 to 59, 73
CDDH/III/SR.48	para. 11

^{1/} This amendment was submitted in the framework of article 65, draft Protocol I; article 42, paragraph 2, has already taken it into account.

48. This article, which was first proposed by a number of countries as an amendment (CDDH/III/260 and Add.1) is designed to ensure a minimum level of protection to every person who takes part in hostilities and is captured. First, it establishes procedural protection of two kinds. Paragraph 1 creates a presumption that such person is a prisoner of war if he claims such status, if he appears entitled to it, or if his armed forces claim it for him. It also follows Article 5 of the third Geneva Convention of 1949 in stating that, should any doubt arise, he must be treated as a prisoner of war unless and until a competent tribunal determines otherwise. As in the case of Article 5, such a tribunal may be administrative in nature.

49. In paragraph 2 a new procedural right is established for persons who are not considered prisoners of war and who are to be tried for a criminal offence arising out of the hostilities. Such persons are given the right to assert their entitlement to prisoner-of-war status and to have that question adjudicated de novo by a judicial tribunal, without regard to any decision reached pursuant to paragraph 1. In view of the great differences in national judicial procedures, it was not thought possible to establish a firm rule that this question must be decided before the trial for the offence, but it should be so decided if at all possible, because on it depend the whole array of procedural protections accorded to prisoners of war by the third Geneva Convention of 1949 and the issue may go to the jurisdiction of the tribunal. The judicial tribunal may be either the same one that tries the offence or another one. It may be either a civilian or military tribunal, the term "judicial" meaning merely a criminal tribunal offering the normal guarantees of judicial procedure. It should be noted that the provisions on the right of the representatives of the protecting power to attend the proceedings is copied from Article 105 of the third Geneva Convention.

50. The Drafting Committee may wish to consider whether paragraph 2 of this article belongs more appropriately in this article or in article 65. The Drafting Committee may also be able to bring to the usage of terms such as "such person", "a person", "he", or "he or she" more uniformity of use than the Committee was able to accomplish.

51. Finally, it should be noted in connexion with paragraph 1, that failure by a prisoner to claim the status of prisoner of war cannot properly be taken, by itself, as determinative of his lack of entitlement to prisoner-of-war status. The Committee has no intention of derogating in any way from Article 7 of the third Geneva Convention.

52. The Committee adopted article 42 bis (Protection of persons taking part in hostilities) by consensus at its forty-seventh meeting on 31 May 1976 (see annex I to the present report).

New article 64 bis - Reunion of dispersed families
(CDDH/III/360*)

53. The symbols of the amendments submitted and of the relevant documents are as follows:

CDDH/III/329 (replacing CDDH/I/297)	Australia, Austria, Belgium, Cyprus, Denmark, Egypt, Finland, Federal Republic of Germany, Ghana, Greece, Guatemala, Holy See, Iran, Iraq, Jordan, Lebanon, Libyan Arab Republic, Liechtenstein, Monaco, Sultanate of Oman, Pakistan, Qatar, Saudi Arabia, Spain, Sudan, Yugoslavia
CDDH/III/SR.42	paras. 57 to 85
CDDH/III/345	Proposal of the Working Group
CDDH/III/SR.49	para. 11.

54. This article, which obligates parties to facilitate the reunion of families dispersed as a result of an armed conflict, was proposed by a number of delegations and was adopted by the Committee without change. It is self-explanatory.

55. The Committee adopted new article 64 bis by consensus at its forty-ninth meeting, on 4 June 1976 (see annex I to the present report).

B. Draft Protocol II

Article 20 - Prohibition of unnecessary injury
(CDDH/III/354*)

56. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/47/Rev.1	Report of the <u>Ad Hoc</u> Committee on Conventional Weapons, para. 9
CDDH/III/87	German Democratic Republic (whole article)
CDDH/III/104	Finland (title and whole article)

CDDH/I/SR.23	para. 41
CDDH/III/215	Brazil (para. 1)
CDDH/III/SR.32	paras. 4 to 11
CDDH/215/Rev.1	Report of Committee III, para. 16
CDDH/III/346	Proposal by the Working Group
CDDH/III/353	Report on the work of the Working Group
CDDH/III/SR.49	para. 2.

57. This article is identical, with several small drafting changes, to article 33 of draft Protocol I, which was adopted by Committee III on 10 April 1975. The introductory language of the article was amended to refer to "any armed conflict to which this Protocol applies" in order to limit its scope of application to the armed conflicts referred to in article 1 of this Protocol. A mere reference to "any armed conflict" might have been subject to the interpretation that a Party to Protocol II had undertaken obligations with respect to international conflicts, as well as non-international ones. The word "combat" was substituted for the word "warfare", which had appeared in article 33, because it was thought inappropriate to refer to "warfare" in the context of an instrument on non-international armed conflicts.

58. An article 28 bis on the protection of the natural environment in non-international conflicts, corresponding to paragraph 3 of article 33 of Protocol I, was adopted by Committee III on 10 April 1975. It was noted at that time that article 28 bis might properly form part of article 20 (see report of Committee III, CDDH/215/Rev.1, p. 66), but this matter may be left to the Drafting Committee.

59. The Committee adopted article 20 by consensus at its forty-ninth meeting on 4 June 1976 (see annex I to the present report).

New article 20 bis - Protection of cultural objects
and of places of worship
(CDDH/III/355*)

60. The symbols of the relevant documents are as follows:

CDDH/III/347	Proposal of the Working Group
CDDH/III/353	Report on the work of the Working Group
CDDH/III/SR.49	paras. 3, 13 to 15, 16, 17, 19, 21.

A proposal was made in the Working Group that a new article be inserted in Part IV of draft Protocol II, in order to deal with the protection of cultural property along the lines of article 47 bis of draft Protocol I, which was adopted by Committee III on 25 February 1975. The text is a modification of the amendment submitted by Greece and ten other delegations (CDDH/III/GT/95) and conforms in general to the wording of article 47 bis, but without any reference to "reprisals" which is a term that will not be used in Protocol II.

61. The reference to The Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict is intended to point in particular to Article 19 of that Convention, which deals with non-international armed conflicts.

62. There is still a measure of disagreement on the effect of the modifying clause "which constitute the cultural heritage of peoples" on the term "places of worship". The views in the Working Group ranged from the position that any place of worship was a "cultural heritage of peoples" to the assertion that a place of worship was protected if and only if it was identifiable as specifically forming part of the "cultural heritage of peoples". Here cultural heterogeneity may be the key, for among some peoples any place of worship may be part of the cultural heritage, while among others only some places of worship may be so described. This difference of views is already implicit in article 47 bis, which has been adopted by Committee III, and the corresponding text in draft Protocol II cannot be expected to clarify the matter for both Protocols.

63. The Committee adopted new article 20 bis by consensus at its forty-ninth meeting on 4 June 1976 (see annex I to the present report).

Article 21 - Prohibition of perfidy

64. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/III/105	Poland (para. 1)
CDDH/III/221	Canada (whole article)
CDDH/III/SR.27	para. 69
CDDH/III/SR.32	paras. 12 to 18
CDDH/III/286	Draft report of Committee III, para. 16
CDDH/III/348	Proposal of the Working Group
CDDH/III/353	Report on the work of the Working Group
CDDH/III/SR.49	paras. 4 and 5.

65. A text for article 21, dealing with the subject of perfidy (CDDH/III/348), was submitted by the Working Group to the Committee, but the Working Group was not in a position to recommend its adoption by consensus, there being differing views on the desirability of the inclusion of such an article in draft Protocol II. At its forty-ninth meeting on 4 June 1976, the Committee decided by consensus to resubmit this proposal to the Working Group in the hope that a body might be in a position to arrive at a simplified text which might command the general support of the Working Group and of the Committee. The views of various delegations in the Working Group are reflected in document CDDH/III/353, pages 4 and 5.

Article 22 - Quarter (CDDH/III/356*)

66. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/I/37	Canada (whole article)
CDDH/III/221	Canada (whole article)
CDDH/III/SR.32	paras. 19 to 26
CDDH/I/SR.32	paras. 55, 58, 61, 62

CDDH/215/Rev.1	Report of Committee III, para. 16
CDDH/III/349	Proposal by the Working Group
CDDH/III/353	Report on the work of the Working Group
CDDH/III/SR.49	para. 6.

67. This text is identical to that of article 38 of draft Protocol I, as adopted by Committee III on 31 May 1976.

68. The Committee adopted article 22 by consensus at its forty-ninth meeting on 4 June 1976 (see annex I to the present report).

New article 22 bis - Safeguard of an enemy
hors de combat
(CDDH/III/357*)

69. This article includes the following amendments submitted to the ICRC text of article 7 of draft Protocol II. The symbols of the amendments and of the relevant documents are as follows:

CDDH/I/37	Canada (title and whole article)
CDDH/III/SR.32	para. 20
CDDH/I/SR.32	paras. 13, 18, 26, 29, 47 to 64, 73
CDDH/I/SR.33	para. 24
CDDH/I/257	United States of America (whole article)
CDDH/I/287/Rev.1.	Report of Working Group B
CDDH/I/SR.41	para. 77
CDDH/219/Rev.1	Report of Committee I, paras. 156 to 158
CDDH/III/350	Proposal by the Working Group
CDDH/III/353	Report on the work of the Working Group
CDDH/III/SR.49	para. 7

70. This text is identical to that of article 38 bis of Protocol I, as adopted by Committee III on 31 May 1976, with the exception that paragraph 3, dealing with the release of prisoners of war who have fallen into the hands of an adverse party under unusual conditions, has been deleted. The matter has already been dealt with in article 8, paragraph 5, which was adopted by Committee I on 11 April 1975.

71. Article 22 bis deals with the same subject matter as article 7 of draft Protocol II, as originally put forward by the International Committee of the Red Cross. With the approval of the Chairman of Committee I, Committee III took up this article and decided to make no changes in the text for article 38 bis already adopted in Committee III, with the exception noted above. It will be left to the Drafting Committee to decide whether the article will be inserted where it now stands relative to other articles or will be moved to the space left for article 7.

72. The Committee adopted article 22 bis by consensus at its forty-ninth meeting on 4 June 1976 (see annex I to the present report).

Article 23 - Recognized signs (CDDH/III/358*)

73. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/III/75	Venezuela (new para.)
CDDH/III/216	Brazil (para. 1)
CDDH/III/221	Canada (whole article)
CDDH/III/SR.32	paras. 27 to 31
CDDH/215/Rev.1	Report of Committee III, para. 16
CDDH/III/351	Proposal by the Working Group
CDDH/III/353	Report on the work of the Working Group
CDDH/III/SR.49	paras. 3, 16, 18

74. This text is almost identical to that of article 36 of draft Protocol I, adopted by Committee III on 10 April 1975.

75. There was some discussion of whether it would be wise to include a reference to "the protective emblem of cultural property". In view of the inclusion of a new article 20 bis on the protection of cultural property, it seems appropriate to include some reference to the protective emblem of cultural property which may be employed during a non-international armed conflict to which Article 19 of The Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict applies. The distinctive emblem of cultural property described in Article 16 of that Convention may be expected to be employed in those non-international armed conflicts that take place in the territory of a State which is a Party to The Hague Convention. The language "whenever applicable" points to this situation.

76, The Committee adopted article 23 by consensus at its forty-ninth meeting on 4 June 1976 (see annex I to the present report).

Article 27 - Protection of objects indispensable
to the survival of the civilian
population (CDDH/III/359*)

77. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/III/12	Romania
CDDH/III/13 and Add.1	Finland, Sweden
CDDH/III/324 (replacing CDDH/III/28)	Ghana
CDDH/III/36	Canada
CDDH/III/47	Australia
CDDH/III/62/Rev.1 and Rev.1/Corr.1 and Add.1	Egypt, Iraq, Mali, Syrian Arab Republic
CDDH/III/SR.14	paras. 4, 27
CDDH/III/SR.16	paras. 38 to 60
CDDH/III/SR.17	paras. 1 to 44
CDDH/III/SR.18	paras. 2 to 15
CDDH/III/SR.19	para. 12
CDDH/III/SR.20	paras. 33 and 44

CDDH/215/Rev.1	Report of Committee III, para. 16
CDDH/III/352	Proposal by the Working Group
CDDH/III/353	Report on the work of the Working Group
CDDH/III/SR.49	paras. 9 and 10

78. This text corresponds to, but differs from, that of article 48 of draft Protocol I, which was adopted by Committee III on 14 March 1975.

79. The view was taken in the Committee that in draft Protocol II there should be a shorter form of article 48 of draft Protocol I. The text submitted to the Committee merges paragraphs 1 and 2 of that article and forbids attacks, destruction, removal, or the rendering useless of certain designated objects which have as their purpose the starvation of civilians in a non-international armed conflict. It is thought that this formulation preserves the essence of article 48.

80. The reference to reprisals contained in paragraph 4 of article 48 of draft Protocol I has been deleted on the understanding that when work on the articles of draft Protocol II falling within the responsibility of Committee III has been completed, the Working Group will make proposals to the Committee about what provisions "shall not, in any circumstances or for any reason whatsoever, be violated, even in response to a violation of the provisions of the Protocol", according to the proposal about "reprisals" in Protocol II made to Committee I by its Working Group B on "Reprisals" (CDDH/I/320/Rev. 2).

81. The term "combat" was substituted for "warfare", as in article 20.

82. The Committee adopted article 27 by consensus at its forty-ninth meeting on 4 June 1976 (see annex I to the present report).

III. REPORT ON ARTICLES 42 AND 42 quater NOT ADOPTED
BY THE COMMITTEE

Article 42 - New category of prisoners of war

83. This article, as proposed by the ICRC, would have added a new category of prisoners of war to those contained in Article 4 of the third Convention of 1949. The purpose of the ICRC proposal was to loosen the restrictions imposed by that Convention on the entitlement of members of resistance and liberation movements to prisoner-of-war status. The Working Group agreed with that purpose but devised an alternative method of achieving it. The text of the Working Group's proposal, which remains pending before the Committee, appears in annex II.

84. In view of the obvious interrelation of the issues involved in this article with those involved in articles 40, 41 and 42 bis (and even to some extent article 35), the Rapporteur began work on them during this session by proposing a list of questions for discussion (document CDDH/III/GT/75). The responses of the representatives in the Working Group revealed overwhelming support for an effort to develop a single standard for entitlement to prisoner-of-war status which would be applicable to regulars and irregulars alike. As concrete drafts developed, however, this concept of a single standard gave rise to certain problems, particularly concern that we should not develop a rule that would encourage uniformed regular soldiers to dress in civilian clothes. Ultimately, this concern resulted in the reference in paragraph 3 to situations where an armed combatant cannot distinguish himself from the civilian population and in paragraph 7 of article 42. Regulars who are assigned to tasks where they must wear civilian clothes, as may be the case, for example, with advisers assigned to certain resistance units, are not required to wear the uniform when on such assignments.

85. The drafting of article 42 was considerably simplified when the Working Group decided to deal with the question of spies in article 40 only and to define the term "combatant" in article 41. There was general relief that it proved possible to avoid terms such as "lawful combatant", "legitimate combatant", and "privileged combatant" by defining a combatant as a member of armed forces who has a right to participate directly in hostilities.

86. Having defined "combatant" in article 41, it was relatively simple to provide in article 42, paragraphs 1 and 2, that captured combatants are prisoners of war and that violations of the rules of applicable law by a combatant or by others of the group will not deprive that combatant of his right to be a prisoner of war. This is not to say that there were not still some difficulties. Several representatives suggested, for example, that it should be stated clearly that, if a group of combatants announced that it would not respect the laws and in fact consistently violated them, all members of the group should forfeit their rights to prisoner-of-war status. Others argued, however, that such behaviour by a group was unlikely given the requirements of article 41, that we did not need to provide specifically for it, and that, in any event, there were other and better methods for punishing and deterring such behaviour, and that prisoners of war could, of course, be punished for criminal offences.

87. The wording of paragraph 2 also gave rise to some concern that it might require new reservations by those States which at present have reservations to Article 85 of the third Geneva Convention of 1949. Representatives of those States pointed out, however, that only Article 85 covered the period after final conviction of a prisoner of war and that this paragraph should be understood as dealing with the situation only up to final conviction. Therefore, it seemed possible to elaborate paragraph 2 as it now stands, and to leave the issue of status after final conviction where it stands under the third Convention.

88. Paragraph 3 raised the question of what, if any, distinction from the civilian population was to be required. While restating the generally recognized rule of distinction, it notes that, in some types of conflicts, there will be situations, particularly in wars of national liberation and in occupied territories, in which a combatant cannot distinguish himself and retain a chance of success, and it provides that, in such event, an armed combatant shall retain his combatant status if he carries his arms openly during each military engagement and during such time as he is visible to the adversary, that is, to enemy personnel, "while he is engaged in a military deployment preceding the launching of an attack in which he is to participate." The purpose of this requirement is to identify the individual as a combatant. Implicitly, the rule requires that the combatant knows, or should know, that he is visible. The purpose of this rule,

of course, is to protect the civilian population by deterring combatants from concealing their arms and feigning civilian non-combatant status, for example, in order to gain advantageous positions for the attack. Such actions are to be deterred in this fashion, not simply because they are wrong (criminal punishment could deal with that), but because this failure of even minimal distinction from the civilian population, particularly if repeated, places that population at great risk.

89. The final sentence of paragraph 3 is designed to make clear that the concept of perfidy through feigning of civilian status cannot properly be used to punish those who comply with the requirements of paragraph 3. The acceptance of article 35 paragraph 1 (c) in the Committee was conditioned by a number of representatives on the inclusion of this sentence by the Rapporteur in this proposed text.

90. Paragraph 4, which was suggested late in the third session of the Conference was considered as the best basis for a compromise. It obtained a considerable degree of support. In essence, paragraph 4 provides a separate, but equal, status for combatants who are captured while failing to observe even the minimal rule of distinction set forth in the second sentence of paragraph 3. They are not to be prisoners of war (and under paragraph 3, they will have forfeited their combatant status), but they shall benefit from procedural and substantive protections equivalent to those accorded prisoners of war by the third Geneva Convention and Protocol I. Several representatives made the point that this paragraph is not, in any event, intended to protect terrorists who act clandestinely to attack the civilian population.

91. Paragraph 5 is an important innovation developed within the Working Group. It would ensure that any combatant who is captured while not engaged in an attack or a military operation preparatory to an attack retains his rights as a combatant and a prisoner of war whether or not he may have violated in the past the rule of the second sentence of paragraph 3. This rule should, in many cases, cover the great majority of prisoners and will protect them from any efforts to find or fabricate past histories to deprive them of their protection.

92. Paragraph 6 is a savings clause designed to make clear that article 42 is not intended to supplant Article 4 of the third Geneva Convention of 1949 in cases where the latter would entitle a prisoner to prisoner-of-war status.

93. Paragraph 8 is a technical addition which seemed desirable to ensure that persons whose entitlement to prisoner-of-war status comes only from article 42 are equally entitled to the protection of the first and second Conventions as those whose prisoner-of-war entitlement flows from Article 4 of the third Convention.

94. In summary, the Rapporteur stated his conviction that article 42 was a compromise - the greatest possible increase in protection of guerrilla combatants at the cost of some, but hopefully not unacceptable, loss of protection to the civilian population. Some representatives agreed that one could not have one without the other. Other representatives disagreed and felt that adequate protection could be assured to the civilian population. In any event, the negotiation of the various differences took much patient effort, and the tentative settlement remains subject to confirmation at the fourth session of the Conference. It was decided by the Committee that final action on article 42 as a whole should be deferred until the fourth session of the Conference in 1977, and that draft article 42 would have priority on its agenda at the beginning of the fourth session, for prompt adoption, if possible, or for further modification by the Working Group, if necessary.

New article 42 quater - Mercenaries

95. A proposal with respect to mercenaries was submitted to the Working Group by the delegation of Nigeria (CDDH/III/GT/82) in the form of the following article 42 quater for inclusion in Protocol I:

"1. The status of combatant or prisoner of war shall not be accorded to any mercenary who takes part in armed conflicts referred to in the Conventions and the present Protocol.

"2. A mercenary includes any person not a member of the armed forces of a party to the conflict who is specially recruited abroad and who is motivated to fight or to take part in armed conflict essentially for monetary payment, reward or other private gain."

96. The proposal was the subject of extensive debate in the Working Group. While there was widespread support for the inclusion of a provision denying combatant and prisoner-of-war status to mercenaries, it proved impossible to formulate a text on the subject which the Working Group might be in a position to recommend by consensus. The Working Group and Committee III were of the view that it would be useful to have an account of the areas of agreement and disagreement incorporated in its report for the guidance of the Working Group and the Committee at the fourth session of the Conference in 1977.

97. The general support for the core concept of a denial of combatant and prisoner-of-war status to mercenaries proved to be somewhat difficult to translate into a definition of the mercenary and into a statement of the consequences of service as a mercenary. Some delegations favoured a short and simple definition of a mercenary, because of the danger that qualifications might empty the concept of any real meaning. Other delegations, by calling for an enumeration of the criteria for a mercenary and by noting that certain types of individuals should be excluded from the definition, lent support to a more detailed and elaborate definition.

98. The nature and scope of the definition of mercenaries are important because the definition should properly embrace all mercenaries, while at the same time avoiding the danger that persons who are not mercenaries in the generally accepted sense will be swept up by the definition. The definition can have life or death consequences for a person charged with being a mercenary, and no room must be left for abuse of the provision by participants either in conventional wars or in wars of national liberation.

99. The following core of agreement appeared to exist within the Working Group:

Most important of all, a mercenary is a person who is motivated to fight essentially or primarily by the desire for, as one representative put it, "hard cash". He fights for monetary gain - whether it be higher pay than is given to the regular armed forces of the state or by way of bonuses for persons killed or captured. The definition must be so framed, however, that the individual who enlists as a regular member of the armed forces because he is attracted by good pay is not on that account deemed

to be a mercenary. The establishment of a person's motivation may pose some problems of proof.

100. There also seemed to be general agreement that the mercenary must also be someone recruited to take part in the fighting itself. Some delegations might go somewhat beyond this in order to include instructors who do not take a direct part in combat. It also seems to be generally accepted that the mercenary should be recruited on behalf of a party to the conflict and that he must be enlisted to participate in a particular conflict. The mercenary may be a career fighter or killer, but if a person makes a career of fighting in support of one and only one State, it seems rather difficult to regard him as a mercenary.

101. A mercenary was also seen to be someone who is not a national of a party to the conflict. An individual who has the nationality of one of the parties to the conflict should not be included within the definition. The mercenary may also be recruited either locally or abroad; the place of recruitment is thus not the governing criterion.

102. Beyond this point, there were some differences of views within the Working Group. A number of delegations thought that a person would not be a mercenary if he were enrolled in the armed forces of a State and that the definition of a mercenary should therefore include the statement that he is not a member of the armed forces of a party to the conflict. Other delegations pointed to the fact that a State employing mercenaries could avoid having them lose combatant and prisoner-of-war status simply by making them members of the armed forces; they therefore opposed excluding members of the armed forces from the category of mercenaries.

103. Members of foreign armed forces who might be serving with or advising the armed forces of parties to the conflict also posed difficulties. Some delegations wished to make it clear that military advisers or technicians or other personnel from the armed forces of States not parties to the conflict cannot be mercenaries, even though they are recruited abroad, are not nationals of the parties to the conflict, and are motivated by the desire for gain. Other delegations wished persons in that category not to be excluded.

104. Reference was made to the fact that volunteers who fight with, but not in, the armed forces of parties to the conflict and who do not fight for money should be excluded from the definition of mercenaries.

105. So far as the consequences of being a mercenary are concerned, there is general agreement that, as a minimum, mercenaries have no entitlement to prisoner-of-war or combatant status. But beyond this, a number of delegations desired to see an absolute requirement that mercenaries must not be treated as prisoners of war or combatants, thus making it mandatory that the capturing Power deny such status. Those delegations supporting this formulation considered that it would reinforce the deterrent effect of the provision. Other delegations thought that a capturing Power should not be precluded from according prisoner-of-war or combatant status to mercenaries if it desired to do so. The difference amounts to a choice between saying that a mercenary "need not" and saying that a mercenary "shall not" be treated as a prisoner of war and a combatant.

106. All who spoke in the Working Group believed that as a minimum persons found to be mercenaries should be entitled to be treated humanely and in accordance with the national law of the capturing Power. But some delegations thought that this was not enough. Mercenaries, even if found to be such, should receive the protection accorded by article 65 of draft Protocol I; even the worst of sinners is entitled to basic safeguards. Other delegations opposed the application of article 65 to mercenaries, whose barbarities should place them outside the protection of international law.

107. There was no agreement on whether article 42 quater should be a separate article or whether it should be introduced as a paragraph or paragraphs of article 42, or new categories of prisoners of war. In the latter event, it would be made clear that mercenaries are an exception to the definition of prisoners of war. Others thought that the matter is of sufficient consequence to warrant a separate article. The exact placement of the provision is not a matter of major consequence and may in the end be left to the decision of the Drafting Committee.

108. Various other possible rules about mercenaries, such as requiring States to prohibit their recruitment, were mentioned in the Working Group but were not further pursued.

IV. ADOPTION OF THE REPORT OF COMMITTEE III

109. At its fifty-second and fifty-third meetings, on 9 and 10 June 1976, the Committee adopted its report as amended.

ANNEXES

Annex I

TEXTS OF ARTICLES ADOPTED BY COMMITTEE III AT THE THIRD SESSION

Draft Protocol I,
Part III, Section I

Article 35 - Prohibition of perfidy*

1. It is forbidden to kill, injure, or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary that he is entitled to, or is obliged to accord, protection under international law applicable in armed conflicts with intent to betray that confidence shall constitute perfidy. The following are examples of such acts:

- (a) the feigning of an intent to negotiate under a flag of truce, or of a surrender,
- (b) the feigning of an incapacitation by wounds or sickness,
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by use of neutral or United Nations signs, emblems or uniforms.

2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflicts and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, traps, mock operations, and misinformation.

* Adopted by consensus at the forty-seventh meeting (31 May 1976) in the following languages: English, French, Russian, Spanish. See paragraphs 14 to 19 of the present report.

Draft Protocol I,
Part III, Section I

Article 38 - Quarter*

It is forbidden to order that there shall be no survivors, to threaten an adversary therewith, or to conduct hostilities on this basis.

* Adopted by consensus at the forty-seventh meeting (31 May 1976) in the following languages: English, French, Russian, Spanish. See paragraphs 20 to 26 of the present report.

Draft Protocol I,
Part III, Section I

New article 38 bis - Safeguard of an enemy hors de combat*

1. A person who is recognized or who, under the circumstances, should be recognized to be hors de combat shall not be made the object of attack.

2. A person is hors de combat if:

- (a) he is in the power of an adverse party; or
- (b) he clearly expresses an intention to surrender; or
- (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

and, in any case, provided that he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I of the third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

* Adopted by consensus at the forty-seventh meeting (31 May 1976) in the following languages: English, French, Russian, Spanish. See paragraphs 20 to 26 of the present report.

Draft Protocol I,
Part III, Section I

Article 39 - Aircraft occupants*

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent unless it is apparent that he will land in territory controlled by the party to which he belongs or by an ally of that party.
2. Upon reaching the ground in territory controlled by an adverse party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.
3. Airborne troops are not protected by this article.

* Adopted by 47 votes to 6 with 15 abstentions at the forty-seventh meeting (31 May 1976) in the following languages: English, French, Russian, Spanish. See paragraphs 27 to 31 of the present report.

Draft Protocol I,
Part III, Section I

Article 40 - Independent missions*

1. Notwithstanding any other provision of the Conventions or this Protocol, any member of the armed forces of a party to the conflict who falls into the power of an adverse party while engaging in espionage shall have no right to be a prisoner of war and may be treated as a spy.
2. A member of the armed forces of a party to the conflict who, on behalf of that party, gathers or attempts to gather information within territory controlled by an adverse party shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.
3. A member of the armed forces of a party to the conflict who is a resident of territory occupied by an adverse party, and who, on behalf of the party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident loses his right to be a prisoner of war and may be treated as a spy only if he is captured while engaging in espionage.
4. A member of the armed forces of a party to the conflict who is not a resident of occupied territory and who has engaged in espionage loses his right to be a prisoner of war and may be treated as a spy only if he is captured before he has rejoined the armed forces to which he belongs.

* Adopted by consensus at the forty-seventh meeting (31 May 1976) in the following languages: English, French, Russian, Spanish. See paragraphs 32 to 40 of the present report.

Draft Protocol I,
Part III, Section I

Article 41 - Organization and discipline*

1. The armed forces of a party to a conflict consist of all organized armed forces, groups, and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by an adverse party. Such armed forces shall be subject to an internal disciplinary system, which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict. These rules include those established by applicable treaties, including the Conventions and this Protocol, and all other generally recognized rules of international law.
2. Members of the armed forces of a party to the conflict (other than medical personnel and chaplains covered by article 33 of the third Convention) are combatants, that is, they have the right to participate directly in hostilities.
3. Whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other parties to the conflict.

* Adopted by consensus at the forty-seventh meeting (31 May 1976) in the following languages: English, French, Russian, Spanish. See paragraphs 41 to 45 of the present report.

Draft Protocol I,
Part III, Section II

New article 42 bis - (Protection of persons taking part
in hostilities*)

1. A person who takes part in hostilities and falls into the power of an adverse party shall be presumed to be a prisoner of war, and therefore shall be protected by the third Convention, if he claims such status, or if he appears to be entitled to such status, or if the party on which he depends claims such status on his behalf by notification to the detaining power or to the protecting power. Should any doubt arise as to whether any such person is entitled to be a prisoner of war, he shall continue to have such status, and therefore, to be protected by the third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

2. In the event that a person who has fallen into the power of an adverse party is not held as a prisoner of war and is to be tried by that party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this shall occur prior to the trial for the offence, the representatives of the protecting power shall be entitled to attend the proceedings in which that question is adjudicated, unless exceptionally, this is held in camera in the interest of state security. In such a case the detaining power shall advise the protecting power accordingly.

3. Any person who, having taken part in hostilities, is not entitled to prisoner-of-war status and who does not benefit from more favorable treatment in accordance with the fourth Convention shall have the right at all times to the protection of article 65 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding article 5 of the fourth Convention, to his rights of communication under that Convention.

*Adopted by consensus at the forty-seventh meeting (31 May 1976) in the following languages: English, French, Russian, Spanish. See paragraphs 46 to 52 of the present report.

Draft Protocol I,
Part IV, Section III

New article 64 bis - Reunion of dispersed families*

The High Contracting Parties and the parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task in accordance with the provisions of the Conventions and the present Protocol and in conformity with their respective security regulations.

* Adopted by consensus at the forty-ninth meeting (4 June 1976) in the following languages: English, French, Russian, Spanish. See paragraphs 53 to 55 of the present report.

Draft Protocol II,
Part IV

Article 20 - Prohibition of unnecessary injury*

1. In any armed conflict to which this Protocol applies, the right of the parties to the conflict to choose methods or means of combat is not unlimited.
2. It is forbidden to employ weapons, projectiles, and material and methods of combat of a nature to cause superfluous injury or unnecessary suffering.

* Adopted by consensus at the forty-ninth meeting (4 June 1976) in the following languages: English, French, Russian, Spanish. See paragraphs 56 to 59 of the present report.

Draft Protocol II,
Part IV

New article 20 bis - Protection of cultural objects
and of places of worship*

Without prejudice to the provisions of The Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is forbidden to commit any acts of hostility directed against historic monuments, places of worship, or works of art which constitute the cultural heritage of peoples, and to use them in support of the military effort.

* Adopted by consensus at the forty-ninth meeting (4 June 1976) in the following languages: English, French, Russian, Spanish. See paragraphs 60 to 63 of the present report.

Draft Protocol II,
Part IV

Article 22 - Quarter*

It is forbidden to order that there shall be no survivors, to threaten an adversary therewith, or to conduct hostilities on this basis.

* Adopted by consensus at the forty-ninth meeting (4 June 1976) in the following languages: English, French, Russian, Spanish. See paragraphs 66 to 68 of the present report.

Draft Protocol II,
Part IV

New article 22 bis - Safeguard of an enemy hors de
combat*

1. A person who is recognized or should, under the circumstances, be recognized to be hors de combat, shall not be made the object of attack.

2. A person is hors de combat if:

- (a) he is in the power of an adverse party; or
- (b) he clearly expresses an intention to surrender; or
- (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and he is therefore incapable of defending himself;

and in any case, provided that he abstains from any hostile act and does not attempt to escape.

* Adopted by consensus at the forty-ninth meeting (4 June 1976) in the following languages: English, French, Russian, Spanish. See paragraphs 69 to 72 of the present report.

Draft Protocol II,
Part IV

Article 23 - Recognized signs*

1. It is forbidden to make improper use of the protective emblem of the Red Cross (Red Crescent, Red Lion and Sun) or other emblems, signs or signals provided for by the Conventions or by the present Protocol. It is also forbidden to misuse deliberately in armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce and, whenever applicable, the protective emblem of cultural property.

2. It is forbidden to make use of the distinctive emblem of the United Nations, except as authorized by that organization.

* Adopted by consensus at the forty-ninth meeting (4 June 1976) in the following languages: English, French, Russian, Spanish. See paragraphs 73 to 76 of the present report.

Draft Protocol II,
Part V, Chapter I

Article 27 - Protection of objects indispensable to the
the survival of the civilian population*

Starvation of civilians as a method of combat is prohibited and therefore it is forbidden to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population, such as foodstuffs and food producing areas, crops, livestock, drinking water installations and supplies, and irrigation works, for that purpose.

* Adopted by consensus at the forty-ninth meeting (4 June 1976) in the following languages: English, French, Russian, Spanish. See paragraphs 77 to 82 of the present report.

Annex II

Draft Protocol I,
Part III, Section II

Article 42 - New category of prisoners of war

(Proposal by the Working Group)

1. Any combatant, as defined in article 41, who falls into the power of an adverse party shall be a prisoner of war.
2. While all combatants are obligated to comply with the rules of international law applicable in armed conflicts, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4 of this article.
3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obligated to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities, an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
 - (a) during each military engagement; and
 - (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of article 35, 1 (c).

Draft Protocol I,
Part III, Section II

Article 42 - New category of prisoners of war (continued)

4. A combatant who falls into the power of an adverse party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded prisoners of war by the third Convention and this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the third Convention in the event such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This article is without prejudice to the right of any person to be a prisoner of war pursuant to article 4 of the third Convention.

7. This article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a party to a conflict.

8. In addition to the categories of persons mentioned in article 13 of the first and second Conventions, all members of the armed forces of a party to a conflict, as defined in article 41 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the second Convention, shipwrecked at sea or on other waters.

Geneva, 21 April - 11 June 1976

REPORT TO COMMITTEE III ON
THE WORK OF THE WORKING GROUP

Submitted by the Rapporteur

The Working Group held a series of meetings during the period 23 April - 27 May 1976. It completed its work on articles 35, 38, 38 bis, 39, 40, 41 and 42 bis. With the exception of the bracketed phrase in article 39, general agreement was reached on the text of this article. As with the reports by the Rapporteur in previous sessions, this report has not been approved by the Working Group and should be understood simply as the report of the Rapporteur on the work of the group.

The Working Group agreed to submit to the Committee the texts set forth in the following documents:

Article 35	:	CDDH/III/330
Article 38	:	CDDH/III/331
Article 38 <u>bis</u>	:	CDDH/III/332
Article 39	:	CDDH/III/333
Article 40	:	CDDH/III/334
Article 41	:	CDDH/III/335
Article 42 <u>bis</u>	:	CDDH/III/337

The comments by the Rapporteur concerning the deliberations of the Working Group with respect to each of these articles are the following:

DRAFT PROTOCOL I
Article 35

The Working Group, after a brief discussion, agreed to utilize for its work the ICRC text, as amended by the proposal by Canada, Ireland, and the United Kingdom in document CDDH/III/233, dated 25 February 1975. The initial effort was directed toward finding an appropriate, general definition of perfidy. The key suggestion in this connexion came from the aforementioned tripartite amendment, which proposed to define "confidence" in terms of whether one is entitled to, or obliged to accord, protection under international law. The Working Group agreed that confidence could not be an abstract confidence and that one must speak of confidence in something. In the end, it was decided to refer to confidence in protection under "international law applicable in armed conflicts", by which was meant the laws governing the conduct of armed conflict which are applicable to the conflict in question. The Working Group rejected reference to international law in general out of concern that this phrase might include such general matters as the Charter of the United Nations and such specific-matters as bilateral, local arrangements.

It should be noted that article 35 does not prohibit perfidy, per se, but merely "to kill, injure or capture an adversary by resort to perfidy". Additionally, it should be noted that, in order to be perfidy, an act must be done "with intent to betray" the confidence created. This was intended to mean that the requisite intent would be an intent to kill, injure or capture by means of the betrayal of confidence. Thus, acts such as feigning death, which are intended merely to save one's life would not be perfidy; whereas feigning death in order to kill an enemy once he turned his back would be perfidy.

With respect to the list of examples of perfidy, the Working Group decided to limit itself to a brief list of particularly clear examples. Examples that were debatable or involved borderline cases were avoided.

Paragraph 1 (c) could not be completely agreed upon, and it remains in brackets for decision by the Committee. It was generally agreed that 1 (c) is a valid example of perfidy, but there were some expressions of concern that it might be misused to punish some combatants who would be entitled to prisoner-of-war status under article 42. Certainly it seems indisputable that no combatant could legitimately be accused of perfidy under 1 (c) with respect to actions which comply with the requirements of article 42, paragraph 3. It should also be noted that the reference to neutral emblems in paragraph 1 (d) was not intended to affect the law governing the uses of neutral flags in warfare at sea. In this connexion, the Working Group suggests that the Drafting Committee consider the question whether article 37, paragraph 3, might not be made applicable specifically to article 35, as well as to article 37, so that no doubt could arise on this question. Furthermore with respect to paragraph 1 (d), it should be noted that the misuse of United Nations signs, emblems or uniforms would be perfidious in cases where the United Nations and its personnel enjoyed a neutral, protected status, but not, of course, in situations where the United Nations forces were involved as combatants in a conflict.

Articles 38 and 38 bis

The ICRC proposal for an article on quarter and safeguard of an enemy hors de combat was fairly quickly divided into two articles - one on each subject. Article 38 on quarter posed no drafting problems. Article 38 bis on hors de combat proved considerably more difficult.

A preliminary question was whether the concept of being hors de combat should include persons who had already fallen into the power of the enemy. In this connexion, a number of proposals were made to prohibit torture or other ill-treatment of such persons, as well as attacks against them. In the end, the Working Group decided to include such persons within the definition of hors de combat but to leave to other provisions (e.g. the Third Convention and article 65 of this Protocol) the protection from mistreatment of persons in the power of the enemy.

The Working Group changed the prohibition contained in the ICRC draft (and, indeed, all the amendments) from "kill or injure" to "make the object of attack". This change was designed to make clear that what was forbidden was the deliberate attack against persons hors de combat, not merely killing or injuring them as the incidental consequence of attacks not aimed at them per se. In this connexion, the Working Group limited the prohibition to attacks directed against persons who are "recognized or, under the circumstances, should be recognized" as hors de combat. This change was intended to make clear that the prohibition extended only to attacks directed against persons who were, in fact, recognized to be hors de combat and those who, under the circumstances, should have been recognized by a reasonable man as hors de combat.

Paragraph 3 dealing with the release of prisoners who cannot be evacuated proved quite difficult. The phrase "unusual conditions of combat" was intended to reflect the fact that this circumstance would be abnormal. What, in fact, most delegates referred to was the situation of the long distance patrol which is not equipped to detain and evacuate prisoners. The requirement that all "feasible precautions" be taken to ensure the safety of released prisoners was intended to emphasize that the detaining power, even in these extraordinary circumstances, is expected to take all measures that are practicable in the light of the combat situation. In the case of the long distance patrol, it need not render itself ineffective by handing the bulk of its

supplies over to the released prisoners, but it should do all that it reasonably can do, in view of all the circumstances, to ensure their safety.

Several proposals which were not accepted by the Working Group may require consideration by other Committees. Committee I should be asked to consider whether article 17, which it has already adopted, should be amended by adding a reference to the protection of persons hors de combat. Certainly it seems that such persons should be respected by the civilian population. The Rapporteur believes that the proper place for this to be stated is article 17, rather than article 38 bis. A question was also raised whether article 38 bis should make clear that persons hors de combat who have not fallen into the power of an adverse party by the close of general hostilities remain entitled to the protections of article 38 bis. This question might arise, for example, with respect to wounded stragglers who find themselves behind enemy lines at the close of hostilities. It was the view of the Rapporteur that such persons would still be protected pursuant to article 3 (2) as adopted by Committee I. This question should, however, be brought to the attention of Committee I so that if it disagrees with this interpretation, it can consider amending article 3 accordingly.

Article 39

The discussions in the Working Group resulted in a significant narrowing of the scope of the draft article proposed by the ICRC. Whereas that proposal would have covered persons within aircraft descending in distress, the Working Group decided to limit the article to persons descending by parachute from aircraft in distress. This decision was taken in order to avoid the difficulties inherent in trying to protect aircraft which might or might not crash.

With respect to airmen descending by parachute, there were three principal problems: What should be done about paratroops? Does it matter who controls the territory into which the airman in question is descending? In what circumstances should the airman, once he is on the ground, be given an opportunity to surrender? The first was solved by explicitly excepting airborne troops from the protection of the article even if they are forced to leave their aircraft. The second problem is left for resolution by the Committee. A number of delegations stated that immunity from attack during descent would be unrealistic in a case where it were clear that the airman would return to his armed forces by landing in territory controlled by them or by an ally. Many other delegations argued, on the contrary, that an airman descending by parachute should be considered temporarily hors de combat for humanitarian reasons until he reaches the ground. This issue could not be resolved in the Working Group.

The third question, the opportunity to surrender, was resolved by limiting the provision to airmen who reach the ground in territory controlled by their enemy and by further restricting it by the phrase "unless it is apparent that he is engaging in a hostile act." The Working Group decided not to try to define what constitutes a hostile act, but there was considerable support for the view that an airman who is aware of the presence of enemy armed forces and tries to escape is engaging in a hostile act. On the other hand, merely moving in the direction of his own lines would not, by itself, mean that he should not be given an opportunity to surrender, for he may not know in which direction he is going or that he is visible to enemy armed forces.

Article 40

It will immediately be noticed that, whereas the ICRC draft dealt both with espionage and sabotage, the proposal by the Working Group confines itself to espionage. This change resulted from the relation of this article with articles 41 and 42. Since these latter articles are now so structured that a captured member of armed forces is or is not entitled to be a prisoner of war, depending upon his compliance with the standards of these articles, it was unnecessary to deal separately with sabotage. The Group noted that it would make no sense for a combatant to keep his right to PW status if he killed people, but lose it if he destroyed property.

The case of a spy, however, was recognized to be different, and paragraph 1 was designed to state the general rule that, notwithstanding any other provision, a member of armed forces captured while engaging in espionage has no right to be a PW and may be treated as a spy.

Paragraph 2 is designed to make clear that a member of the armed forces cannot, under any conditions, be considered a spy if he is acting in the uniform of his armed forces. There was no intent to define what constitutes a uniform. The paragraph refers to territory controlled by the enemy, as that is the only place this question could arise. The Working Group expressed no intention to change the law regarding espionage as set out in articles 29, 30 and 31 of the 1907 Hague Regulations.

Paragraph 3 developed slowly in the Working Group, as there was gradual recognition of the fact that a special rule was needed to protect residents of occupied territory. These persons will almost necessarily in their everyday life come across information of value to the armed forces to which they belong, and this should not make them spies or serve as a pretext for denying them protection as prisoners of war. On the other hand, it was agreed that, if they disguised themselves in order to gain access to secret information or in other ways used false pretences or deliberate clandestine acts in order to obtain such information, they would be spies. For example, the resident who observes military movements while walking along the street or who takes photographs from his residence would not be engaged in espionage; whereas the resident who uses a forged pass to enter a military base or who, if lawfully on the base, illegally brings a camera with him, would be engaging in espionage.

A second limitation on the vulnerability of residents of occupied territory to be treated as spies is contained in the last sentence of paragraph 3. Whereas the spy who enters enemy territory in order to gather information remains vulnerable to punishment as a spy until he has left such territory and rejoined his own forces (a rule restated in paragraph 4), the spy who is a resident

of occupied territory may be considered as rejoining his forces whenever he ceases to engage in espionage. Although no attempt has been made by the Working Group to define more precisely when a resident may be considered as engaging in espionage, several delegates suggested that each act of espionage would end when the information obtained had been transmitted by the spy to his armed forces. This approach was commended, as it would reduce the possibility that an occupying power could improperly deprive captured members of underground armed forces of their rights to be prisoners of war by asserting that they were captured while engaging in espionage.

There is, of course, a question of who is to be considered to be a "resident" of occupied territory. The Working Group devoted little attention to this question, but several delegations expressed the view that the term should be limited to "usual" or "ordinary" residents, that is, excluding anyone who was sent into the territory in order to engage in espionage. Whether it would exclude someone sent in to engage in hostilities, rather than to spy, is less certain, and it would seem that the burdens of proof in such cases might prove insuperable.

Finally, the Rapporteur wishes to point out that, as a result of the changed composition of articles 40, 41 and 42, it would be advisable for the Drafting Committee to consider whether article 40 might not be better placed immediately following article 42.

Article 41

The Working Group decided to expand the concept of the ICRC draft article 41 to cover not only the requirements of organization and discipline, but also the definition of armed forces, the definition of those who have a right to be combatants, and the possibility of incorporating police forces into the armed forces. The resulting text is relatively clear and requires little explanation. It should, however, be noted that the term "members of the armed forces" is all-inclusive and includes both combatants and noncombatants and that, as elsewhere in the Protocol, the term "party to a conflict" includes national liberation movements, by virtue of article 1, paragraph 2, of the Protocol.

The Drafting Committee should note that the last sentence of paragraph 1 of this article sets forth at least a partial definition of the phrase, "the rules of international law applicable in armed conflict". This phrase occurs in a number of articles, and it might be well if it could be defined in article 2 of the Protocol. In that event, the Drafting Committee could delete the last sentence of paragraph 1 of article 41.

With respect to the requirement of notification of incorporation of police forces, the Working Group recognized that, where a State has a law providing for the automatic incorporation of such forces into its armed forces in time of war, the notice requirement may be satisfied by notification to all Parties to the Protocol, through the depositary.

Article 42 bis

This article, which was first proposed by a number of countries as an amendment (CDDH/III/260) is designed to ensure a minimum level of protection to every person who takes part in hostilities and is captured. First, it establishes procedural protection of two kinds. Paragraph 1 creates a presumption that such person is a prisoner of war if he claims such status, if he appears entitled to it, or if his armed forces claim it for him. It also follows article 5 of the Third Convention in stating that, should any doubt arise, he must be treated as a PW unless and until a competent tribunal determines otherwise. As in the case of article 5, such a tribunal may be administrative in nature.

In paragraph 2 a new procedural right is established for persons who are not considered prisoners of war and who are to be tried for a criminal offense arising out of the hostilities. Such persons are given the right to assert their entitlement to prisoner of war status and to have that question adjudicated de novo by a judicial tribunal, without regard to any decision reached pursuant to paragraph 1. In view of the great differences in national judicial procedures, it was not thought possible to establish a firm rule that this question must be decided before the trial for the offense, but it should be so decided if at all possible, because on it depend the whole array of procedural protections accorded to prisoners of war by the Third Convention, and the issue may go to the jurisdiction of the tribunal. The judicial tribunal may be either the same one that tries the offence or another one. It may be either a civilian or military tribunal, the term "judicial" meaning merely a criminal tribunal offering the normal guarantees of judicial procedure. It should be noted that the provisions on the right of the representative of the protecting power to attend the proceedings is copied from article 105 of the Third Convention.

The Drafting Committee may wish to consider whether paragraph 2 of this article belongs more appropriately in this article or in article 65. The Drafting Committee may also be able to bring to the usage of terms such as "such person", "a person", "he", or "he or she" more uniformity of use than the Working Group was able to accomplish.

Finally, it should be noted in connection with paragraph 1 that a failure of a prisoner to claim the status of prisoner of war cannot properly be taken, by itself, as determinative of his lack of entitlement to PW status. The Working Group has no intention of derogating in any way from article 7 of the Third Convention.

Geneva, 21 April - 11 June 1976

REPORT TO COMMITTEE III ON
THE WORK OF THE WORKING GROUP
SUBMITTED BY THE RAPPORTEUR

The Working Group agreed to submit to the Committee the texts set forth in the following documents:

Article 20	CDDH/III/346
Article 20 <u>bis</u>	CDDH/III/347
Article 21	CDDH/III/348
Article 22	CDDH/III/349
Article 22 <u>bis</u>	CDDH/III/350
Article 23	CDDH/III/351
Article 27	CDDH/III/352

As with the reports by the Rapporteur in previous sessions, this report has not been approved by the Working Group and should be understood simply as the report of the Rapporteur on the work of the Group.

The comments by the Rapporteur concerning the deliberations of the Working Group with respect to each of these Articles are the following:

DRAFT REPORTArticle 20

This article is identical, with several small drafting changes, to article 33 of Protocol I, which was adopted by Committee III on 10 April 1975. The introductory language of the article was amended to refer to "any armed conflict to which this Protocol applies" in order to limit its scope of application to the armed conflicts referred to in article 1 of this Protocol. A mere reference to "any armed conflict" might have been subject to the interpretation that a Party to Protocol II had undertaken obligations with respect to international conflicts, as well as non-international ones. The word "combat" was substituted for the word "warfare," which had appeared in article 33, because it was thought inappropriate to refer to "warfare" in the context of an instrument on non-international armed conflicts.

An article 28 bis on the protection of the natural environment in non-international conflicts, corresponding to paragraph 3 of article 33 of Protocol I, was adopted by Committee III on 10 April 1975. It was noted at that time that Article 28 bis might properly form part of article 20 (Report of Committee III, CDDH/215/Rev.1, p.66), but this matter may be left to the Drafting Committee.

DRAFT REPORT

Article 20 bis

A proposal was made in the Working Group that a new article be inserted in Part IV, in order to deal with the protection of cultural property along the lines of article 47 bis of Protocol I, which was adopted by Committee III on 25 February 1975. The text recommended by the Working Group is a modification of the amendment submitted by Greece and ten other Delegations (CDDH/III/GT/95) and conforms in general to the wording of article 47 bis, but without any reference to "reprisals," which is a term that apparently will not be used in Protocol II.

The reference to the Hague Convention of 1954 on the Protocol of Cultural Property in the Event of Armed Conflict is intended to point in particular to article 19 of that Convention, which deals with non-international armed conflicts.

Candor compels one to acknowledge that there is still a measure of disagreement on the effect of the modifying clause "which constitute the cultural heritage of peoples" on the term "places of worship". The views in the Working Group ranged from the position that any place of worship is a "cultural heritage of peoples" to the assertion that a place of worship is protected if and only if it is identifiable as specifically forming part of the "cultural heritage of peoples". Here cultural heterogeneity may be the key, for among some peoples any place of worship may be part of the cultural heritage, while among others only some places of worship may be so described. This difference of views is already implicit in article 47 bis, which has been adopted by Committee III, and the corresponding text in Protocol II cannot be expected to clarify the matter for both Protocols.

In response to specific inquiries from several Delegations, the Rapporteur asserted that he had no doubt that great religious centres like Mecca and Medina and the ancient mosques of Cairo were covered by the article. A few examples were given for only one faith, and the Rapporteur would be hesitant to carry the matter further by a specific enumeration of other places of worship forming part of the "cultural heritage of peoples".

DRAFT REPORTArticle 21

This article corresponds, with some drafting changes, to article 35 of Protocol I as adopted by Committee III on 31 May 1976.

There was a sharp difference between two camps in the Working Group. Some thought that perfidious conduct might be encountered in non-international armed conflicts in much the same way as in international armed conflicts, and that it would be unwise to imply that acts that are unlawful in international armed conflicts are legitimate in non-international armed conflicts. There might be attempts at treachery under cover of a flag of truce or by the misuse of the United Nations sign or through feigning of incapacitation or of non-combatant status. Others were of the view that the provision should be deleted in whole or in part. In their view, the prohibition of killing or capture through perfidy might imply that it is lawful for those directing armed force against the authorities in power to kill or to capture. This seemed particularly inappropriate when police, for example, were being used to put down insurrectionary activity. Moreover, the prohibitions against perfidy in Protocol I gave effect to certain specific prohibitions in Protocol I which had no analogies in Protocol II.

It being impossible to reconcile these differences, a text was submitted to the Committee which did not reflect a consensus in the Working Group. A number of delegations maintain their view that this article should be completely deleted from Protocol II.

The Delegation of the Syrian Arab Republic specifically requested that its position that subparagraph 1(c) should be eliminated or bracketed be recorded.

The reference in paragraph 1 to "this Protocol or any other applicable rule of international law" came in response to the suggestion that a specific reference be made to the international law applicable in non-international armed conflicts. It went without saying that this Protocol would apply, but the Working Group could find no agreement on precisely what other rules of conventional or customary international law might apply in non-international conflicts. The formula of "any other applicable rule" seemed to offer a way out, which left the question unresolved.

In subparagraph 1(d) the reference to "neutral signs, or uniforms," found in the corresponding paragraph of article 35, was dropped because of the unlikelihood that the problem would arise. Only isolated individuals, such as military attachés, might be expected to wear the uniforms of a third state. Situations in which many persons were in the uniforms of a foreign state might arise when foreign forces were participating in the conflict, under such circumstances, their presence would convert the conflict into an international one.

In paragraph 2, the reference to "ruses of war" was changed to "ruses" in order to avoid the use of the term "war" in connexion with non-international armed conflicts.

DRAFT REPORT

Article 22

This text is identical to that of article 38 of Protocol I,
as adopted by Committee III on 31 May 1976.

DRAFT REPORT

Article 22 bis

This text is identical to that of article 38 bis of Protocol I, as adopted by Committee III on 31 May 1976, with the exception that paragraph 3, dealing with the release of prisoners of war who have fallen into the hands of an adverse party under unusual conditions, has been deleted. The matter has already been dealt with in article 8, paragraph 5, which was adopted by the First Committee on 11 April 1975.

Article 22 bis deals with the same subject matter as article 7 of Protocol II, as originally put forward by the International Committee of the Red Cross. With the approval of the Chairman of Committee I, the Working Group took up this article and decided to make no changes in the text for article 38 bis already adopted in Committee III, with the exception noted above. It will be left to the Drafting Committee to decide whether the article, if adopted by the Committee, will be inserted where it now stands relative to other articles or will be moved to the space left for article 7.

DRAFT REPORTArticle 23

This text is identical to that of article 36 of Protocol I, adopted by Committee III on 10 April 1975.

There was some discussion of whether it would be wise to include a reference to "the protective emblem of cultural property". In view of the inclusion of a new article 20 bis on the protection of cultural property, it seems appropriate to include some reference to the protective emblem of cultural property which may be employed during a non-international armed conflict to which article 19 of the Hague Convention of 1954 on the Protection of Cultural Property applies. The distinctive emblem of cultural property described in article 16 of that Convention may be expected to be employed in those non-international armed conflicts taking place in the territory of a State which is a Party to the Hague Convention. In that event, it would be important that neither the authorities in power nor those fighting against the authorities in power should misuse the emblem.

The obligation with respect to the "protective emblem of cultural property" is thus qualified by the language "whenever applicable"; in certain cases the State in which the internal armed conflict is taking place may not be bound by any rule authorizing the use of the protective emblem in internal armed conflicts.

DRAFT REPORT

Article 27

This text corresponds to, but differs from, that of article 48 of Protocol I, which was adopted by Committee III on 14 March 1975.

The predominant view in the Working Group was that there should be a shorter form of the text of article 48. The text submitted to the Committee merges paragraphs 1 and 2 of article 48 and forbids attacks, destruction, removal, or the rendering useless of certain designated objects which have as their purpose the starvation of civilians in a non-international armed conflict. It is thought that this formulation preserves the essence of article 48.

The reference to reprisals contained in paragraph 4 of article 48 of Protocol I has been deleted on the understanding that when work on the articles of Protocol II falling within the responsibility of Committee III has been completed, the Working Group will make proposals to the Committee about what provisions "shall not, in any circumstances or for any reason whatsoever, be violated, even in response to a violation of the provisions of the Protocol", according to the proposal about "reprisals" in Protocol II made to Committee I by its Working Group B on "Reprisals" (CDDH/I/320).

The term "combat" was substituted for "warfare", as in article 20.

FOURTH SESSION

(Geneva, 17 March - 10 June 1977)

COMMITTEE III

REPORT

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COMMITTEE III

REPORT

I. INTRODUCTION

A. OFFICERS OF THE COMMITTEE, SECRETARIAT, EXPERTS

1. Officers of the Committee

Chairman: Mr. H. Sultan (Egypt)
Vice-Chairmen: Mr. G. Herczegh (Hungary)
Mr. D. Erdembileg (Mongolia)
Rapporteur: Mr. G. Aldrich (United States of America)

2. The Legal Secretaries of the Committée were

Miss A.M. Birchler
Mr. B. Gianoli

3. The International Committee of the Red Cross (ICRC) was represented by Mr. Jean Pictet, Mr. J-J. Surbeck and Mr. M. Veuthey.

B. MEETINGS AND ORGANIZATION OF WORK

4. Committee III held seven meetings between 15 April 1977 and 13 May 1977 (CDDH/III/SR.54 to SR.60). During the same period a Working Group under the chairmanship of the Rapporteur held twenty-two meetings.

5. Committee III was entrusted with the consideration of certain articles of the draft additional Protocols to the Geneva Conventions of 12 August 1949 (CDDH/1). The articles referred to Committee III were as follows (see CDDH/4/Rev.1, p.8):

	<u>Draft Protocol I</u>	<u>Draft Protocol II</u>
General protection against effects of hostilities	Articles 43-53	Articles 24-29
Methods and means of combat	Articles 33-41	Articles 20-23
New category of prisoners of war	Article 42	
Treatment of persons in the power of a Party to the conflict	Articles 63-69	Article 32

6. By the end of the third session (report of Committee III, CDDH/236/Rev.1), the following articles had been adopted by Committee III:

Draft Protocol I

Articles 33-38
 New Article 38 bis
 Articles 39-41
 New Article 42 bis
 Articles 43-47
 New Article 47 bis
 Article 48
 New Article 48 bis
 Articles 49-53
 Article 64 bis

Draft Protocol II

Article 20
 New Article 20 bis
 Article 22
 New Article 22 bis
 Articles 23-26
 New Article 26 bis
 Articles 27 and 28
 New Article 28 bis
 Article 29

7. Accordingly, the articles remaining for consideration by the Committee at the fourth session were:

Draft Protocol I

Article 42
 New Article 42 ter
 New Article 42 quater
 (Mercenaries)
 Articles 63 and 64
 Articles 65-69

Draft Protocol II

Article 21
 Article 32

8. The Committee continued to follow the same procedure with respect to the consideration of articles as was described in paragraphs 10 to 12 of its report at the second session (CDDH/215/Rev.1).

9. The proceedings of the Working Group are reported upon by the Rapporteur in documents CDDH/III/369 and Corr.1 and CDDH/III/391.

10. The Working Group submitted to the Committee the texts set forth in the following documents:

Draft Protocol I

Article 37	CDDH/III/383
Article 39	CDDH/III/382
New Article on Mercenaries	CDDH/III/363
Article 46	CDDH/III/384
Article 47 <u>bis</u>	CDDH/III/385/Rev.1
Article 49, paragraph 7 and annex	CDDH/III/378

Draft Protocol I (continued)

Article 63	CDDH/III/368
Article 64	CDDH/III/367
Article 65	CDDH/III/366
Article 66	CDDH/III/365
Article 67	CDDH/III/375
Article 68	CDDH/III/376
Article 69	CDDH/III/377

Draft Protocol II

Article 20 <u>bis</u>	CDDH/III/386/Rev.1
Article 21	CDDH/III/381
Article 26, paragraphs 6 and 7	CDDH/III/387
Article 26 <u>bis</u>	CDDH/III/388
Article 28	CDDH/III/379 and Corr.1 and CDDH/III/390
Article 29, paragraph 3	CDDH/III/389
Article 32	CDDH/III/380

11. The Committee adopted the twenty-two articles which are discussed in the following section.

12. Several proposals for articles that were before the Committee failed, for various reasons, to be adopted. First, a proposal concerning "General principles for the protection of oil and of installations for its extraction, storage, transport and refining" (CDDH/III/GT/62/Rev.1) was withdrawn by its sponsors. Second, the proposal for a new Article 42 ter (CDDH/III/254) was withdrawn by its sponsor in view of the adoption by the Committee of Article 65, paragraph 7. Third, the proposal for a new article to precede Article 33 of draft Protocol I, dealing with the issue of aggression and non-discrimination (CDDH/III/284) was withdrawn by its sponsors in view of the action by Committee I in dealing with this issue in the draft Preamble to Protocol I. Fourth, the proposal for a new Article 65 bis (referred to in the report on Article 67 below) failed to achieve a consensus. Despite the fact that all delegations agreed with the principle of the proposal - that no person may be arrested, detained or interned solely because of his convictions - it proved impossible in the time available to work out an agreed text. Ultimately, the Committee agreed to record its consensus that this rule was implicit in Article 65, paragraph 1, as adopted by the Committee.

13. Finally, mention should be made of a proposal inspired by Article 64 which would have extended certain protections to persons who were forced to flee their homes because of hostilities. Again, in the time available, it proved impossible to reach agreement on a text. A number of delegations stated that Article 65 already covered all such persons and that, unless they were a Party's own nationals, they were protected against that Party also by Part III of the fourth Geneva Convention of 1949. The

Committee suggests that the sponsors of this proposal may wish to continue their efforts as a matter of the law of refugees, in co-operation with the United Nations High Commissioner for Refugees, and outside of the specialized field of the laws of war.

II. REPORT ON ARTICLES ADOPTED BY THE COMMITTEE*

A. Draft Protocol I

Article 37 - Emblems of nationality

14. The Committee decided to reconsider and revise paragraph 3 of this article, which it had adopted at the second session (see CDDH/215/Rev.1, Annex) in order to avoid any possibility that the text could be interpreted as making a drastic and quite unintended change in the law of espionage. As the text was adopted by the Committee at the second session it was subject to the interpretation that it prohibited sending out a spy wearing the enemy's uniform. That was not the Committee's intention, but, if so interpreted, any officer who sent out such a spy and any officer who knew of such action and failed to stop it, could be accused of violating Article 37. Since the sending of spies has never been considered an unlawful act, this would be a drastic change in the law which should be avoided. Certainly it would be nonsensical to make the sending of a spy wearing the enemy's uniform unlawful, while the sending of a spy dressed in civilian clothes remained lawful. For these reasons the Committee, acting by consensus, amended Article 37, paragraph 3, which is a savings clause for the use of flags at sea, so as to refer as well to the law of espionage.

Article 39 - Occupants of aircraft

15. The Committee decided to reconsider and revise paragraph 1 of this article, which it had adopted at the third session (see CDDH/236/Rev.1, Annex I). As was noted in paragraph 29 of the report of Committee III on its work at the third session of the Conference (CDDH/236/Rev.1) some delegations suggested that the question of immunity from attack of airmen descending by parachute should be reconsidered at the fourth session. Although the Committee was not unanimous in its view, it decided by vote to reconsider the text and to amend it so as to prohibit attacks against airmen descending by parachute, regardless of which Party controlled the territory into which they descended. It was felt that an airman in this situation was temporarily hors de combat

* The texts of the adopted articles appear in Annex II to this report.

as effectively as if he were unconscious and that it would be inappropriate for a Protocol designed to expand humanitarian protections to authorize making him a legitimate object of attack while in that helpless position. It went without saying that any airman who, while descending, committed a hostile act, such as firing a weapon at those on the ground, forfeited his immunity from attack.

Article 42 - New category of prisoners of war

16. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/III/11	Pakistan (paragraph 1)
CDDH/III/73 and Add.1	Madagascar, South West Africa People's Organization (whole article)
CDDH/III/94	Poland (paragraphs 1 and 2 and new paragraphs 3 and 4)
CDDH/III/95	Finland (paragraph 1)
CDDH/III/209	Spain (paragraph 1)
CDDH/III/253	Democratic Republic of Viet Nam (whole article)
CDDH/III/256	Netherlands (whole article)
CDDH/III/257	United Kingdom of Great Britain and Northern Ireland, United States of America (whole article)
CDDH/III/258 and Add.1	Argentina, Nicaragua (title and whole article)
CDDH/III/259	Norway (title and whole article)
CDDH/III/324 and Corr.1	Ghana (new symbol of amendment CDDH/III/28)
CDDH/III/SR.5	Paragraph 6
CDDH/III/SR.6	Paragraph 20
CDDH/III/SR.10	Paragraphs 23, 29 and 30

CDDH/II/SR.19	paragraph 43
CDDH/III/SR.27	paragraphs 58, 61 and 80
CDDH/III/SR.28	paragraphs 8, 9, 16, 18, 25, 29, 30, 33, 41, 50 and 53
CDDH/III/SR.30	paragraphs 28, 29, 32, 37, 42 and 48
CDDH/III/SR.33	paragraphs 7 to 76
CDDH/III/SR.34	paragraphs 1 to 93
CDDH/III/SR.35	paragraphs 1 to 83
CDDH/III/SR.36	paragraphs 1 to 46
CDDH/III/SR.38	paragraphs 57, 76 to 78
CDDH/III/286	Draft report of Committee III, second session, paragraph 16
CDDH/III/215/Rev.1	Report of Committee III, second session, paragraph 16
CDDH/III/361 and Add.2	Addendum to the draft report of Committee III
CDDH/III/362	Proposal by the Working Group
CDDH/III/SR.47	paragraphs 45, 49 and 60
CDDH/III/SR.48	paragraphs 3 and 7
CDDH/III/SR.50	paragraphs 1 to 31
CDDH/III/SR.51	paragraphs 1 to 13
CDDH/236/Rev.1	Report of Committee III, third session, paragraphs 83 to 94
CDDH/SR.33	paragraph 16

17. Work on this article consumed weeks at the third session but the Committee decided to defer it until the fourth session. (See the discussion of the debate on the article and the decision of the Committee at the third session in the report of that session - CDDH/236/Rev.1, paragraphs 83 to 94). Finally, without further debate in the Committee, the article was adopted by vote at the fifty-fifth meeting.

18. The explanation of votes on this article revealed a very large degree of consensus with respect to its meaning, which is scarcely surprising considering the extensive analysis and debate to which it had been subjected at the third session. In particular, various representatives noted with approval that the article restated the obligation of the guerrilla fighter to distinguish himself clearly from the civilian population, but limited that requirement to that part of the time in which he was conducting his military operations and accepted as an adequate minimum sign of distinction the carrying of arms openly. Those changes in the law were generally welcomed by representatives as better reflecting the realities of modern warfare in occupied territory and in wars of national liberation.

19. Several representatives also welcomed another change made by this article, namely the sanction for failure to comply with the requirements of distinction from the civilian population. With one narrow exception, the article makes the sanction for failure by a guerrilla to distinguish himself when required to do so to be merely trial and punishment for violation of the laws of war, not loss of combatant or prisoner-of-war status. The exception, which was the most difficult part of the article to negotiate, related to the guerrilla fighter who relied on his civilian attire and lack of distinction to take advantage of his adversary in preparing and launching an attack. That exception recognized that situations could occur in occupied territory and in wars of national liberation in which a guerrilla fighter could not distinguish himself throughout his military operations and still retain any chance of success. The article provides that, in such situations, such a fighter would retain his status as a combatant and, if captured, his right to be a prisoner of war, unless he failed to carry his arms openly both during an attack and during such time prior to the attack "as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack ...". Thus, in that extreme case, but in that case only, the sanction for failure to comply with the requirement of distinction is that the individual may be tried and punished for any crimes he has committed as a belligerent without privileges. Even then he must be given treatment in captivity equivalent in all respects to that to which prisoners of war are entitled.

20. The one question on which the explanations of vote revealed a clear difference of opinion was the meaning of the term "deployment". Some delegations stated that they understood it as meaning any movement toward a place from which an attack was to be launched. Other delegations stated that it included only a final movement to firing positions. Several delegations stated that they understood it as covering only the moments immediately prior to attack.

21. The statements of the representatives, while revealing some continuing reservations with respect to the article, showed a general satisfaction that it was the best attainable compromise and that it represented a major development in the law to make it conform more closely to reality, while at the same time giving the guerrilla fighter an incentive to distinguish himself from the civilian population where he reasonably could be expected to do so.

New article on mercenaries

22. This article, which was originally numbered 42 quater had been the subject of considerable debate at the third session of the Conference. For a summary of the divergent views expressed during that debate, see the report of Committee III, CDDH/236/Rev.1, paragraphs 95-108.

23. At the fourth session of the Conference a different approach was adopted in which the representative of Nigeria, who had originally introduced the proposal, undertook to conduct a series of private consultations with other interested representatives. That approach was so successful that the resultant draft (CDDH/III/GT/105) was approved by the Working Group of the Committee in a single meeting on April 21 with only a very few minor drafting changes and was adopted by the Committee at its fifty-seventh meeting by consensus. It is intended to be a new, separate article in Part III, Section II of draft Protocol I.

24. However, it should not be thought that all representatives were fully satisfied with the final text. A number of them said that they would have preferred a stronger text which would have required States to prohibit recruitment, training, assembly, and operation of mercenaries and to prohibit their citizens from enlisting as mercenaries. Several representatives said they wished the text could deal with the scope of responsibility, which they felt extended both to the mercenaries and to any groups or States that encouraged or allowed such activity. Several representatives also noted that they would have preferred a text that included another aspect in the definition of a mercenary - that the activities of mercenaries were directed to the frustration by armed violence of the process of self-determination.

25. Nevertheless, it was the general conclusion of the Committee that the text submitted was probably the best compromise possible at the time. It was pointed out that the text might be supplemented by regional agreements and national legislation. Recognizing that the determination of a person's status as a mercenary was likely to involve life or death consequences, the draft deliberately placed emphasis upon defining a mercenary in such a way as to reduce the risk that the article could be misused

to deny combatant and prisoner-of-war status to non-combatants and legitimate combatants. Thus, it excludes mere advisers by requiring that to be a mercenary, one must in fact, take a direct part in hostilities, that is, become a combatant, albeit an illegitimate one. The draft also excludes from any possibility of mercenary status all nationals of a Party to the conflict, all residents of territory controlled by a Party to the conflict, all members of the armed forces of a Party to the conflict, and all members of the armed forces of any State who are sent by that State. It goes without saying that this is limited to members of armed forces on active duty. It was felt that persons in such groups should not be placed at risk of being considered mercenaries.

26. Recognizing that some ranks and functions in armed forces are likely to be paid more than others, the draft, in paragraph 2 (c) provides an objective test to help determine motivations of persons serving with the armed forces of a Party to the conflict; such persons may not be considered to be motivated essentially by the desire for private gain unless they are promised compensation substantially in excess of that promised or paid to combatants of similar rank and function in the armed forces of that Party. Thus, pilots would be judged by the same standards of compensation as other pilots, not by the standard of infantrymen. Several representatives criticized this paragraph as providing a possible escape for some mercenaries.

27. Finally, although the proposed new article makes no reference to the fundamental protections of Article 65, it was understood by the Committee that mercenaries would be one of the groups entitled to the protections of that article which establishes minimum standards of treatment for persons not entitled to more favourable treatment under the Conventions and Protocol I.

Article 46 - Protection of the civilian population

28. The Committee decided by consensus to reconsider paragraph 5 (a) of this article and to amend it by inserting the adjective "similar" in order to modify the phrase "concentration of civilians". It was acknowledged that this was the intent of the Committee in adopting the sub-paragraph, and the Group agreed that this intent should be made explicit. By concentration of civilians is meant such a concentration as to be similar to a city, town, or village. Thus, a refugee camp or a column of refugees moving along a road would be examples of such a similar concentration. It seems desirable to clarify this point so that the term will not be misunderstood, for example, as implying ordinary rural areas.

Article 47 - General protection of civilian objects

29. The Committee decided by consensus to revise paragraph 3 of this article by adding the phrase "a place of worship", as an example of an object which was normally dedicated to civilian purposes. The change was made as a result of the deletion of the phrase "places of worship" in Article 47 bis.

Article 47 bis - Protection of cultural objects

30. The Committee decided by consensus to reconsider this article and to revise it by deleting all reference to places of worship. This was the only possible ground for compromise between those who wished the article to give special protection only to those objects which were part of the cultural heritage of mankind and those who could not agree to a text that covered some places of worship, and not others. An integral part of that compromise was the inclusion in Article 47 of specific reference to a place of worship as an example of an object normally dedicated to civilian purposes and therefore presumptively protected as a civilian object. The Committee did not, however, intend to exclude from the special protection of Article 47 bis those places of worship which qualified for protection either as historical monuments or as works of art.

Article 49 - Works and installations containing dangerous forces

31. When this article was adopted at the second session (see CDDH/215/Rev.1, Annex, p.53), blanks were left for subsequent determination of an appropriate sign to identify the objects protected by the articles. During the fourth session the Working Group of the Committee established a special Sub-Working Group, under the chairmanship of Mr. Mokhtar Shaaban of Egypt, to make recommendations concerning this sign. The report of that Sub-Working Group appears in Annex I to this report. The Committee approved the recommendations of the Sub-Group, and adopted the amendment to Article 49 and the Annex by consensus. The Committee recommends that the Drafting Committee decide whether the Annex to Protocol I will be a separate one or will be added to the existing annex, which deals with quite different subjects.

Article 63 - Field of application

32. The symbols of the amendments to the ICRC text and of the relevant documents are as follows:

CDDH/III/313	United States of America
CDDH/III/286	Draft report of Committee III, second session, paragraph 9
CDDH/215/Rev.1	Report of Committee III, second session, paragraph 9

CDDH/III/SR.42	paragraphs 2 to 17
CDDH/III/361	Draft report of Committee III, third session, paragraph 8
CDDH/236/Rev.1	Report of Committee III, third session, paragraph 8

33. The one amendment proposed to this article defining the scope of application of the Section was a precise proposal by the delegation of the United States of America (CDDH/III/313), which would have specified which articles in the Section applied to the whole of the populations of the Parties to a conflict and which applied only to persons in the power of a Party of which they were not nationals. The Committee decided, however, in the process of negotiating Article 65 that it would be desirable to be less specific. The precedent that quickly won favour with the Committee was that of Article 44, paragraph 3, which defined the scope of application of the Section dealing with the protection of the civilian population. Thus, in addition to reference to Parts I and III of the fourth Geneva Convention of 1949, reference was also made to "other applicable rules of international law relating to the protection of fundamental human rights during international armed conflicts."

Article 64 - Refugees and stateless persons

34. The symbols of the amendments to the ICRC text and of the relevant documents are as follows:

CDDH/III/306	Union of Soviet Socialist Republics (new paragraph)
CDDH/III/286	Draft report of Committee III, second session, paragraph 9
CDDH/215/Rev.1	Report of Committee III, second session, paragraph 9
CDDH/III/SR.42	paragraphs 18 to 56
CDDH/III/361	Draft report of Committee III, third session, paragraph 8
CDDH/236/Rev.1	Report of Committee III, third session, paragraph 8.

35. The only written amendment proposed to this article was an additional paragraph suggested by the delegation of the Union of Soviet Socialist Republics (CDDH/III/306) for the purpose of ensuring that States not parties to international refugee agreements would not indirectly through this Protocol, become bound by those agreements. This concern was met by a compromise that added to the ICRC text the phrase "accepted by the Parties concerned."

36. This compromise had been reached at the third session of the Conference, but the article remained under discussion at the fourth session because of an oral amendment proposed by the representative of the Syrian Arab Republic late in the third session that would have extended the scope of the article to persons who become refugees after the beginning of an armed conflict. The essence of that amendment was set forth in square brackets in document CDDH/III/GT/99 of 1 June 1976.

37. Upon further review of this problem at the fourth session, it was agreed that the problem raised by the representative of the Syrian Arab Republic was too complex to be settled in Article 64. The Working Group thus agreed to adopt this article as it stood at the end of the third session of the Conference and to consider further in private consultations what, if anything, should be done at the Conference to deal with the problem raised by the Syrian Arab Republic (see paragraph 13 above).

Article 65 - Fundamental guarantees

38. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/III/305	Democratic Republic of Viet Nam (paragraph 2 and new paragraph 3) (new symbol of amendment CDDH/I/226)
CDDH/III/307	Austria, Belgium (new sub-paragraph (<u>a</u>))
CDDH/III/308	Ireland (paragraph 2)
CDDH/III/310	Austria, Holy See (paragraph 1)
CDDH/III/311	Australia, Canada, Egypt, Ireland, Jordan, Saudi Arabia, Thailand, United States of America, Yugoslavia (paragraph 4)
CDDH/III/312	Australia, Egypt (paragraph 5)
CDDH/III/314	Australia, United States of America (paragraphs 1 and 2)

CDDH/III/315 and Add.1	Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Democratic People's Republic of Korea, Democratic Republic of Viet Nam, German Democratic Republic, Hungary, Mongolia, Poland, Republic of South Viet Nam, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics (new paragraph 6)
CDDH/III/316	Spain (paragraph 3) (new symbol of amendment CDDH/I/224).
CDDH/III/317	Netherlands, Switzerland (paragraph 3) (new symbol of amendment CDDH/I/225 and Add.1)
CDDH/III/318	Belgium (new paragraph 3) (new symbol of amendment CDDH/I/234)
CDDH/III/319	Finland (paragraph 1) (new symbol of amendment CDDH/III/99)
CDDH/III/320	Poland (paragraph 3) (new symbol of amendment CDDH/III/100)
CDDH/I/SR.9	paragraphs 1 and 4
CDDH/II/SR.10	paragraph 52
CDDH/II/SR.14	paragraph 49
CDDH/I/SR.21	paragraph 30
CDDH/II/SR.23	paragraph 21
CDDH/III/SR.24	paragraph 49
CDDH/II/SR.34	paragraph 55
CDDH/I/SR.32	paragraph 28
CDDH/III/SR.33	paragraphs 40, 48 and 49
CDDH/I/SR.33	paragraphs 34, 39, 61 and 71
CDDH/III/SR.34	paragraphs 11, 21 and 85
CDDH/III/SR.35	paragraphs 4 and 65
CDDH/III/SR.37	paragraphs 48 and 65

CDDH/III/286	Draft report of Committee III, second session, paragraph 9
CDDH/215/Rev.1	Report of Committee III, second session, paragraph 9
CDDH/III/SR.43	paragraphs 1 to 63, 67 to 105
CDDH/III/SR.44	paragraphs 1 to 53
CDDH/III/361	Draft report of Committee III, third session, paragraph 8
CDDH/236/Rev.1	Report of Committee III, third session, paragraph 8

39. Article 65, which is one of the most important in draft Protocol I, as it establishes minimum standards of humane treatment to be accorded persons who are not entitled to more favourable treatment under the Geneva Conventions or the Protocol, was the subject of thirteen formal amendments and many more informal proposals within the Working Group of the Committee. Not surprisingly, the consideration of this article occupied the greater part of the time of the Committee for two weeks, and that time doubtless would have been much greater if it had not been for the intensive and most helpful informal consultations in March and April 1977, which were led by the representative of Belgium, in close co-operation with the representatives of the Netherlands and Switzerland.

40. The Committee was also aided in its task by the somewhat similar work done at the third session of the Conference by Committee I with respect to draft Protocol II. As a matter of drafting, the Committee adopted the texts of those parts of Articles 6 and 10 of draft Protocol II which it decided to include in Article 65. The rule applied was that the same text would be used unless there was reason for changing it inherent in the differences between international and non-international armed conflicts.

41. Paragraph 1 of Article 65 was the last paragraph resolved because it raised a delicate question of whether the protections of the article were to be extended to a Party's own nationals. At an early stage it was decided that the scope of the article should be restricted to persons affected by the armed conflict and further restricted to the extent that the actions by a Party in whose power they are so affect them. This is the purpose of the introductory clause of the paragraph. Moreover, paragraphs 3 to 7 inclusive are further limited by their own terms to persons affected in specific ways, e.g., persons "arrested, detained, or interned for actions related to the armed conflict" (paragraph 3).

42. Nevertheless, the question of whether or not to specify one's own nationals as protected by the article remained contentious for many days. Ultimately a compromise was reached whereby reference was deleted to all examples of persons covered by the article, at which point the article was quickly approved by the Committee.

43. It should be noted that the Committee decided to avoid placing any adjectives in front of the word "convictions" in paragraph 1 so that all types of convictions would be covered, whether political, religious, or philosophical.

44. The Committee modified the ICRC text of paragraph 2 in a number of ways. For instance, the prohibition of torture is highlighted and is specified as covering all types of torture, whether physical or mental. This prohibition, coupled with the more general one of violence to life, health, or physical or mental well-being, was considered adequate to permit the deletion of reference to coercion, which a number of representatives thought too vague. Similarly, those prohibitions, coupled with the prohibition in paragraph 2 (e) of threats of such actions, were considered to encompass, and therefore to render unnecessary, a more specific proposal to prohibit intimidation, harassment, and threats by agents of an Occupying Power aimed at forcing the movement of individuals or portions of the civilian population.

45. The Committee decided to add a prohibition on "collective punishments" (paragraph 2 (d)) to the list of prohibited acts because of concern that such punishments might be imposed otherwise than judicially, in which event they might not be covered by paragraph 4 (b).

46. Paragraph 3 was added to the ICRC text pursuant to a proposal by the representative of Belgium to cover the period of arrest prior to that dealt with in the judicial safeguards of paragraph 4. Several representatives wished to have it noted for the record that the final phrase of that paragraph could not legitimately be used as a pretext for negating the requirement of release "with the minimum delay possible."

47. Paragraph 4 is modelled on Article 10 of draft Protocol II. However, for reasons inherent in the differences between international and non-international armed conflicts, paragraph 4 (c) was amended to include a reference to the national or international law to which a person was subject. Several representatives suggested that the introductory clause of the paragraph was unclear in that it seemed to speak of a person being found guilty prior to his conviction. The Committee believes the Drafting Committee may wish to re-examine this introductory language, along with the similar language of Article 10 of draft Protocol II, and see if it can find a clearer formulation.

48. There were certain other points made with respect to paragraph 4 that should be noted. First, in connexion with sub-paragraph (e), it was understood that persistent misconduct by a defendant could justify his banishment from the courtroom. Second, sub-paragraph (g) is so worded as to be consistent both with the cross-examination of witnesses and with the inquisitorial system in which the judge alone conducts the examination. Third, the provision on ne bis in idem, (paragraph 4 (h)) is drawn from the United Nations International Covenant on Civil and Political Rights (General Assembly resolution 2201 (XXI)) and is so drafted as to pose the minimum difficulties to States in an area where practice varies widely. Finally, it should be noted that paragraph 4 (i) is so written as to permit a person to waive his right to public judgement, e.g., a juvenile offender where publicity is undesirable.

Article 66 - Objects indispensable to the survival
of the civilian population

49. Once Committee III adopted Article 48 at the second session, the ICRC text proposed for Article 66 became out of date. The Committee decided, however, that this article provided a useful occasion to clarify the scope of application, not only of Article 48, but also of all articles restricting or prohibiting attacks.

50. Paragraph 1 of the text, which was taken from an amendment proposed in document CDDH/III/261, proved relatively non-controversial, although one representative stated that he would have preferred that it not restrict attacks by a party within such part of its territory as might be controlled by its adversary. The overwhelming view in the Committee, however, was that a régime of reciprocity must prevail and that it could not be expected that restraints on attacks would be effective if they did not bind both sides.

51. Paragraph 2 proved relatively easy to agree upon once it was phrased in terms that recognized the vital requirements of a state defending its national territory against invasion. The Committee generally considered that it would be impossible to prohibit completely the conduct of a scorched earth policy where the armed forces of a State were being forced to retreat within the national territory of that State, and the best protection on which agreement was possible was to permit derogation from the rules of Article 48, paragraph 2 only where required by imperative military necessity. Several representatives expressed dissatisfaction with that standard because of its apparent anti-humanitarian implications, but it was generally regarded as the most demanding standard that would be acceptable.

52. It should be noted that the term "control" in both paragraphs refers to areas of de facto control. In paragraph 1 it is the area under control of the Occupying Power, and in paragraph 2 it is the area of national territory remaining under the de facto control of the lawful sovereign. It goes without saying that the Occupying Power may not treat the occupied territory as if it were its national territory.

53. The Committee leaves to the Drafting Committee the final decision on the proper place for the provisions of Article 66 to appear, but the Rapporteur suggests that the Drafting Committee consider whether paragraph 1 might not appropriately be added to the definition of the term "attacks" in Article 44, paragraph 2 and Article 48, paragraph 2.

Article 67 - Protection of women

54. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/III/321	German Democratic Republic (paragraph 2) (new symbol of amendment CDDH/III/86)
CDDH/III/322	Poland (paragraph 2) (new symbol of amendment CDDH/III/102)
CDDH/III/323	Democratic Republic of Viet Nam (paragraph 1) (new symbol of amendment CDDH/I/227)
CDDH/II/SR.4	paragraphs 13, 23 and 28
CDDH/II/SR.23	paragraph 21
CDDH/III/286	Draft report of Committee III, second session, paragraph 9
CDDH/215/Rev.1	Report of Committee III, second session, paragraph 9
CDDH/III/SR.44	paragraphs 54 to 79
CDDH/III/361	Draft report of Committee III, third session, paragraph 8
CDDH/236/Rev.1	Report of Committee III, third session, paragraph 8

55. Although the Committee quickly accepted paragraph 1 of the ICRC draft, this article proved surprisingly difficult to complete. Paragraph 2 was added to ensure the quickest possible release from detention of pregnant women and mothers of infants, but there was prolonged discussion of a proposed addition to that paragraph which

would have precluded arrest or detention solely because of the convictions held by such a woman. Ultimately it was agreed to delete that sentence so as to avoid any negative implication that other persons could legitimately be arrested or confined solely because of their convictions and to attempt to deal with the question as one applicable to all persons in a new Article 65 bis (see paragraph 12 above).

56. After some discussion, the Committee decided to heed the experience of Committee I in dealing with comparable provisions in draft Protocol II in which that Committee had been unable to reach agreement on an age when infants no longer are dependent on their mothers. It was recognized that this might differ from case to case and from culture to culture. The Committee also decided not to use the term "nursing mothers", but rather the broader term "mothers of infants on whom the infants are dependent". A proposal to add protection for aged persons responsible for the care of children was considered but failed to achieve consensus.

57. Paragraph 3, dealing with the death penalty, also proved complex. There was no great difficulty with prohibiting the execution of pregnant women, but considerable conflict with national laws and traditions arose when it was proposed to extend that prohibition to mothers of infants and to prohibit also pronouncement of the death penalty on such persons. Proposals to suspend execution for a time were found unacceptable by a number of delegations on the grounds of inhumanity. The resultant compromise is reflected in paragraph 3. Ultimately, Article 67 was adopted by consensus.

Article 68 - Protection of children

58. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/III/304	Democratic Republic of Viet Nam (paragraph 1)
CDDH/III/324	Ghana (paragraph 1) (new symbol of amendment CDDH/III/28)
CDDH/III/325	Brazil (paragraphs 2 and 3) (new symbol of amendment CDDH/I/300)
CDDH/II/SR.4	paragraphs 13 and 23
CDDH/II/SR.9	paragraph 24
CDDH/II/SR.23	paragraph 21
CDDH/III/286	Draft report of Committee III, second session, paragraph 9

CDDH/215/Rev.1	Report of Committee III, second session, paragraph 9
CDDH/III/SR.45	paragraphs 3 to 40
CDDH/III/361	Draft report of Committee III, third session, paragraph 8
CDDH/236/Rev.1	Report of Committee III, third session, paragraph 8

59. Article 68 was the subject of discussion in the Committee for one week. The final text was a compromise in many respects and was not completely satisfactory to a number of representatives. Nevertheless, it was adopted by consensus.

60. In paragraph 1, the phrase "any other reason" was included to cover possible problems not resulting solely from age, such as the state of health, mental retardation, etc.

61. Paragraph 2 reflects a compromise in which a flat ban on recruiting children under fifteen years of age is coupled with a more flexible restriction, on the acceptance of voluntary services, i.e., to "take all feasible measures" to prevent them taking a direct part in hostilities. The Committee recognized that sometimes, particularly in occupied territories and in wars of national liberation, a total prohibition on the voluntary participation of children under fifteen years of age would be unrealistic. The final sentence of paragraph 2 was also part of the compromise with those who wished a higher age limit on recruitment.

62. With respect to paragraph 3, it should be noted that prisoner-of-war status cannot be denied on the grounds of age but that, whether a child under fifteen years of age is or is not a prisoner of war, he should continue to benefit from the special protection accorded by Article 68.

63. It should also be noted that the Committee decided not to place specific age limits in paragraphs 1 and 4 and that there is no precise definition of the term "children". Whether persons of sixteen, seventeen or eighteen years of age would thus have to be detained separately from adults is left to national law, traditions, and the decision of the Parties to a conflict who, it is expected, will act in the light of the purposes of Article 68.

64. With respect to paragraph 5, the age of eighteen was used in order to conform to the provisions of Article 10, paragraph 4 of draft Protocol II. One representative asked that the operative word in that paragraph as recommended by the Working Group - the word "pronounced" - be changed to "executed". He

explained that his country's law did not permit the prohibition of pronouncement but that it could accept a prohibition of execution. The Committee felt that this change would not, in the terms of paragraph 5 have significant consequences and therefore was willing to accept the change. Either Committee I or the Drafting Committee may wish to reconsider the prior decision on Article 10, paragraph 4.

65. One representative wished to have it noted in the report that he would have preferred to add a new paragraph 6 prohibiting any penal prosecution and punishment of a child who was not old enough at the time the offence was committed to understand the implications of his acts. The Committee recognized that it was a principle of general international law that no person could be convicted of a criminal offence if, at the time the offence was committed, he was unable to understand the consequences of his act. The Committee, nevertheless, decided that the application of this principle should be left to national legislation.

Article 69 - Evacuation of children

66. Article 69 was adopted by consensus. The changes made in the original ICRC text are largely self-explanatory. The one formal amendment (CDDH/III/326) was accepted. It should be noted, however, that the limitation to evacuation for compelling reasons of health or medical treatment where the evacuation is to be from occupied territory reflects a deep-seated concern among many representatives in the Committee that the dangers of Occupying Powers abusing their discretion are greater than the dangers of prohibiting evacuation for reasons of safety. Even the requirement of the consent of the Party of which the child was a national was considered inadequate. In the light of these concerns and the restrictive provisions of Article 49 of the fourth Geneva Convention of 1949, it was decided to be very cautious here in expanding the rights of an Occupying Power.

67. The list of items of information in paragraph 3 was expanded considerably, but it was recognized that all of the specified information will not always be available. Also, in rare cases the furnishing of an item of information, e.g., the child's religion, might be prejudicial to his safety, and the phrase, "whenever it involves no risk of harm to the child" was added to ensure that, in such a case the information would not be included.

B. Draft Protocol II

Article 20 bis - Protection of cultural objects

68. Article 20 bis was changed in the same way, and for the same reasons, as Article 47 bis of draft Protocol I (see paragraph 30 above).

Article 21 - Prohibition of perfidy

69. A text of this article was submitted to the Committee at the third session but was returned to the Working Group for further study (see CDDH/236/Rev.1, para. 65). Upon reconsideration at the fourth session, the Committee adopted a much simplified text. It should be noted that not all representatives supported even this reduced text, and the article was adopted by vote.

Reprisals in Protocol II - Articles 26, 26 bis, 28 and 29

70. When adopting each of these articles at the third session, the Committee either left a blank or a bracketed provision, pending a decision on the issue of prohibition of reprisals in draft Protocol II. Committee I is now facing this problem and clearly will resolve it by listing certain chapters or articles of draft Protocol II, or a combination thereof, that may not be violated even in response to violations by an adverse Party. Therefore, Committee III decided that there was no need for such provisions in any of the Protocol II articles adopted by it, and the blank paragraphs and bracketed material were deleted from the articles mentioned.

71. With respect to Article 26, the word "similar" was added to paragraph 5, in accordance with the decision on Article 46 of draft Protocol I (see paragraph 28 above).

72. With respect to Article 28, further changes were made in conformity with the report of the Sub-Working Group on the Special Sign for Works and Installations containing Dangerous Forces (Annex I to this report) to adopt the recommended special sign for these installations (see the discussion of Article 49 of draft Protocol I in paragraph 31 above).

Article 32 - Privileged treatment

73. The symbols of the amendments submitted to the ICRC text and of the relevant documents are as follows:

CDDH/III/309 and Add.1 and 2	Austria, Belgium, Egypt, Greece, Holy See, Nicaragua, Saudi Arabia, Uruguay (paragraph 2, new sub- paragraph (d))
CDDH/III/324	Ghana (paragraph 1) (new symbol of amendment CDDH/III/28)
CDDH/III/327	Romania (whole article) (new symbol of amendment CDDH/III/12)

CDDH/III/328	Brazil (paragraph 2 (e)) (new symbol of amendment CDDH/I/299)
CDDH/I/SR.32	paragraph 27
CDDH/II/SR.44	paragraph 12
CDDH/III/286	Draft report of Committee III, second session, paragraph 9
CDDH/215/Rev.1	Report of Committee III, second session, paragraph 9
CDDH/III/SR.46	paragraphs 1 to 29
CDDH/III/361	Draft report of Committee III, third session, paragraph 8
CDDH/236/Rev.1	Report of Committee III, third session, paragraph 8

74. Article 32, which covers some of the same ground as Articles 68 and 69 of draft Protocol I, proved relatively easy to modify and to accept. It was adopted by consensus. It should be noted that part of paragraph 1 of the ICRC draft was covered by Article 6 bis, as adopted by Committee I, and therefore was deleted from this article. The Committee believes that the Drafting Committee should consider adding Article 32 to Article 6 bis, or at least moving it to follow Article 6 bis.

III. ADOPTION OF THE REPORT OF COMMITTEE III

75. At its sixtieth meeting, on 13 May 1977, the Committee adopted this report, as amended, by consensus.

A N N E X E S

- I. Report of the Sub-Working Group on the special sign for works and installations containing dangerous forces
- II. Articles adopted by Committee III

ANNEX I

REPORT OF THE SUB-WORKING GROUP ON THE SPECIAL SIGN
FOR WORKS AND INSTALLATIONS CONTAINING DANGEROUS FORCES

Chairman: Mr. M. Shaaban (Egypt)

Members: Mr. J.C. Bowden (United States of America)
Mr. H.G.L. Wentholt (Netherlands)
Mr. K.F. Liko (Austria)
Mr. S. Roman (Chile)
Mr. R. Felber (German Democratic Republic)
Mr. P. Escribano Ruiz (Spain)
Mr. P. Eberlin, Technical Adviser (ICRC)

1. The Sub-Group held four meetings from 27 April to 29 April 1977. It reviewed different distinctive signs already adopted with respect to international protection, as well as several distinctive signs used for other purposes, with a view to avoiding any possibility of confusion.

2. The Sub-Group adopted the following guidelines:

- (a) The distinctive sign (emblem) must be as simple as possible.
- (b) It must be of no political or religious relevance whatsoever.
- (c) It must not be confused with any other distinctive sign (emblem) already in use.
- (d) It should be visible and distinguishable as such from all directions and from as far away as possible.
- (e) The choice of colour should be made according to available technical knowledge.

3. With respect to choice of colour, the Sub-Group received technical advice that a bright orange colour had proved to be clearly visible from relatively high altitudes.

4. Considerable debate was devoted to the design of the sign (emblem). Using the above adopted guidelines, many designs were considered by the Sub-Group and rejected in order to avoid confusion. Debate resulted in the following proposal:
"A group of three bright orange circles, of equal size, placed on the same axis" (see model in Fig. ...).

5. It was understood that the sign of three circles, when displayed over an extended surface, could be repeated as often as would appear appropriate.
6. The proposed sign has the advantage of not being liable to any change of shape, viewed from all possible directions.
7. It was agreed that the sign should be of one colour, i.e. bright orange, the background being in most cases the concrete itself (roofs, walls or slopes of installations and works). It could also be marked on roads situated on the top of dams, dikes and barrages, or simply on the earth in between or around the installations and works.
8. The Sub-Group emphasizes the importance of requiring that the sign should be made as large as possible.
9. It also considered the possibility of using flags bearing the sign. Particulars relating to the design of such flags are proposed.
10. With respect to formulation of detailed rules relative to description and use of the proposed sign, the Sub-Group recommends the following proposals:

PROPOSALS BY THE WORKING GROUP

Article 49, paragraph 7

7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis as specified in Annex Absence of such marking in no way relieves any Party to the conflict of its obligations under this article.

Articles to be inserted in Annex ... to
draft Additional Protocol I

Article ... - International special sign for works
and installations containing dangerous forces

1. The international special sign for works and installations containing dangerous forces, as provided for in Article 49, paragraph 7 of the present Protocol, shall be a group of three bright orange circles of equal size, placed on the same axis, the distance between each circle being one radius, in accordance with the model in Fig.
2. The sign when displayed over an extended surface may be repeated as often as it would be appropriate under the circumstances.

3. On a flag the distance between outer limits of the sign and adjacent sides of the flag shall be one radius of a circle. The background of the flag shall be white in colour and rectangular in form.

4. At night or when visibility is reduced, the sign may be lighted or illuminated. It may also be made of materials rendering it recognizable by technical means of detection.

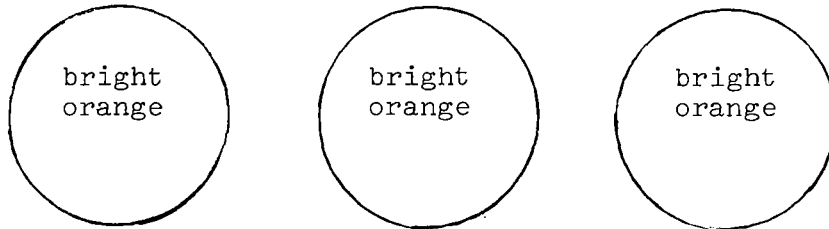


Fig. ... International special sign for works and installations containing dangerous forces.

Article ... - Use

1. The international special sign shall, whenever possible, be displayed on a flat surface or on flags visible from as many directions and from as far away as possible.
2. The sign shall be as large as appropriate under the circumstances.

ANNEX II

ARTICLES ADOPTED BY COMMITTEE III

ARTICLES OF DRAFT PROTOCOL I

ANNEX II

ARTICLES ADOPTED BY COMMITTEE III

ARTICLES OF DRAFT PROTOCOL I

Draft Protocol I

Part III - Methods and means of combat, Prisoner-of-war status

Section I - Methods and means of combat

Article 37 - Emblems of nationality*

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.
2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.
3. Nothing in this article or in Article 35, paragraph 1 (d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

* Adopted by consensus at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraph 14 of the present report.

Draft Protocol IPart III - Methods and means of combat, Prisoner-of-war statusSection I - Methods and means of combatArticle 39 - Occupants of aircraft*

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.
2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.
3. Airborne troops are not protected by this article.

* Adopted by 52 votes to 4 with 22 abstentions at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraph 15 of the present report.

Draft Protocol I

Part III - Methods and means of combat, Prisoner-of-war status

Section II - Prisoner-of-war status

Article 42 - New category of prisoners of war*

1. Any combatant, as defined in Article 41, who falls into the power of an adverse party shall be a prisoner of war.

2. While all combatants are obligated to comply with the rules of international law applicable in armed conflicts, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4 of this article.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obligated to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 35 (1) (c).

4. A combatant who falls into the power of an adverse party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded prisoners of war by the third Convention and this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the third Convention in the event such a person is tried and punished for any offences he has committed.

* Adopted by roll-call vote (66 votes to 2, with 18 abstentions) at the fifty-fifth meeting, 22 April 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraphs 16 to 21 of the present report.

5. Any combatant who falls into the power of an adverse party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the third Convention.

7. This article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to a conflict.

8. In addition to the categories of persons mentioned in Article 13 of the first and second Conventions, all members of the armed forces of a Party to a conflict, as defined in Article 41 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the second Convention, shipwrecked at sea or on other waters.

Draft Protocol I

Part III - Methods and means of combat, Prisoner-of-war status

Section II - Prisoner-of-war status

New Article on mercenaries*^{1/}

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
 - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) does, in fact, take a direct part in the hostilities;
 - (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; and
 - (e) is not a member of the armed forces of a Party to the conflict, or of any State and sent by that State.

* Adopted by consensus at the fifty-seventh meeting, 29 April 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraphs 22 to 27 of the present report.

^{1/} The Drafting Committee will decide where in the Protocol this article is to be inserted.

Draft Protocol IPart IV - Civilian populationSection I - General protection against effects of hostilitiesChapter II - Civilians and civilian populationArticle 46 - Protection of the civilian population*

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
 - (a) Those which are not directed at a specific military objective;
 - (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, of a nature to strike military objectives and civilians or civilian objects without distinction.
5. Among others, the following types of attacks are to be considered as indiscriminate:
 - (a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village, or other area containing a similar concentration of civilians or civilian objects; and
 - (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

* Adopted by consensus at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraph 28 of the present report.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 50.

Draft Protocol IPart IV - Civilian populationSection I - General protection against effects of hostilitiesChapter III - Civilian objectsArticle 47 - General protection of civilian objects*

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

* Adopted by consensus at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraph 29 of the present report.

Draft Protocol I

Part IV - Civilian population

Section I - General protection against effects of hostilities

Chapter III - Civilian objects

Article 47 bis - Protection of cultural objects*

Without prejudice to the provisions of The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

(a) To commit any acts of hostility directed against those historic monuments or works of art which constitute the cultural heritage of peoples;

(b) To use such historic monuments in support of the military effort;

(c) To make such objects the object of reprisals.

* Adopted by consensus at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraph 30 of the present report.

Draft Protocol IPart IV - Civilian populationSection I - General protection against effects of hostilitiesChapter III - Civilian objects

Article 49 - Works and installations containing
dangerous forces*
(paragraph 7)

7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis as specified in Annex ...^{1/}. Absence of such marking in no way relieves any Party to the conflict of its obligations under this article. ^{2/}

* Adopted by consensus at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraph 31 of the present report.

^{1/} To be determined by the Drafting Committee.

^{2/} For the text of the relevant articles to be inserted in Annex I to draft Protocol I, see page 55 of the present report.

Draft Protocol I

Part IV - Civilian population

Section III - Treatment of persons in the power of a Party
to the conflict

Chapter I - Field of application and protection of persons
and objects

Article 63 - Field of application*

The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.

* Adopted by consensus at the fifty-seventh meeting, 29 April 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraphs 32 and 33 of the present report.

Draft Protocol IPart IV - Civilian populationSection III - Treatment of persons in the power of a
Party to the conflictChapter I - Field of application and protection of
persons and objectsArticle 64 - Refugees and stateless persons*

Persons who, before the beginning of hostilities, were considered as being stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the fourth Convention, in all circumstances and without any adverse distinction.

* Adopted by consensus at the fifty-seventh meeting, 29 April 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraphs 34 to 37 of the present report.

Draft Protocol I

Part IV - Civilian population

Section III - Treatment of persons in the power of a
Party to the conflict

Chapter I - Field of application and protection of persons
and objects

Article 65 - Fundamental guarantees*

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely under all circumstances and shall enjoy, as a minimum, the protection provided by this article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

- (i) murder;
- (ii) torture of all kinds whether physical or mental;
- (iii) corporal punishment; and
- (iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

- (c) the taking of hostages;
- (d) collective punishments; and
- (e) threats to commit any of the foregoing acts.

* Adopted by consensus at the fifty-seventh meeting, 29 April 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraphs 38 to 48 of the present report.

3. Any person arrested, detained, or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for criminal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) No one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) Anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) Anyone charged with an offence shall have the right to be tried in his presence;

(f) No one shall be compelled to testify against himself or to confess guilt;

(g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) No one shall be prosecuted or punished for an offence in respect of which a final judgement has been previously pronounced under the same law and legal procedure of the Party acquitting or convicting that persons;

(i) Anyone prosecuted for an offence shall have the right to have his judgement pronounced publicly; and

(j) A convicted person shall be advised on conviction of his judicial and other remedies and of the time limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this article until their final release, repatriation, or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply;

(a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law, and

(b) Any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this article may be construed as limiting or infringing any other more favourable provision granting greater protection to persons covered by paragraph 1 under any applicable rules of international law.

Draft Protocol IPart IV - Civilian populationSection III - Treatment of persons in the power of a
Party to the conflictChapter I - Field of application and protection of persons
and objectsArticle 66 - Objects indispensable to the survival of
the civilian population*

1. The provisions of this Protocol with respect to attacks apply to all attacks wheresoever conducted, including the national territory belonging to a Party to the conflict but under the control of an adversary.
2. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 of Article 48 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

* Adopted by consensus at the fifty-seventh meeting, 29 April 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraphs 49 to 53 of the present report.

Draft Protocol I
Part IV - Civilian population
Section III - Treatment of persons in the power of a
Party to the conflict
Chapter II - Measures in favour of women and children

Article 67 - Protection of women*

1. Women shall be the object of special respect and shall be protected, in particular against rape, enforced prostitution and any other form of indecent assault.
2. Pregnant women and mothers of infants on whom the infants are dependent who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.
3. The death penalty for an offence related to the armed conflict shall not be executed on pregnant women or on mothers of infants on whom the infants are dependent. To the maximum extent feasible the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on such women.

* Adopted by consensus at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraphs 54 to 57 of the present report.

Draft Protocol IPart IV - Civilian populationSection III - Treatment of persons in the power of a
Party to the conflictChapter II - Measures in favour of women and childrenArticle 68 - Protection of children*

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require whether because of their age or for any other reason.
2. The Parties to the conflict shall take all feasible measures in order that children who have not reached fifteen years of age do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them in their armed forces. In recruiting among those persons who have reached fifteen years of age but who have not reached eighteen years of age, the Parties to the conflict shall endeavour to give priority to those who are oldest.
3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not reached fifteen years of age take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this article, whether they are prisoners of war or not.
4. If arrested, detained, or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except in cases of families accommodated as family units as foreseen in Article 65, paragraph 5.
5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not reached eighteen years of age at the time the offence was committed.

* Adopted by consensus at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraphs 58 to 65 of the present report.

Draft Protocol I

Part IV - Civilian population

Section III - Treatment of persons in the power of a
Party to the conflict

Chapter II - Measures in favour of women and children

Article 69 - Evacuation of children*

1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the child or, except in occupied territory, his safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuations of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, that is, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In all cases, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.

2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.

3. With a view to facilitating the return to their families and country of children evacuated pursuant to this article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall communicate to the Central Tracing Agency of the International Committee of the Red Cross. Each card shall bear, whenever possible, and whenever it involves no risk of harm to the child, the following information:

- (a) surname(s) of the child,
- (b) the child's first name(s),
- (c) the child's sex,
- (d) the place and date of birth (or, if that date is not known, the approximate age),

* Adopted by consensus at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraphs 66 and 67 of the present report.

- (e) the father's full name,
- (f) the mother's full name and her maiden name,
- (g) the child's next-of-kin,
- (h) the child's nationality,
- (i) the child's native language, and any other languages he speaks,
- (j) the address of the child's family,
- (k) any identification number for the child,
- (l) the child's state of health,
- (m) the child's blood group,
- (n) any distinguishing features,
- (o) the date on which and the place where the child was found,
- (p) the date on which and the place from where the child left the country,
- (q) the child's religion, if any,
- (r) the child's present address in the receiving country,
- (s) should the child die before his return, the date, place and circumstances of death and place of interment.

Annex to draft Protocol I

Article ...^{1/} - International special sign for works and installations containing dangerous forces*

1. The international special sign for works and installations containing dangerous forces, as provided for in Article 49, paragraph 7 of the present Protocol, shall be a group of three bright orange circles of equal size, placed on the same axis, the distance between each circle being one radius, in accordance with the model in Fig. ... ^{1/}.
2. The sign when displayed over an extended surface may be repeated as often as it would be appropriate under the circumstances.
3. On a flag the distance between outer limits of the sign and adjacent sides of the flag shall be one radius of a circle. The background of the flag shall be white in colour and rectangular in form.
4. At night or when visibility is reduced, the sign may be lighted or illuminated. It may also be made of materials rendering it recognizable by technical means of detection.

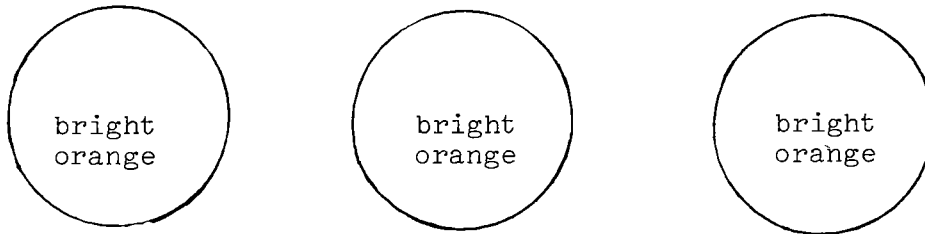


Fig. ...^{1/} - International special sign for works and installations containing dangerous forces

Article ...^{1/} - Use

1. The international special sign shall, whenever possible, be displayed on a flat surface or on flags visible from as many directions and from as far away as possible.
2. The sign shall be as large as appropriate under the circumstances.

* Adopted by consensus at the fifty-ninth meeting on 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraph 31 of the present report.

^{1/} To be determined by the Drafting Committee.

ARTICLES OF DRAFT PROTOCOL II

Draft Protocol II
Part IV - Methods and means of combat

Article 20 bis - Protection of cultural objects*

Without prejudice to the provisions of The Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against those historic monuments or works of art which constitute the cultural heritage of peoples, and to use them in support of the military effort.

* Adopted by consensus at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraph 68 of the present report.

Draft Protocol II

Part IV - Methods and means of combat

Article 21 - Prohibition of perfidy*

It is prohibited to kill, injure, or capture an adversary by resort to perfidy. Ruses are not prohibited.

* Adopted by 21 votes to 15 with 41 abstentions at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraph 69 of the present report.

Draft Protocol II
Part V - Civilian population
Chapter I - General protection against effects of hostilities

Article 26 - Protection of the civilian population*

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Chapter, unless and for such time as they take a direct part in hostilities.
4. The employment of methods or means of combat which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives, is prohibited.
5. An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects is to be considered as indiscriminate.
6. The Parties to the conflict shall not use the civilian population or civilians in order to attempt to shield military objectives from attacks.

* Adopted by consensus at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraphs 70 and 71 of the present report.

Draft Protocol II

Part V - Civilian population

Chapter I - General protection against effects of hostilities

Article 26 bis - General protection of civilian objects*

Civilian objects shall not be the object of attack. Attacks shall be limited strictly to those objects which by their nature, location, purpose or use make an effective contribution to the armed action of the Parties to the conflict.

* Adopted by consensus at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraph 70 of the present report.

Draft Protocol II
Part V - Civilian population
Chapter I - General protection against effects of hostilities

Article 28 - Protection of works and installations
containing dangerous forces*

1. Works or installations containing dangerous forces, namely dams, dikes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.
2. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, an armed guard may be placed over such works or installations without prejudice to the protection that they enjoy under paragraph 1.
3. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis as specified in Annex ...1/. Absence of such marking in no way relieves any Party to the conflict of its obligations under this article.

Articles to be inserted in Annex^{1/} ... to
draft Additional Protocol II

Article ^{1/}... - International special sign for works and
installations containing dangerous forces

1. The international special sign for works and installations containing dangerous forces, as provided for in Article 28, paragraph 3 of the present Protocol, shall be a group of three bright orange circles of equal size, placed on the same axis, the distance between each circle being one radius, in accordance with the model in Fig. ... 1/.
2. The sign when displayed over an extended surface may be repeated as often as it would be appropriate under the circumstances.

* Adopted by consensus at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraphs 70 and 72 of the present report.

1/ To be determined by the Drafting Committee.

3. On a flag the distance between outer limits of the sign and adjacent sides of the flag shall be one radius of a circle. The background of the flag shall be white in colour and rectangular in form.

4. At night or when visibility is reduced, the sign may be lighted or illuminated. It may also be made of materials rendering it recognizable by technical means of detection.

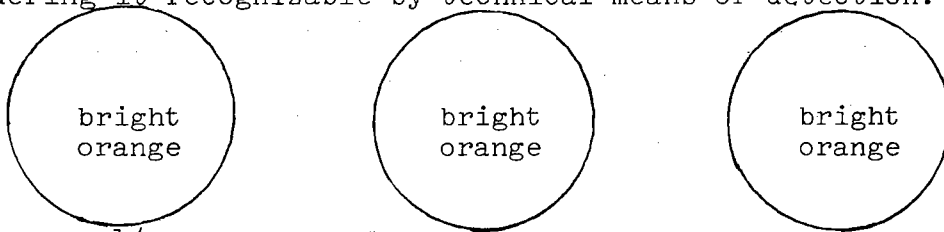


Fig. 1/...: International special sign for works and installations containing dangerous forces

Article 1/ ... - Use

1. The international special sign shall, whenever possible, be displayed on a flat surface or on flags visible from as many directions and from as far away as possible.

2. The sign shall be as large as appropriate under the circumstances.

1/ To be determined by the Drafting Committee.

Draft Protocol II

Part V - Civilian population

Chapter I - General protection against effects of hostilities

Article 29 - Prohibition of forced movement of civilians*

1. The displacement of the civilian population shall not be ordered by a Party to the conflict for reasons related to that conflict unless the security of the civilians involved or imperative military reasons so demand. Should a Party to the conflict effect such displacements it shall take all possible measures in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict except in the case in which individuals convicted by final judgement of crimes are required to leave that territory or, having been offered the opportunity of leaving the territory, elect to do so, or in the case of individuals extradited in conformity with law.

* Adopted by consensus at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraph 70 of the present report.

Draft Protocol II
Part V - Civilian population
Chapter III - Measures in favour of children

Article 32 - Privileged treatment*

1. The Parties to the conflict shall provide children with the care and aid they require, whether because of their age or for any other reason.
2. To this end, the Parties to the conflict shall, inter alia:
 - (a) endeavour to furnish children with a durable means of identification;
 - (b) take care that children who are orphaned or separated from their families as a result of armed conflict are not abandoned;
 - (c) take measures, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons entrusted to provide for their safety and well-being;
 - (d) take care that children who are orphaned or separated from their families as a result of the armed conflict receive an education, including religious and moral education, in keeping with the wishes of their parents, or, in the absence of parents, of those responsible for their care;
 - (e) take all appropriate steps to facilitate the reunion of families temporarily separated;
 - (f) take all feasible measures in order that children who have not reached fifteen years of age do not take a direct part in hostilities, and, in particular, to refrain from recruiting them in their armed forces; and
 - (g) continue to accord the special protection provided by this article to children who have not reached fifteen years of age and who, despite the provisions of sub-paragraph (e), have taken a direct part in hostilities and have fallen into the power of an adverse party.

* Adopted by consensus at the fifty-ninth meeting, 10 May 1977, in the following languages: Arabic, English, French, Russian and Spanish. See paragraphs 73 and 74 of this report.

Geneva, 17 March - 10 June 1977

REPORT TO COMMITTEE III ON
THE WORK OF THE WORKING GROUP
SUBMITTED BY THE RAPPORTEUR

The Working Group agreed to submit to the Committee the texts set forth in the following documents:

New Article on Mercenaries	(CDDH/III/363)
Article 63	(CDDH/III/368)
Article 64	(CDDH/III/367)
Article 65	(CDDH/III/366)
Article 66	(CDDH/III/365)

As with the reports by the Rapporteur in previous sessions, this report has not been approved by the Working Group and should be understood simply as the report of the Rapporteur on the work of the Group.

The comments by the Rapporteur concerning the deliberations of the Working Group with respect to each of these articles are the following:

Although there were some delegates who expressed reservations about some of the articles covered by this report, the Rapporteur believes that it should be possible for the Committee to adopt all of them by consensus. Naturally, the reservations, if they remain, will be reflected in explanations of vote, as well as in this report. *

* This page incorporates CDDH/III/369/Corr.1.

New ArticleMercenaries

This article, which was originally given the number 42 Quater, had been the subject of considerable debate at the third session of the Conference. For a summary of the divergent views expressed during that debate, see the Report of Committee III, CDDH/236/Rev.1, 31 December 1976, paragraphs 95-108.

At the fourth session of the Conference a different approach was adopted in which the delegate from Nigeria, who had originally introduced the proposal, undertook to conduct a series of private consultations with other interested delegates. This approach was so successful that the resulting draft (CDDH/KKK/GT/105) was approved by the Working Group in a single session on April 21 with only a very few minor changes in wording. It is intended to be a new, separate article in Part III, Section II of the Protocol. Only three delegates said that they could not support the final text (CDDH/III/363), and it seems probable that the Committee will be able to adopt it without objection, although with certain reservations stated in explanation of vote.

However, it should not be thought that all delegates were fully satisfied with the final text. A number of delegates said that they would have preferred a stronger text which would have required States to prohibit recruitment, training, assembly, and operation of mercenaries and to prohibit their citizens from enlisting as mercenaries. Several delegates said they wished the text could deal with the scope of responsibility, which they felt extended both to the individual mercenaries and to any groups or States that encourage or allow such activity. Several delegates also noted that they would have preferred a text that included another aspect in the definition of a mercenary - that the activities of mercenaries are directed to the frustration by armed violence of the process of self-determination.

Nevertheless, it was the general conclusion of the Working Group that the text presented was probably the best compromise possible at this time. It was pointed out that this text might be supplemented by regional agreements and national legislation. Recognizing that the determination of a person's status as a mercenary was likely to involve life or death consequences, the draft deliberately placed emphasis upon defining a mercenary in such a way as to reduce the risk that the article could be misused to deny combatant and prisoner-of-war status to non-combatants and legitimate combatants. Thus it excludes mere advisors by requiring that to be a mercenary, one must in fact, take a direct part in hostilities, that is, become a combatant, albeit an illegitimate one.

The draft also excludes from any possibility of mercenary status all nationals of a Party to the conflict, all residents of territory controlled by a Party to the conflict, all members of the armed forces of a Party to the conflict, and all members of the armed forces of any State who are sent by that State. It was felt that persons in these groups should not be placed at risk of being considered mercenaries.

Recognizing that some ranks and functions in armed forces are likely to be paid more than others, the draft, in paragraph 2(c) provides an objective test to help determine motivations of persons serving with the armed forces of a Party to the conflict; such persons may not be considered to be motivated essentially by the desire for private gain unless they are promised compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party. Thus, pilots would be judged by the same standards of compensation as other pilots, not by the standards of foot soldiers.

Finally, although the proposed new article makes no reference to the fundamental protections of Article 65, it was understood by the Working Group that mercenaries would be one of the groups entitled to the protections of Article 65, which establishes minimum standards of treatment for persons not entitled to more favourable treatment under the Conventions and the Protocol.

Article 63

The one amendment proposed to this article defining the scope of application of the Section was a precise proposal by the delegation of the United States of America (CDDH/III/313), which would have specified which articles in the Section applied to the whole of the populations of the Parties to a conflict and which applied only to persons in the power of a Party of which they were not nationals. The Working Group decided, however, in the process of negotiating Article 65 that it would be desirable to be less specific. The precedent that quickly won favour with the Working Group was that of Article 44, paragraph 3, which defined the scope of application of the Section dealing with the protection of the civilian population. Thus, in addition to reference to Parts I and III of the Fourth Convention, reference was also made to "other applicable rules of international law relating to the protection of fundamental human rights during international armed conflicts".

Article 64

The only written amendment proposed to this article was an additional paragraph suggested by the delegation of the Union of Soviet Socialist Republics (CDDH/III/306) for the purpose of ensuring that States not parties to international refugee agreements would not indirectly through this Protocol, become bound by those agreements. This concern was met by a compromise that added to the ICRC text the phrase "accepted by the Parties concerned".

This compromise had been reached at the third session of the Conference, but the article remained under discussion in the fourth session because of an oral amendment proposed by the delegate of Syria late in the third session that would have extended the scope of the article to persons who become refugees after the beginning of an armed conflict. The essence of this amendment was set forth in square brackets in document CDDH/III/GT/99 of June 1976.

Upon further review of this problem during the fourth session, it was agreed that the problem raised by the Syrian delegate was too complex to be settled in this article. The Working Group thus agreed to adopt this article as it stood at the end of the third session of the Conference and to consider further in private consultations what, if anything, could be done at this Conference to address the problem raised by Syria.

Article 65

This article, which is one of the most important in the Protocol, as it establishes minimum standards of humane treatment to be accorded persons who are not entitled to more favorable treatment under the Geneva Conventions or the Protocol, was the subject of thirteen formal amendments and many more informal proposals within the Working Group. Not surprisingly, the consideration of this article occupied the greater part of the time of the Working Group for two weeks, and this time doubtless would have been much greater if it had not been for the intensive and most helpful informal consultations in March and April, 1977, which were led by the delegate of Belgium, in close cooperation with the delegates of Switzerland and the Netherlands.

The Working Group was also aided in its task by the somewhat similar work done during the third session of the Conference by Committee I with respect to Protocol II. As a matter of drafting, the Working Group adopted the texts of those parts of Articles 6 and 10 of Protocol II which it decided to include in Article 65. The rule applied was that the same text would be used unless there was reason for changing it inherent in the differences between international and non-international armed conflicts.

Paragraph 1 of Article 65 was the last paragraph resolved because it raised a delicate question of whether the protections of the article were to be extended to a Party's own nationals. At an early stage it was decided that the scope of the article should be restricted to persons affected by the armed conflict and further restricted to the extent that the actions by a Party in whose power they are so affect them. This is the purpose of the introductory clause of the paragraph. Moreover, paragraphs 3 through 7 are further limited by their own terms to persons affected in specific ways, e.g., persons "arrested, detained, or interned for actions related to the armed conflict" (para. 3).

Nevertheless, the question of whether or not to specify one's own nationals as protected by the article remained contentious for many days. Ultimately a compromise was reached whereby reference was deleted to all examples of persons covered by the article, at which point the article was quickly approved by the Working Group.

It should be noted that the Working Group decided to avoid placing any adjectives in front of the word "convictions" in paragraph 1 so that all types of convictions would be covered, whether political, religious, or philosophical.

The Working Group modified the ICRC text of paragraph 2 in a number of ways. For one, the prohibitions of torture is highlighted and is specified as covering all kinds of torture, whether physical or mental. This prohibition, coupled with the more general one of violence to life, health, or physical or mental well-being, was considered adequate to permit the deletion of reference to coercion, which a number of delegates thought too vague. Similarly, these prohibitions, coupled with the prohibition in 2 (e) of threats of such actions, were considered to encompass, and therefore to render unnecessary, a more specific proposal to prohibit intimidation, harassment, and threats by agents of an occupying power aimed at forcing the movement of individuals or portions of the civilian population.

The Working Group decided to add a prohibition on "collective punishments" (2 (d)) to the list of prohibited acts because of concern that such punishments might be imposed otherwise than judicially, in which event they might not be covered by paragraph 4 (b).

Paragraph 3 was added to the ICRC text pursuant to a proposal by the delegate of Belgium to cover the period of arrest prior to that dealt with in the judicial safeguards of paragraph 4.

Paragraph 4 is modeled on Article 10 of Protocol II. However, for reasons inherent in the differences between international and non-international armed conflicts, sub-paragraph (c) was amended to include a reference to national or international law. Several delegates suggested that the introductory clause of this paragraph is unclear in that it seems to speak of a person being found guilty prior to his conviction. The Working Group hopes the Drafting Committee will re-examine this introductory language, along with the similar language of Article 10 of Protocol II, and see if it can find a clearer formulation.

There were certain other points made with respect to paragraph 4 that should be noted. First, in connection with sub-paragraph (e), it was understood that persistent misconduct by a defendant can justify his banishment from the courtroom. Second, sub-paragraph (g) is so worded as to be consistent both with the cross-examination of witnesses and with the inquisitorial system in which the judge alone conducts the examination. Third, the provision on ne bis in idem (4 (h)) is drawn from the United Nations Covenant on Civil and Political Rights and is so drafted as to pose the minimum difficulties to States in an area where practice varies widely. Finally, it should be noted that 4 (i) is so written as to permit a person to waive his right to public judgment, e.g., a juvenile offender where publicity is undesirable.

Article 66

Once Committee III adopted Article 48 in 1975, the ICRC text proposed for Article 66 became out of date. The Working Group decided, however, that this article provided a useful occasion to clarify the scope of application, not only of Article 48, but also of all articles restricting or prohibiting attacks.

The first paragraph of the text, which was taken by an amendment proposed in document CDDH/III/261, proved relatively non-controversial, although one delegate stated that he would have preferred that it not restrict attacks by a Party within such part of its territory as may be controlled by its adversary. The overwhelming view in the Working Group, however, was that a regime of reciprocity must prevail and that it could not be expected that restraints on attacks would be effective if they did not bind both sides.

The second paragraph proved relatively easy to agree upon once it was phrased in terms that recognized the vital requirements of a state defending its national territory against invasion. The Working Group generally considered that it would be impossible to prohibit completely the conduct of a scorched earth policy where the armed forces of a state were being forced to retreat within the national territory of that state, and the best protection on which agreement was possible was to permit derogation from the rules of Article 48(2) only where required by imperative military necessity. Several delegates expressed dissatisfaction with this standard because of its apparent anti-humanitarian implications, but it was generally regarded as the most demanding standard that would be acceptable.

It should be noted that the term "control" in both paragraphs refers to areas of de facto control. In paragraph 1 it is the area under control of the occupying power, and in paragraph 2 it is the area of national territory remaining under the de facto control of the lawful sovereign. It goes without saying that the occupying power may not treat the occupied territory as if it were its national territory.

The Working Group leaves to the Drafting Committee the final decision on the proper place for the provisions of Article 66 to appear, but the Rapporteur suggests that the Drafting Committee consider whether the first paragraph might not appropriately be added to the definition of the term "attacks" in Article 44(2) and the second paragraph to Article 48.

Geneva, 17 March - 10 June 1977

REPORT TO COMMITTEE III ON
THE WORK OF THE WORKING GROUP
SUBMITTED BY THE RAPPORTEUR

The Working Group agreed to submit to the Committee the texts set forth in the following documents:

Protocol I

Article 37, paragraph 3	(CDDH/III/383)
Article 39, paragraph 1	(CDDH/III/382)
Article 46, paragraph 5(a)	(CDDH/III/384)
Article 47 <u>bis</u>	(CDDH/III/385/Rev.1)
Article 49, paragraph 7 and annex	(CDDH/III/378)
Article 67	(CDDH/III/375)
Article 68	(CDDH/III/376)
Article 69	(CDDH/III/377)

Protocol II

Article 20 <u>bis</u>	(CDDH/III/386/Rev.1)
Article 21	(CDDH/III/381)
Article 26, paragraphs 6 and 7	(CDDH/III/387)
Article 26 <u>bis</u>	(CDDH/III/388)
Article 28, paragraphs 3 and 4	(CDDH/III/379) and (CDDH/III/390)
Article 29, paragraph 3	(CDDH/III/389)
Article 32	(CDDH/III/380)

As with the reports by the Rapporteur in previous sessions, this report has not been approved by the Working Group and should be understood simply as the report of the Rapporteur on the work of the Group.

It should be noted that the articles listed above fall into three distinct categories: (1) new articles not previously adopted by the Committee, (2) articles previously adopted but with blanks or bracketed words left for subsequent resolution, and (3) articles previously adopted by the Committee which the Working Group believes should be reconsidered. For purposes of discussion in this report, however, the Rapporteur has, in general, kept the articles in numerical order, taking those in Protocol I first and those in Protocol II second.

The comments by the Rapporteur concerning the deliberations of the Working Group with respect to each of these articles are the following:

Protocol I

Article 37, paragraph 3

The Working Group recommends that this paragraph be reconsidered and revised in order to avoid any possibility that the text could be interpreted as making a drastic and quite unintended change in the law of espionage. As the text was adopted by the Committee in 1975 it was subject to the interpretation that it prohibited sending a spy dressed in the enemy's uniform. That was not the Committee's intention, but, if so interpreted, any officer who sent such a spy and any officer who knew of it and failed to stop it, could be accused of violating Article 37. Since the sending of spies has never been considered an unlawful act, this would be a drastic change in the law which should be avoided. Certainly it would be nonsensical to make the sending of a spy dressed in the enemy's uniform unlawful, while the sending of a spy dressed in civilian clothes remains lawful.

For these reasons the Working Group recommends that Article 37, paragraph 3, which is a savings clause for the use of flags at sea, be expanded to refer as well to the law of espionage. There was no dissent on this subject in the Working Group, and the Rapporteur believes this change can be made by consensus.

Article 39, paragraph 1

As was noted in paragraph 29 of the Report of the Third Committee on its work at the third session of the Conference (CDDH/236/Rev.1) some delegations suggested that the question of immunity from attack of airmen descending by parachute should be reconsidered at the fourth session. Although the Working Group was not unanimous in its view, only a few representatives opposed reconsideration. The Working Group proposes amending the text of this paragraph so as to prohibit attacks against airmen descending by parachute, regardless of which Party controls the territory into which they are descending. It was felt that an airman in this situation is temporarily hors de combat as effectively as if he were unconscious and that it would be inappropriate for a Protocol designed to expand humanitarian protections to authorize making him a legitimate object of attack while in that helpless position. The Rapporteur, however, is uncertain whether this change can be adopted by consensus or whether a vote will be demanded.

Article 40, paragraph 2

The Working Group did not recommend any revision of this paragraph, but it was discussed briefly. It was considered useful to emphasize again in the report, as noted last year (CDDH/236/Rev.1, paragraph 35), that, for the purposes of this paragraph, "any customary uniform which clearly distinguishes the member wearing it from a non-member, should suffice."

Article 46, paragraph 5(a)

The Working Group recommends that this subparagraph be reconsidered and that the adjective "similar" be inserted in order to modify the phrase "concentration of civilians." It was acknowledged that this was the intent of the Committee in adopting this subparagraph, and the Group agreed that this intent should best be made explicit. By concentration of civilians is meant such a concentration as to be similar to a city, town, or village. Thus, a refugee camp or a column of refugees moving along a road would be examples of such a similar concentration. It seems desirable to clarify this point so that the term will not be misunderstood, for example, as implying ordinary rural areas. There was no dissent on this question within the Working Group, and the change can probably be made by consensus.

Article 47 bis
(and Article 20 bis of Protocol II)

The Working Group recognized the desirability of clarifying the inherent ambiguity of the text of Article 47 bis (and of the corresponding Article 20 bis in Protocol II), but it had great difficulty in finding a solution. Although the Committee Report for the second session (CDDH/215, paragraph 70), when this text was adopted, indicates that the phrase "which constitute the cultural heritage of peoples" was intended to modify the phrases "historic monuments" and "places of worship," as well as "works of art," the adopted text did not clearly state that intent. When Article 20 bis of Protocol II was adopted during the third session, however, it became clear that some representatives could not agree that there could be any places of worship which were not subject to the special protection of this article (see CDDH/236/Rev.1, paragraph 62). Other representatives maintained that these articles were intended to give an additional special protection to certain places of worship of extraordinary historical or artistic value and that all places of worship were already protected as civilian objects under Article 47.

In view of these differing views, the only point of consensus within the Working Group was that the ambiguous texts of these two articles should be clarified if at all possible. However, the revised texts proposed by the Working Group, which change the order of the phrases (both in the title and in sub-paragraph (a)) to give first place to places of worship, still do not command a consensus because they also make clear the majority view that not all places of worship are covered by this article. It may well be necessary for the Committee to vote on this issue. The consequence of leaving the texts ambiguous would be that they would from the outset be interpreted two different ways by different countries. We should avoid this if at all possible.

Article 49, paragraph 7 and Annex
(and Article 28, paragraph 3 and Annex, Protocol II)

When these articles were adopted in 1975 blanks were left for subsequent determination of an appropriate sign to identify the objects protected by the articles. During the fourth session the Working Group established a special Sub-working Group, under the chairmanship of Brigadier General Mokhtar Shaaban of Egypt, to make recommendations concerning this sign. The report of that Sub-working Group is annexed to this Report. The Working Group approved the recommendations of the Sub Group, and the Rapporteur believes that the consequent additions to the two articles in question and the annexes to each Protocol should be adopted by consensus. It is recommended that it be left to the Drafting Committee to decide whether the annex to Protocol I will be a separate annex or will be added to the existing annex, which, of course, deals with quite different subjects.

Article 67

Although the Working Group quickly accepted the first paragraph of the ICRC draft, this Article proved surprisingly difficult to complete. Paragraph 2 was added to ensure the quickest possible release from confinement of pregnant women and mothers of infants, but there was prolonged discussion of a proposed addition to that paragraph which would have precluded arrest or confinement solely because of the convictions held by such a woman. Ultimately, it was agreed to delete that sentence so as to avoid any negative implication that other persons could legitimately be arrested or confined solely because of their convictions and to attempt to deal with the question as one applicable to all persons in a new Article 65 bis (see below).

After some discussion, the Working Group decided to heed the experience of the First Committee in dealing with comparable provisions in Protocol II in which that Committee had been unable to reach agreement on an age when infants no longer are dependent on their mothers. It was recognized that this may differ from case to case and from culture to culture. The Working Group also decided not to use the term "nursing mothers", but rather the broader term "mothers of infants on whom the infants are dependent." A proposal to add protection for aged persons responsible for the care of children was considered but failed to achieve consensus.

The third paragraph, dealing with the death penalty, also proved complex. There was no great difficulty with prohibiting the execution of pregnant women, but considerable conflict with national laws and traditions arose when it was proposed to extend this prohibition to mothers of infants and to prohibit also pronouncement of the death penalty on such persons. Proposals to suspend execution for a time were found unacceptable by a number of delegations on the grounds of inhumanity. The resultant compromise is reflected in paragraph 3.

The Rapporteur believes this Article can be adopted by consensus.

Article 68

This Article was the subject of discussion in the Working Group for a period of a week. The final product was a compromise in many respects and was not completely satisfactory to a number of representatives. Nevertheless, with one minor change described below, it is ready for adoption by consensus.

In paragraph 1, the phrase "any other reason" was included to cover possible problems not resulting solely from age, such as the state of health, mental retardation, etc.

Paragraph 2 reflects a compromise in which a flat ban on recruiting children under 15 is coupled with a more flexible restriction, on the acceptance of voluntary services, i.e., to "take all feasible measures" to prevent them taking a direct part in hostilities. The Working Group recognized that sometimes, particularly in occupied territories and in wars of national liberation, a total prohibition on the voluntary participation of children under 15 would be unrealistic. The final sentence of paragraph 2 was also part of the compromise with those who wished a higher age limit on recruitment.

With respect to paragraph 3, it should be noted that prisoner of war status cannot be denied on the grounds of age but that, whether a child under 15 is a PW or not, he should continue to benefit from the special protection accorded by this article.

It should also be noted that the working Group decided not to place specific age limits in paragraphs 1 and 4 and that there is no precise definition of the term "children". Whether persons of 16, 17 or 18 years of age would, thus, have to be detained separately from adults is left to national law, traditions, and the decision of the Parties to a conflict who, it is expected, will act in light of the purposes of this article.

With respect to paragraph 5, the age of 18 was used in order to conform to the provisions of Article 10, paragraph 4 of Protocol II. However, after the Working Group proposal for this Article had been printed, one representative asked that the operative word in that paragraph, "pronounced", be changed to "executed". He explained that his country's law did not permit the prohibition of pronouncement but that it could accept a prohibition of execution. The Working Group felt that this change would not, in the terms of this paragraph, have significant consequences and therefore was willing to accept the change. If the change is made, the First Committee may wish to reconsider its prior decision on Article 10, paragraph 4.

One representative wished to have it noted in the report that he would have preferred to add a new paragraph 6 prohibiting any penal prosecution and punishment of a child who was not old enough at the time the offence was committed to understand the implications of his acts. The Working Group, however, decided that the definition of such standards was better left to national law.

Article 69

The changes made in the original ICRC text are largely self-explanatory. It should be noted, however, that the limitation to evacuation for compelling reasons of health or medical treatment where the evacuation is to be from occupied territory reflects a deep-seated concern among many representatives in the Group that the dangers of occupying powers abusing their discretion are greater than the dangers of prohibiting evacuation from reasons of safety. Even the requirement of the consent of the Party of which the child was a national was considered inadequate in view of the possibility of puppet governments. In light of these concerns and the restrictive provisions of Article 49 of the Fourth Geneva Convention, it was decided to be very cautious here in expanding the rights of an occupying power.

The list of items of information in paragraph 3 was expanded considerably, but it was recognized that not always will all of the specified information be available. Also, in rare cases the furnishing of an item of information, e.g., the child's religion, might be prejudicial to his safety, and the phrase, "whenever it involves no risk of harm to the child" was added to ensure that, in such a case the information would not be included.

The Rapporteur believes this article can be adopted by consensus.

PROTOCOL II

Article 20 bis

(See the discussion under Article 47 of Protocol I above)

Article 21

A text of this article, dealing with perfidy, was submitted to the Committee during the third session but was returned to the Working Group for further study (see CDDH/236/Rev.1, paragraph 65). Upon reconsideration during the fourth session, the Working Group produced the much simplified text that it now recommends for adoption. It should be noted that not all representatives supported even this reduced text, but the Rapporteur believes that it probably can be adopted by consensus, with those who have reservations stating them for the record.

Reprisals in Protocol IIArticles 26, 26 bis, 28 and 29

When adopting each of these articles, the Committee either left a blank or a bracketed provision, pending a decision on the issue of prohibition of reprisals in Protocol II. Committee I is now facing this problem and clearly will resolve it by listing certain chapters or articles of Protocol II, or a combination thereof, that may not be violated even in response to violations by an adverse Party. Therefore, there is no need for such provisions in any of the Protocol II articles adopted by the Third Committee, and the Working Group proposes that the blank paragraphs and bracketed material be deleted from Articles 26, 26 bis, 28 and 29. This decision clearly can be taken by consensus. Further, with respect to Article 28 see the discussion of Article 49 of Protocol I above.

Article 32

This article, which covers some of the same ground as Articles 68 and 69 of Protocol I, proved relatively easy to modify and accept. It should be noted that part of the first paragraph of the ICRC draft was covered by Article 6 bis, as adopted by the First Committee, and therefore was deleted from this article. The Working Group believes that the Drafting Committee should consider adding this article to Article 6 bis, or at least moving it to follow Article 6 bis. The Rapporteur believes this article can be adopted by consensus.

Articles not proposed

Although mention need not be made of everything considered by the Working Group and not adopted, there are several items that should be noted. First, the issue of aggression and non-discrimination, raised by a new article proposed to precede Article 33 of Protocol I is now being dealt with by the First Committee as part of the preamble. Therefore, the Working Group did not discuss this question. Second, the proposal for a new Article 65 bis (referred to in the report on Article 67 above) failed to achieve a consensus. Despite the fact that all delegations agreed with the principle of the proposal - that no person may be arrested, detained or interned solely because of his convictions, it proved impossible in the time available to work out an agreed text. Ultimately, the Working Group agreed to record its consensus that this rule was implicit in Article 65, paragraph 1, as adopted by the Committee. If the Committee agrees, this understanding should be recorded in the Committee's report.

Finally, mention should be made of a proposal inspired by Article 64 which would have extended certain protections to persons who were forced to flee their homes because of hostilities. Again, in the time available, it proved impossible to reach agreement on a text. A number of delegations pointed out that Article 65 probably already covers all such persons and that, unless they are a Party's own nationals, they are protected also by Part IV of the Fourth Geneva Convention. The Rapporteur suggests that the sponsors of this proposal may wish to continue their efforts as a matter of the law of refugees, in cooperation with the United Nations High Commissioner for Refugees, and outside of the specialized field of the laws of war.

A N N E XDRAFT ADDITIONAL PROTOCOL IPART IV - Civilian populationSECTION I - General protection against effects of hostilitiesChapter III - Civilian objectsArticle 49 - Works and installations containing dangerous forcesREPORT OF THE SUB-WORKING GROUP ON THE SPECIAL SIGN
FOR WORKS AND INSTALLATIONS CONTAINING DANGEROUS FORCES

CHAIRMAN: Brig. General Mokhtar SHAABAN (Egypt)

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Colonel Karl F. LIKO (Austria)
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Ph. EBERLIN, Technical Adviser (ICRC)

The Sub-Group held 4 meetings from 27 April to 29 April 1977. It reviewed different distinctive signs already adopted with respect to international protection, as well as several distinctive signs used in for other purposes, with a view to avoid any possibility of confusion.

The Sub-Group adopted the following guidelines:

- (a) The distinctive sign (emblem) must be as simple as possible
- (b) It must be of no political or religious relevance whatsoever
- (c) It must not be confused with any other distinctive sign (emblem) already in use

- (d) It should be visible and distinguishable as such from all directions and from as far away as possible
- (e) The choice of colour should be made according to available technical knowledge.

With respect to choice of colour, the Sub-Group received technical advice that a bright orange colour has proved to be clearly visible from relatively high altitudes.

Considerable deliberation was devoted to the design of the sign (emblem). Using the above adopted guide lines, many designs were considered by the Sub-Group and rejected in order to avoid confusion. Deliberations resulted in the following proposal: "A group of three bright orange circles, of equal size, placed on the same axis"

(see model in Fig. ...)

It was understood that the sign of three circles, when displayed over an extended surface, could be repeated as often as would appear appropriate.

The proposed sign has the advantage of not being liable to any change of shape, viewed from all possible directions.

It was agreed that the sign should be of one colour, i.e. bright orange, the background being in most cases the concrete itself (roofs, walls or slopes of installations and works). It could also be marked on roads situated on the top of dams, dykes and barrages, or simply on the earth in between or around the installations and works.

The Sub-Group emphasizes the importance of requiring that the sign should be made as large as possible.

It also considered the possibility of using flags bearing the sign. Particulars relating to the design of such flags are proposed.

With respect to formulation of detailed rules relative to description and use of the proposed sign, the Sub-Group recommends the following proposals:

PROPOSALS BY THE WORKING GROUP

Paragraph 7 of Article 49

7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis as specified in Annex ... Absence of such marking in no way relieves any Party to the conflict of its obligations under this article.

Articles to be inserted in Annex ... to
draft Additional Protocol IArticle ... - International special sign for works and
installations containing dangerous forces

1. The international special sign for works and installations containing dangerous forces, as provided for in Article 49, paragraph 7 of the present Protocol, shall be a group of three bright orange circles of equal size, placed on the same axis, the distance between each circle being one radius, in accordance with the model in Fig.
2. The sign when displayed over an extended surface may be repeated as often as it would be appropriate under the circumstances.
3. On a flag the distance between outerlimits of the sign and adjacent sides of the flag shall be one radius of a circle. The background of the flag shall be white in colour and rectangular in form.
4. At night or when visibility is reduced, the sign may be lighted or illuminated. It may also be made of materials rendering it recognizable by technical means of detection.

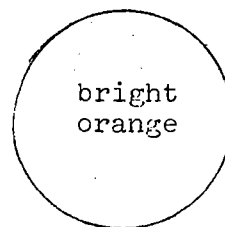
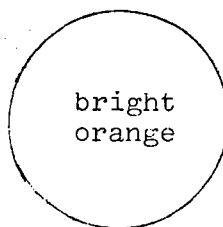
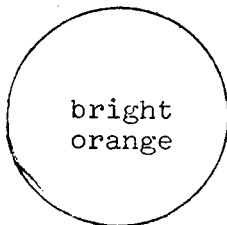


Fig. ...: International special sign for works and installations containing dangerous forces.

Article ... - Use

1. The international special sign shall, whenever possible, be displayed on a flat surface or on flags visible from as many directions and from as far away as possible.
2. The sign shall be as large as appropriate under the circumstances.