



OFFICIAL RECORDS

OF THE

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

GENEVA (1974 -1977)

VOLUME VI

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

HELD AT GENEVA ON THE FOLLOWING DATES:

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

PREPARATION

OF THE TWO PROTOCOLS ADDITIONAL
TO THE GENEVA CONVENTIONS OF 1949,
PROTOCOL I RELATING TO THE PROTECTION OF VICTIMS
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 VI

CONTENTS

SUMMARY RECORDS OF THE PLENARY MEETINGS

	<u>Page</u>
I. Fourth session (CDDH/SR.34-46)*	1

* This document was issued in mimeographed form as volume I of the summary records of the plenary meetings during the fourth session.

FOURTH SESSION

(Geneva, 17 March - 10 June 1977)

PLENARY MEETINGS

SUMMARY RECORDS OF THE THIRTY-FOURTH TO FORTY-SIXTH MEETINGS

held at the International Conference Centre, Geneva,
from 17 March to 31 May, 1977

<u>President:</u>	Mr. Pierre GRABER	Federal Councillor, Head of the Federal Political Department of the Swiss Confederation
<u>Secretary:</u>	Mr. Jean HUMBERT	Ambassador, Secretary- General of the Conference

CONTENTS

	<u>Page</u>
<u>Thirty-fourth (opening) plenary meeting</u>	19
Opening of the session	
Adoption of the agenda	
Statement by the President	
Changes arising in the list of office-holders of the Conference	
Tribute to the memory of Ambassador Edvard Hambro, former head of the Norwegian delegation and Chairman of Committee I at the first and second sessions of the Conference	
Work of the Drafting Committee	
Report on the meeting of the General Committee	
<u>Thirty-fifth plenary meeting</u>	27
Statement by the President	
Adoption of the agenda	
Changes arising in the list of office-holders of the Conference (<u>concluded</u>).	
Report on the work of the Drafting Committee	
Report on the meeting of the General Committee on 13 April 1977	
<u>Thirty-sixth plenary meeting</u>	33
Statement by the President	
Adoption of the agenda	
Proposals by the General Committee concerning the procedure to be followed for the adoption of the draft Protocols in plenary meetings of the Conference	
Introduction of the reports of Committees I, II and III	
Report of Committee I	
Report of Committee II	
Report of Committee III	
Adoption of the articles of draft Protocol I	
Article 1 - General principles and scope of application	

Contents (continued)

Page

Thirty-sixth plenary meeting (continued)

Adoption of the articles of draft Protocol I (continued)

Explanations of vote

Article 2 - Definitions

Article 3 - Beginning and end of application

Article 4 - Legal status of the Parties to the conflict

Annex - Explanations of vote

Draft Protocol I

Australia - Article 1

Cyprus - Article 3

Germany, Federal Republic of - Article 1

Guatemala - Article 1

Holy See - Article 1

Indonesia - Article 1

New Zealand - Article 1

Spain - Article 1

Thirty-seventh plenary meeting 65

Adoption of the articles of draft Protocol I (continued)

Article 5 - Appointment of Protecting Powers and of their substitute

Explanations of vote

Article 6 - Qualified persons

Article 7 - Meetings

Article 8 - Terminology

Article 9 - Field of application

Article 10 - Protection and care

Article 11 - Protection of persons

Article 12 - Protection of medical units

Article 13 - Discontinuance of protection of civilian medical units

Contents (continued)

Page

Thirty-seventh plenary meeting (continued)

Adoption of the articles of draft Protocol I (continued)

Article 14 - Limitations on requisition of civilian medical units

Article 15 - Protection of civilian medical and religious personnel

Article 16 - General protection of medical duties

Article 17 - Role of the civilian population and of aid societies

Article 18 - Identification

Article 19 - Neutral and other States not Parties to the conflict

Article 20 - Prohibition of reprisals

Article 20 bis - General principle

Article 20 ter - Missing persons

Article 20 quater - Remains of deceased

Report of the Ad Hoc Committee on Conventional Weapons

Annex - Explanations of vote

Draft Protocol I

Australia - Article 11

Belgium - Article 5

Egypt - Articles 5 and 20

Greece - Article 5

Holy See - Article 17

Israel - Articles 8, 11, 15 and 17

Madagascar - Article 12

Nigeria - Article 5

Spain - Article 7

United Kingdom of Great Britain and Northern Ireland - Article 20 quater

United States of America - Article 11

Contents (continued)

	<u>Page</u>
<u>Thirty-eighth plenary meeting</u>	83
Tribute to the memory of Mr. Christophe Assamoi, a member of the delegation of the Ivory Coast	
Adoption of the articles of draft Protocol I (<u>continued</u>)	
Article 22 - Medical vehicles	
Article 23 - Hospital ships and coastal rescue craft	
Article 24 - Other medical ships and craft	
Article 26 - Protection of medical aircraft	
Article 26 <u>bis</u> - Medical aircraft in areas not controlled by an adverse Party	
<u>Annex</u> - Explanation of vote	
Draft Protocol I	
Indonesia - Article 23	
<u>Thirty-ninth plenary meeting</u>	93
Organization of work	
Adoption of the articles of draft Protocol I (<u>continued</u>)	
Article 27 - Medical aircraft in contact or similar zones	
Article 28 - Medical aircraft in areas controlled by an adverse Party	
Article 29 - Restrictions on operations of medical aircraft	
Article 30 - Notifications and agreements concerning medical aircraft	
Article 31 - Landing and inspection of medical aircraft	
Article 32 - Neutral or other States not Parties to the conflict	
Article 33 - Basic rules	
Article 34 - New weapons	
Article 35 - Prohibition of perfidy	
Article 36 - Recognized emblems	
Article 37 - Emblems of nationality	
Article 38 - Quarter	

Contents (continued)

Page

Thirty-ninth plenary meeting (continued)

Adoption of the articles of draft Protocol I (continued)

Article 38 bis - Safeguard of an enemy hors de combat

Article 39 - Occupants of aircraft

Article 40 - Spies

Article 41 - Armed forces

Annex - Explanations of vote

Draft Protocol I

Argentina - Article 33

Democratic Yemen - Article 39

Egypt - Articles 27 and 33

Germany, Federal Republic of - Article 33

India - Article 33

Israel - Articles 35, 36, 39, 40 and 41

Mali - Article 35

Sudan - Article 39

United Kingdom of Great Britain and Northern
Ireland - Article 33

Venezuela - Article 33

Fortieth plenary meeting 119

Adoption of the articles of draft Protocol I (continued)

Article 42 - New category of combatants and of
prisoners of war

Explanations of vote

Annex - Explanations of vote

Draft Protocol I

Belgium - Article 42

France - Article 42

Germany, Federal Republic of - Article 42

Holy See - Article 42

Ireland - Article 42

Spain - Article 42

Sudan - Article 42

Contents (continued)

	<u>Page</u>
<u>Forty-first plenary meeting</u>	141
Adoption of the articles of draft Protocol I (<u>continued</u>)	
Article 42 (<u>concluded</u>)	
Title	
Explanations of vote	
Article 42 <u>bis</u> - Protection of persons who have taken part in hostilities	
Article 42 <u>quater</u> - Mercenaries	
Explanations of vote	
Article 43 - Basic rule	
Article 44 - Scope of application	
Article 45 - Definition of civilians and civilian population	
Article 46 - Protection of the civilian population	
Explanations of vote	
Article 47 - General protection of civilian objects	
Explanations of vote	
Article 47 <u>bis</u> - Protection of cultural objects	
<u>Annex</u> - Explanations of vote	
Draft Protocol I	
Afghanistan - Article 42 <u>quater</u>	
Australia - Articles 42 <u>quater</u> , 44 and 47	
Byelorussian Soviet Socialist Republic - Article 46	
Canada - Articles 45, 46, 47 and 50	
Colombia - Articles 42, 42 <u>quater</u> and 46	
Cuba - Articles 42 and 42 <u>quater</u>	
Democratic Yemen - Article 42	
France - Articles 43 and 47	
German Democratic Republic - Article 46	
Germany, Federal Republic of - Articles 46 and 47	
India - Article 43	
Israel - Article 42 <u>bis</u>	

Contents (continued)

Page

Forty-first plenary meeting (continued)

Annex - Explanations of vote (continued)

Draft Protocol I

- Madagascar - Article 42
- Mauritania - Articles 42 and 42 quater
- Mexico - Articles 42 quater, 46 and 47
- Mozambique - Article 42 quater
- Netherlands - Articles 42 quater, 46, 47, 47 bis and 50
- Oman - Article 42
- Romania - Article 46
- Senegal - Article 42 quater
- Sweden - Articles 42 quater and 46
- Socialist People's Libyan Arab Jamahiriya - Article 42 quater
- Ukrainian Soviet Socialist Republic - Articles 43 and 46
- Union of Soviet Socialist Republics - Article 42 quater
- United States of America - Article 47

Forty-second plenary meeting 205

Adoption of the articles of draft Protocol I (continued)

Part IV, Section I

Article 47 bis - Protection of cultural objects (concluded)

Sub-paragraph (a)

Sub-paragraph (b)

Explanations of vote

Article 44 - Scope of application (concluded)

Article 48 - Protection of objects indispensable to the survival of the civilian population

Article 48 bis - Protection of the natural environment

Article 49 - Protection of works and installations containing dangerous forces

Contents (continued)

Page

Forty-second plenary meeting (continued)

Adoption of the articles of draft Protocol I (continued)

Explanations of vote

Article 50 - Precautions in attack

Explanations of vote

Article 51 - Precautions against the effects of attacks

Explanations of vote

Article 52 - Non-defended localities

Article 53 - Demilitarized zones

Article 54 - Definitions and scope

Article 55 - General protection

Explanations of vote

Article 56 - Civil defence in occupied territories

Article 57 - Civilian civil defence organizations of neutral or other States not Parties to the conflict and international co-ordinating organizations

Article 58 - Cessation of protection

Article 59 - Identification

Annex - Explanations of vote

Draft Protocol I

Afghanistan - Article 50

Argentina - Article 48 bis

Australia - Articles 47 bis, 48, 48 bis, 49 and 58

Byelorussian Soviet Socialist Republic -
Article 48 bis

Canada - Articles 47 bis and 51

Cyprus - Article 56

Egypt - Article 55

France - Article 48 bis

Germany, Federal Republic of - Articles 47 bis, 50
and 51

Ghana - Article 49

Contents (continued)

Page

Forty-second meeting (continued)

Annex - Explanations of vote (continued)

Draft Protocol I

- Holy See - Article 47 bis
- Hungary - Article 48 bis
- India - Article 50
- Indonesia - Articles 54, 56, 57 and 58
- Israel - Articles 54 and 58
- Italy - Articles 47 bis, 50 and 51
- Madagascar - Article 50
- Netherlands - Article 55
- Poland - Article 47 bis
- Qatar - Articles 46 to 49
- Republic of Korea - Article 51
- Romania - Articles 49, 50 and 56
- Sweden - Article 50
- Union of Soviet Socialist Republics -
Articles 54 to 59
- United Kingdom of Great Britain and Northern
Ireland - Article 47 bis
- United Republic of Cameroon - Article 51
- United Republic of Tanzania - Article 42
- United States of America - Articles 47 bis, 50
and 51
- Yugoslavia - Article 56

Forty-third plenary meeting 243

Adoption of the articles of draft Protocol I (continued)

Article 59 - Identification (concluded)

Article 59 bis - Members of the armed forces and
military units assigned to civil defence organizations

Explanations of vote

Contents (continued)

Page

Forty-third plenary meeting (continued)

Adoption of the articles of draft Protocol I (continued)

Article 60 - Field of application

Article 61 - Basic needs in occupied territories

Article 62 - Relief actions

Article 62 bis - Personnel participating in relief actions

Article 63 - Field of application

Article 64 - Refugees and stateless persons

Article 64 bis - Reunion of dispersed families

Article 65 - Fundamental guarantees

Explanations of vote

Article 67 - Protection of women

Article 68 - Protection of children

Article 69 - Evacuation of children

New article to be added after Article 69 - Measures of protection for journalists

Article 70 - Measures for execution

Article 70 bis - Activities of the Red Cross and other humanitarian organizations

Article 71 - Legal advisers in armed forces

Article 72 - Dissemination

Article 73 - Rules of application

Annex - Explanations of vote

Draft Protocol I

Afghanistan - Article 65

Australia - Articles 59 bis and 70 bis

Austria - Articles 59 bis, 65 and new article to be added after Article 69

Belgium - Article 65

Cyprus - Article 65

Egypt - Article 59 bis

Contents (continued)

Page

Forty-third plenary meeting (continued)

Annex - Explanations of vote (continued)

Draft Protocol I

France - Article 65

German Democratic Republic - Article 65

Germany, Federal Republic of - Articles 59 bis
and 65

Ghana - Article 59 bis

Holy See - Article 62

Hungary - Article 48 bis

Indonesia - Articles 59 bis and 72

Israel - Articles 59 bis and 70 bis

Japan - Article 65

Netherlands - Article 65

Romania - Article 65

Sudan - Articles 47 bis and 72

Sweden - Article 59 bis

Switzerland - Article 59 bis

Union of Soviet Socialist Republics -
Articles 59 bis and 65

United Kingdom of Great Britain and Northern
Ireland - Article 59 bis

Yugoslavia - Article 59 bis

Forty-fourth plenary meeting 279

Adoption of the articles of draft Protocol I (continued)

Article 74 - Repression of breaches of this Protocol

Explanations of vote

Contents (continued)

Page

Forty-fourth plenary meeting (continued)

Annex - Explanations of vote

Draft Protocol I

Australia - Article 74

Belgium - Article 74

Canada - Philippine amendment to Article 74 and
Article 74

Egypt - Article 74

France - Article 74

India - Article 74

Japan - Article 74

Mozambique - Article 74

Romania - Article 74

Spain - Article 74

Sweden - Article 74

Yugoslavia - Article 74

Forty-fifth plenary meeting 307

Adoption of the articles of draft Protocol I (continued)

Article 76 - Failure to act

Article 76 bis - Duty of commanders

Article 77 - Superior orders

Explanations of vote

Article 79 - Mutual assistance in criminal matters

Article 79 bis - International Fact-Finding Commission

Paragraph 1 (b) - Amendment by the United States of
America

Paragraph 2 (a) - Amendment CDDH/415 and Add.1 and 2
and Corr.1

Explanations of vote

Paragraph 2 - Amendment by the United States of
America

Paragraph 3 (a) - Amendment by the United States of
America

Paragraph 7 - Amendment by the United States of
America; amendment by Austria, Denmark and Sweden

Contents (continued)

Page

Forty-fifth plenary meeting (continued)

Annex - Explanations of vote

Draft Protocol I

Argentina - Article 77

Canada - Article 77

Czechoslovakia - Article 79 bis; amendment
proposed in document CDDH/415 and Add.1 and 2
and Corr.1

Democratic Yemen - Article 77

Egypt - Article 79 bis

France - Article 79

Holy See - Article 77

Indonesia - Articles 76, 76 bis, 77, 79 and
79 bis

Israel - Article 77

Poland - Article 79

Romania - Article 79 bis

Spain - Article 77

Sudan - Article 77

United States of America - Article 77

Yemen - Article 79 bis

Forty-sixth plenary meeting 341

Adoption of the articles of draft Protocol I (continued)

Article 79 bis - International Fact-Finding
Commission (concluded)

Explanations of vote

New article on responsibility to precede Article 80

Explanations of vote

New article on co-operation to be included before or
after Article 70

Explanations of vote

Contents (continued)

Page

Forty-sixth plenary meeting (continued)

Adoption of the articles of draft Protocol I (continued)

Code of International Crimes in Violation of the
Geneva Conventions of 1949 and the draft
Additional Protocols

Article 80 - Signature

Statement by the Observer for the Sovereign Order
of Malta

Article 81 - Ratification

Article 82 - Accession

Article 83 - Entry into force

Article 84 - Treaty relations upon entry into force
of this Protocol

Explanations of vote

Amendment to reintroduce Article 85 - Reservations

Annex - Explanations of vote

Draft Protocol I

Australia - Articles 79 bis, 82 and 85

Austria - Article 85

Belgium - Article 85

Canada - Articles 79 bis and 84

Chile - Article 79 bis

Colombia - Article 79 bis

Democratic Yemen - Article 85

Denmark - Article 79 bis

Ecuador - Article 85 and new article to be
inserted before or after Article 70

Finland - Articles 79 bis and 85

France - New article to be inserted before or
after Article 70, and Article 85

Germany, Federal Republic of - Article 84, para.3

Holy See - Article 85

Honduras - Article 85

Contents (continued)

Page

Forty-sixth plenary meeting (continued)

Annex - Explanations of vote (continued)

Draft Protocol I

Hungary - Article 85	
India - New article before or after Article 70	
Indonesia - New article before or after Article 70, and Articles 81 and 83	
Israel - Article 79 <u>bis</u>	
Italy - New article before or after Article 70, and Article 79 <u>bis</u>	
Jamaica - Article 84	
Japan - Articles 79 <u>bis</u> , 82 and 84	
Mauritania - Article 84	
Mozambique - Article 85	
Netherlands - Article 83	
Peru - New article before or after Article 70, and Article 79 <u>bis</u>	
Republic of Korea - Article 85	
Spain - Article 84	
Syrian Arab Republic - Articles 79 <u>bis</u> , 80, 85 and new article before or after Article 70	
Turkey - Articles 79 <u>bis</u> and 84	
United Kingdom of Great Britain and Northern Ireland - Article 84	
Uruguay - Article 85	

SUMMARY RECORD OF THE THIRTY-FOURTH (OPENING) PLENARY MEETING
held on Thursday, 17 March 1977, at 3.25 p.m.

President: Mr. Pierre GRABER Federal Councillor,
Head of the Federal
Political Department of
the Swiss Confederation

OPENING OF THE SESSION

1. The PRESIDENT declared open the fourth session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

ADOPTION OF THE AGENDA

The draft agenda (CDDH/224), as approved by the General Committee, was adopted.

STATEMENT BY THE PRESIDENT

2. The PRESIDENT cordially welcomed the representatives and said that it was a great pleasure for him to meet once again those who had participated in the past work of the Conference and also to welcome those who were taking part in it for the first time.

3. Two criteria had been applied by the Swiss Government in issuing invitations to the Conference: it had invited the States Parties to the Geneva Conventions of 1949, whether Member States or non-members of the United Nations, and also all States which, although not bound by those Conventions, were Members of the United Nations. Accordingly, three new States had been invited - the People's Republic of Angola, the Republic of Seychelles and the Independent State of Western Samoa, which had become States Members of the United Nations in 1976. Altogether 155 States had been invited to the fourth session of the Conference.

4. On 11 June 1976, at the close of the third session, he had reached the conclusion that positive results had been achieved, less by reason of the number of articles adopted during the session than in the light of the work done by delegations and their co-operative approach with a view to formulating new rules, at times in very difficult fields. He had also emphasized how urgent it was to reach the objective, which was to limit - short of preventing them completely - the sufferings of war, for armed conflicts of all types continued to plague the world. The events which had occurred since then were further proof that it was necessary to make every effort to complete the work of the Conference at the current session.

5. The United Nations attached great importance to that work and had given renewed evidence of its interest in the resolutions adopted by the General Assembly at its thirty-first session. In particular, the Assembly had urged all participants in the Diplomatic Conference to do their utmost to reach agreement on additional rules which might help to alleviate the suffering brought about by armed conflict and "to bring the Conference during the final session in 1977 to a successful close" (General Assembly resolution 31/19).

6. Since the end of the third session, he and his close collaborators had had many informal talks with various delegations, in the course of which they had noted not only the unanimous desire to bring the work of the current session to a successful completion, but also the will to reach reasonable and applicable compromises, thus reflecting the universal nature of international humanitarian law.

7. It was in that spirit that it had been variously suggested that, from the opening of the fourth session and concurrently with the work of the Drafting Committee, it would be very useful to set up a sort of continuous dialogue among those who held different views concerning difficult questions of substance for which no common ground of understanding had yet been found. That was why the invitation to the current meeting had mentioned that delegations and regional groups would have at their disposal all necessary technical facilities for informal consultations.

8. He thanked those representatives who intended to extend their stay in Geneva in order to take part in such consultations. Since many delegations were not yet taking part in the work of the Conference, those consultations could hardly be anything other than purely preliminary and exploratory exchanges of views that would in no way bind Governments. The object would be simply to seek a common ground of understanding before the official resumption of the work of the Committees, and to envisage solutions which might, in due course, lead to a consensus.

9. At its meeting that morning the General Committee had considered how those exchanges of views might be begun. He would refer to that point later, when reporting on the work of the General Committee. For the time being he would merely say that, by agreement with the General Committee, he intended to call a meeting of Heads of delegation at the close of the current meeting in order to consider with them in greater detail the question of the informal consultations, which might even be described as private.

CHANGES ARISING IN THE LIST OF OFFICE-HOLDERS OF THE CONFERENCE

10. The PRESIDENT said that, under rule 6 of the rules of procedure of the Conference, appointments to various offices made at the first session were valid for subsequent sessions, and that Governments had been asked, in the invitation addressed to them, to send if possible to the fourth session the same representatives in order to accelerate the work. However, a number of office holders having been assigned by their Governments to other functions, it had been agreed - in order not to reopen the question of geographical distribution as settled at the first session - that the officers replacing them would be appointed by the States concerned, with the tacit or express consent of their geographical group.

11. Since Ambassador Diego Garcés, Chairman of the Ad Hoc Committee on Conventional Weapons, was unable to participate in the work of the fourth session, the Government of Colombia had proposed Ambassador Héctor Charry Samper as his replacement in that office. The Latin-American Group had signified its approval.

On the proposal of the President, the Conference approved by acclamation the appointment of Ambassador Héctor Charry Samper.

12. The PRESIDENT further announced that Ambassador Sansón-Román, Chairman of the Credentials Committee, having been assigned to other functions, the Government of Nicaragua had proposed as his replacement Ambassador Gastón Cajina Mejicano. The Latin-American Group had signified its approval.

On the proposal of the President, the Conference approved by acclamation the appointment of Ambassador Gastón Cajina Mejicano.

13. The President drew attention to other changes in the list of office holders of the Conference (document CDDH/229/Rev.3); he asked delegations which had still other changes to propose to submit them to the Secretary-General as soon as possible.

TRIBUTE TO THE MEMORY OF AMBASSADOR EDVARD HAMBRO, FORMER HEAD OF THE NORWEGIAN DELEGATION AND CHAIRMAN OF COMMITTEE I AT THE FIRST AND SECOND SESSIONS OF THE CONFERENCE

On the proposal of the President, the members of the Conference observed a minute of silence in tribute to the memory of Ambassador Edvard Hambro.

WORK OF THE DRAFTING COMMITTEE

14. The PRESIDENT said that the main reason why the fourth session had been convened well in advance of the beginning of the work of the Main Committees was the wish, expressed by the Conference at the closing (thirty-third) plenary meeting (CDDH/SR.33) of the third session, that the work of the Drafting Committee should advance as far as possible, and for that purpose, that that Committee should meet before the Main Committees. The Drafting Committee would meet from 18 March to 7 April. Its task would be to review the wording of the articles already adopted by the three Main Committees. It had already reviewed, at the third session, the wording of ten articles.
15. In 1976 the Conference, by resolution CDDH/12 (III), had entrusted the Secretariat with certain preparatory work to be done between sessions in order to facilitate the deliberations of the Drafting Committee. In pursuance of that resolution, a Secretariat team had studied in September and October 1976 all articles so far adopted by the Main Committees. The texts studied had then been passed to a small team consisting of members of the Secretariat, experts of the International Committee of the Red Cross (ICRC) and some technical consultants chosen, in accordance with the terms of the resolution mentioned, from among the representatives of countries participating in the Conference, by reason of their familiarity with the subject matter and their linguistic qualifications. The Secretary-General had convened that team from 3 to 21 January 1977, and it had prepared document CDDH/SEC/Inf.1 of 31 January 1977. That document, intended mainly for the members of the Drafting Committee, had been sent to all States participating in the Conference, and would be dealt with by the Drafting Committee as from its meeting on 18 March 1977.
16. Mr. Al-Fallouji (Iraq), Chairman of the Drafting Committee, had kindly come to Geneva in order to follow the work of the small group which had met in January.
17. In full agreement with Mr. Al-Fallouji, he urged that the Drafting Committee should do its utmost to complete by 7 April its review of the texts submitted to it. After the resumption of work by the Main Committees on 14 April, the Drafting Committee would continue its work and review the articles that would be adopted by the Main Committees at the fourth session. Save in exceptional circumstances, the Drafting Committee should not refer back to the Main Committees articles adopted by them.
18. The Drafting Committee's work was of capital importance, for to a great extent the outcome would depend on it.

19. Mr. MILLER (Canada) said that at the third session of the Conference the Canadian delegation had stressed that the work to be done in the three-week period to be allotted to the Drafting Committee at the fourth session should be well-prepared. His delegation was therefore gratified at the way in which the Secretary-General of the Conference had organized the preparatory work for the Drafting Committee.

20. The document prepared by the experts (CDDH/SEC/Inf.1) was very satisfactory and would certainly assist the Drafting Committee. His delegation would be grateful if that Committee would circulate a time-table of its meetings in order that delegations not members of the Committee might attend those meetings when they had comments to make on certain articles of the draft Protocols.

REPORT ON THE MEETING OF THE GENERAL COMMITTEE

21. The PRESIDENT said that the General Committee of the Conference had met that morning and had mainly considered two questions - first, how to initiate the informal consultations which might take place before the resumption of work by the Main Committees after Easter and, secondly, the organization of the work of the Committees.

22. In the course of the informal consultations he had conducted between the two sessions, it had been variously suggested that, on the opening of the last session and parallel with the work of the Drafting Committee, a continuous dialogue and consultations should take place among delegations on difficult questions which still awaited settlement and for which no common ground of understanding had yet been found. That was why, as he had mentioned earlier, the invitation sent to representatives to attend the current meeting had stated that from the outset delegations would have at their disposal all the necessary technical facilities for such informal consultations.

23. The question had been thoroughly discussed at the morning meeting of the General Committee, which had recognized the usefulness of those preliminary consultations and supported their taking place forthwith. The nature of those consultations would be considered in greater detail during the informal and private meeting of Heads of delegation which would be held at the close of the current meeting.

24. With regard to the nature and limits of the consultations, he would merely stress some essential points: they would be purely informal and open to all delegations present in Geneva. Those taking part must never lose sight of the position of those who

were absent. He hoped that the consultations would proceed in a constructive spirit and produce a "meeting of minds". That would enable the necessary compromise solutions to be prepared for the Committees.

25. Referring to the organization of the work of the fourth session, he said the General Committee had approved the general programme which he, as President, had proposed. The first four weeks would be devoted to the completion of the work of the Committees; the fifth week would be reserved for the work of the Drafting Committee to enable it to complete its task. The last three weeks would be devoted to the adoption of articles in plenary meetings, and the signature of the Final Act.

26. In order to complete within the specified time-limit the consideration of the articles of the Protocols allotted to the Main Committees, the Chairmen of Committees would, of course, have to draw up a very strict time-table. He intended, in that connexion, to talk with each of the Chairmen. In the same spirit, he planned to convene the General Committee more often in view of the important part it would have to play at the final session of the Conference.

27. There was no doubt that, if the Conference was to finish on time, a stricter discipline would have to be observed by delegations. At the third session the General Committee had decided on certain steps which had been approved by the Conference: punctual opening of meetings, possible limitation of statements and of the number of speakers. Further, there should be no hesitation in scheduling night or week-end meetings, if necessary. There were thus a great many measures which Chairmen of Committees could take, as appropriate.

28. The General Committee had recognized in 1976 that Committee I should change its procedure for dealing with articles allotted to it, with a view to shortening debate. However, even if its procedure was improved, the Committee still had a heavy workload, the more so since the whole question of reprisals had been referred to it. The Chairman of Committee I had informed the General Committee that he proposed to set up a specific working group, similar to that which at the second session had considered the draft article concerning journalists engaged in dangerous missions, which would examine the final provisions of the two Protocols. That idea had been welcomed by the members of the General Committee.

29. As regards the Ad Hoc Committee on Conventional Weapons, the General Committee had been informed of a wish shared by several delegations that the Committee would set up a working group in order to facilitate the study of various proposals. Many participants had emphasized that the establishment of such a group should not in any way delay the work of Committee III and had suggested that the Chairmen of that Committee and of the Ad Hoc Committee should keep in touch with one another for that purpose, priority being given to the work of Committee III.

30. Mr. SULTAN (Egypt), speaking as Chairman of Committee III, referred to the suggestion made by the President that the Chairmen of Committee III and of the Ad Hoc Committee on Conventional Weapons should reach agreement concerning the scheduling of meetings of the two Committees. He had already consulted the Chairman of the Ad Hoc Committee, and they intended to confer again.

31. Mr. MILLER (Canada), referring to the President's suggestion regarding informal consultations, supported the idea that the time before the commencement of Committee work on 14 April should be used to the best advantage by delegations for such consultations.

32. He emphasized the importance of the work of the Ad Hoc Committee and that of Committee III, the latter Committee in particular still had to deal with a number of difficult articles.

33. His delegation was conscious of the opinion of the United Nations General Assembly concerning the questions dealt with by the two Committees and was glad to hear from the Chairman of Committee III that he would consult with the Chairman of the Ad Hoc Committee concerning the meetings of their respective Committees in order that the work of neither Committee should be delayed.

34. Mr. de ICAZA (Mexico) said that his delegation would co-operate to the fullest extent in order to ensure that the fourth session of the Conference would be successful and would be the last.

35. He was glad to note that the Chairmen of Committee III and of the Ad Hoc Committee would regularly consult one another in order to ensure that the work schedule of neither of those Committees would interfere with that of the other.

36. Mr. AL-FALLOUJI (Iraq), speaking as Chairman of the Drafting Committee, wished to assure the representative of Canada that the Drafting Committee would meet daily and would proceed in accordance with the prior approval of that Committee's members. A notice of the time of meetings would be posted and all representatives wishing to attend would be welcome.

37. Mr. BLIX (Sweden) said that he took it that the programme of work of the Conference would allow four weeks for Committee work, a fifth week for the Drafting Committee, and three weeks thereafter for plenary meetings.

38. It had been suggested that, as between the Ad Hoc Committee and Committee III, priority should be given to the work of Committee III, but he stressed that the equal importance of the Ad Hoc Committee's work should not be overlooked. He referred in that connexion to General Assembly resolutions 31/19 of 24 November 1976 and 31/64 of 10 December 1976. One way of expediting work on the question of weapons would be to approve the suggestion that the Ad Hoc Committee should set up a working group. If that were done his delegation would support the suggestions made concerning the work of Committee III and that of the Ad Hoc Committee.

The meeting rose at 4.15 p.m.

SUMMARY RECORD OF THE THIRTY-FIFTH PLENARY MEETING

held on Thursday, 14 April 1977, at 10.15 a.m.

President: Mr. Pierre GRABER Federal Councillor,
Head of the Federal
Political Department of
the Swiss Confederation

STATEMENT BY THE PRESIDENT

1. The PRESIDENT said that he was pleased to greet once again the representatives who had taken part in the meeting of 17 March and to welcome most warmly those who had now joined them.
2. Intensive work had been carried out since 17 March, particularly by the Drafting Committee. The present meeting marked the resumption of the work of the Conference as a whole, and that of the four Main Committees in particular.
3. He was sure that, as that session, which was to be the last, began, all the participants were keenly aware of the responsibilities which they must shoulder. They had eight weeks in which to give the reaffirmation and development of international humanitarian law a form and content which would satisfy the expectations of hundreds of millions of men.
4. At the outset, the participants in the Conference had had to deal with organizational and procedural problems, some of them new and many of them difficult. They had found ways of solving them. Later, at the second and third sessions, they had succeeded in settling in Committee, and more often than not by consensus, many of the questions of substance, often of great complexity, raised by the additional draft Protocols submitted to the Conference. By resorting to an almost unprecedented method, that of opening the fourth session ahead of time, they had achieved a result which had appeared anything but certain a year previously: all the articles adopted in Committee had now been reviewed by the Drafting Committee.
5. As the end of the long road thus travelled drew nearer, he was convinced that the remaining substantive questions, whose importance was not to be under-estimated, could and must be solved during the coming weeks. In saying that, he was echoing a very general feeling. He also knew that there was a general desire to complete the work and to complete it well. He was therefore sure that there was no longer any need for him to exhort all the

representatives who were once again assembled to display the spirit of mutual understanding and the conciliatory attitude necessary for carrying out the great task which they had undertaken in common. The strengthening of the protection of the human person in armed conflicts was a fine and noble undertaking and it was therefore a matter of conscience to ensure its success.

ADOPTION OF THE AGENDA (CDDH/245)

6. The PRESIDENT said that a draft agenda for the thirty-fifth plenary meeting (CDDH/245), approved by the General Committee, had been circulated. If there were no objections, it would be regarded as adopted.

The agenda was adopted.

CHANGES ARISING IN THE LIST OF OFFICE-HOLDERS OF THE CONFERENCE (concluded)

7. The PRESIDENT recalled that at its thirty-fourth meeting (CDDH/SR.34) on 17 March, the Conference had approved by acclamation the appointment of two new Committee Chairmen, one for the Ad Hoc Committee on Conventional Weapons and the other for the Credentials Committee. Those changes, as well as others of which the Secretary-General had subsequently been notified, appeared in document CDDH/229/Rev.4 of 31 March.

8. There had been a change in some official positions. Just before Easter, the Chairman of the Latin-American Group had officially notified him that, as Mrs. Annette Auguste, the representative of Trinidad and Tobago, and a Vice-President of the Conference, was no longer able to discharge those functions, the Group had proposed that she should be replaced by Mr. Mario Carías, the representative of Honduras. In accordance with the procedure adopted in such cases, and with the agreement of the General Committee, he proposed that the Conference should approved the appointment of Mr. Mario Carías, the representative of Honduras, as a Vice-President of the Conference.

The appointment was approved by acclamation.

9. The PRESIDENT added that, as Mr. Carías had been Vice-Chairman of the Drafting Committee up till then, the Latin-American Group had proposed that that office should be taken over by the representative of Ecuador. That change was a matter for the Drafting Committee which had been informed of it and whose responsibility it would be to approve it at its next meeting.

10. Those recent changes and any further changes which might be notified would appear in a new version of document CDDH/229.

REPORT ON THE WORK OF THE DRAFTING COMMITTEE

11. The PRESIDENT, reporting on the work of the Drafting Committee, said that as most delegations had realized from the texts issued by the Drafting Committee, that Committee, by meeting from 17 March until just before Easter, had succeeded in fulfilling the task assigned to it by the Conference: namely, to review all the articles already adopted by the Committees at previous sessions. At its meeting on the previous day the General Committee had noted that fact with satisfaction and had been unanimous in thanking and congratulating the Chairman of the Drafting Committee. He himself wished also to thank all the other members of the Drafting Committee and all those who had made a positive contribution, in one way or another, to its work.

12. The measures already adopted at the third session, above all the decision to convene the Drafting Committee before the resumption of work in the Committees, had proved particularly wise. It was true that the Drafting Committee still had an important task to fulfil, in conditions which were more difficult than when it had been the only one to meet, but the work which had been accomplished and the efforts devoted to it augured well for the future.

13. In response to the desire expressed by the General Committee, which was anxious to avoid, as far as possible, articles being referred back to Committees, the Drafting Committee had finally sent back only one article, Article 6 of draft Protocol II, to Committee I. In two other cases, it had merely drawn the attention of the competent Committees to a certain lack of clarity in the provisions adopted. He was sure that in its future work the Drafting Committee would continue to bear the General Committee's desire in mind.

14. The articles which had been finally reviewed by the Drafting Committee had just been issued for all delegations, in French, English, Spanish and Russian, in a special series under the symbol CDDH/CR/RD. They had not yet been issued in Arabic, which as from the current session had become an official and working language of the Conference, but that was only a temporary delay. The Arabic-speaking delegations present at Geneva since 17 March had set up a technical group which, in liaison with the Secretariat services, had undertaken to produce a final version in Arabic of the articles coming from the Drafting Committee. That version would of course have to be submitted to the Drafting Committee for official approval and the articles could then be issued in Arabic in the aforementioned series.

15. The Chairman of the Drafting Committee and the Chairman of the Arabic-speaking group had informed the General Committee, at its meeting on the previous day, that the work was already well advanced. On behalf of all, he thanked the Arabic-speaking delegations for their past and future efforts, in liaison with the Secretariat, to enable the Arabic version of all the articles to be issued in good time.

16. He wished to make a general observation concerning the articles reviewed by the Drafting Committee. Every effort should be made to avoid language problems when the articles came before the plenary meeting of the Conference for adoption. Delegations which had not taken part in the work of the Drafting Committee and which had comments to make on points of language should submit their comments to the Chairman of the Drafting Committee at an early stage and not wait until the last few plenary meetings before doing so.

17. The Drafting Committee had not considered itself competent to decide on the exact wording of the titles of the Protocols. The Chairman of the Drafting Committee had suggested that that point should be referred to Committee I, which would take it up when it considered the final provisions of the two Protocols. The General Committee had adopted that proposal. The Conference might wish to do the same. He took it that the proposal was accepted by the plenary meeting.

It was so decided.

REPORT ON THE MEETING OF THE GENERAL COMMITTEE ON 13 APRIL 1977

18. The PRESIDENT said that the General Committee had met the previous morning to consider various matters of concern to the Conference and to take up again a number of points which it had already broached at its earlier meeting on 17 March.

19. With reference to the work of the Drafting Committee, he pointed out that the General Committee had mainly considered the information that he had just given the Conference.

20. The General Committee had also considered some matters concerning the organization of the work of the current session. The discussion had complemented the earlier debate on that question, of which the thirty-fourth plenary meeting had been informed on 17 March. The General Committee had concentrated mainly on the co-ordination and planning of the work of the various bodies of the Conference and the working groups, so that the work which had yet to be done might be dealt with effectively.

21. With respect to the organization of work, he had had a meeting the previous afternoon with the Chairmen of the Committees. The chief problems that remained had been reviewed. Each Chairman would establish a time-table to enable the Committees to complete their work during the next few weeks.

22. The General Committee, having first defined the terms of reference of Committee I on the question of reprisals, had gone on to consider a question of general interest: namely, the time at which the two additional Protocols should be open for signature. Some took the view that the Protocols should be open for signature as soon as the Conference had completed its work, while others would like an interval of a few months to elapse before the Protocols were open for signature. Whatever was eventually decided, the Protocols would remain open for signature for a given period, possibly a year. The General Committee had had a preliminary exchange of views on the subject. The question would be decided by the Conference itself, on the basis of the report of Committee I. That Committee was responsible for examining the final provisions, which in each Protocol included an article on signature. In any case, as he had already pointed out to the General Committee, the host State and the Secretariat would naturally make all the necessary technical arrangements so that the Protocols could be open for signature at the time decided upon by the Conference, whenever that might be.

The meeting rose at 10.35 a.m.

SUMMARY RECORD OF THE THIRTY-SIXTH PLENARY MEETING

held on Monday, 23 May 1977, at 3.10 p.m.

President: Mr. Pierre GRABER Federal Councillor,
Head of the Federal
Political Department of
the Swiss Confederation

STATEMENT BY THE PRESIDENT

1. The PRESIDENT said that he had the honour to declare open the thirty-sixth plenary meeting of the Conference, which marked a very important step since the Conference was now entering upon the final phase of its work.

2. The programme set for the final session had so far been respected. It had called for sustained effort on the part of all representatives, and in particular of the Chairmen and Rapporteurs of the Committees, and he expressed his satisfaction and gratitude to all concerned.

ADOPTION OF THE AGENDA (CDDH/255/Rev.1)

3. The PRESIDENT said that the General Committee had that morning approved the agenda for the current meeting (CDDH/255/Rev.1). Representatives had been informed by the Secretary-General's note (CDDH/243) of the main items that would appear on the agenda of the current meeting. One change only had been made in that note: the General Committee had decided that morning that the report of the Drafting Committee would be submitted later, when that Committee had completed its work.

The agenda was adopted.

PROPOSALS BY THE GENERAL COMMITTEE CONCERNING THE PROCEDURE TO BE FOLLOWED FOR THE ADOPTION OF THE DRAFT PROTOCOLS IN PLENARY MEETINGS OF THE CONFERENCE (CDDH/253)

4. The PRESIDENT said that at its meeting that morning the General Committee had taken a decision which he felt would be received by the Conference with great satisfaction: the Committee had unanimously agreed on the order in which the two draft Protocols would be considered. Consequently, if the Conference confirmed that proposal, part II of document CDDH/253 would not have to be considered and the Conference would not need to decide by vote on one of the two possibilities outlined there.

5. Thanks to informal consultations which had taken place during the past week, and with the understanding and goodwill shown by all, the members of the General Committee had that morning agreed on the following solution of the problem concerning the order for the consideration of the draft Protocols.
6. From 23 May to 1 June the Conference would take decisions on all the articles of draft Protocol I with the exception of the Preamble. From 2 to 7 June decisions would be taken on all articles of draft Protocol II with the exception of the Preamble. The Conference would take a decision on the Preamble to draft Protocol I and, if necessary, on the Preamble to draft Protocol II on 8 and possibly 9 June. The Conference would vote on 9 or 10 June on the two draft Protocols as a whole, first on draft Protocol I and then on draft Protocol II. Should the plenary Conference be unable to complete the adoption of draft Protocol I by 1 June, then, beginning on 2 June, the discussion and adoption of the articles of draft Protocols I and II would proceed simultaneously. In that case - and he was sure that no one would wish that to happen - thought would be given to the way in which the work would continue and which meetings would be allocated for dealing with Protocol I and for considering and adopting the provisions of Protocol II.
7. The solution adopted by the General Committee would entail the deletion not only of part II of document CDDH/253, but also of the annex to that document. The Secretariat would endeavour to draw up a time-table for the work to be done within the dates mentioned in the solution adopted by the General Committee that morning. The time-table would be provisional and it might not cover the whole of the remaining three weeks of the Conference, but it would be adjusted periodically and would always be issued three or four days in advance of the meetings it was to cover.
- The procedure proposed by the General Committee was adopted.
8. The PRESIDENT said that document CDDH/253 had been discussed very carefully by the General Committee at two meetings and he hoped that it would be approved without difficulty.
9. Without prejudice to the provisions in part III of the document concerning statements and explanations of vote which representatives might make regarding each article, he appealed to all, on behalf of the General Committee, to make their statements and explanations of vote as short as possible, to submit them in writing as far as possible and to make statements in explanation of vote only if they were absolutely necessary, since in many cases such explanations had already been made in Committee and had appeared in the summary records.

10. Representatives would have noted the strict time-limit of three minutes laid down for each statement if an article was adopted by consensus, and five minutes for statements in the case of a vote or an amendment. He, as President, would be forced to impose those time-limits strictly.

11. Decisions in plenary meetings on matters of substance concerning articles of draft Protocols I and II would be taken by a two-thirds majority of the representatives present and voting, in accordance with rule 35, paragraph 1, of the rules of procedure of the Conference.

12. Lastly, he said that the General Committee had agreed in principle that, as from the following Wednesday or Thursday, the plenary Conference would be able to use the electronic voting system in Conference Room I. The Conference would not use that system, however, until all the necessary explanations and tests had been made.

13. The PRESIDENT, replying to a question by Mr. CLARK (Nigeria), who asked for clarification of the second paragraph of part III of document CDDH/253, said that the proposal concerning written statements had been made by the General Committee in order to save time. However, that would not prevent representatives from making oral statements, which should not exceed three minutes. Written statements, which would be alternative to oral statements, should reach the Secretariat within twenty-four hours of the end of the relevant meeting and should not be more than two pages in length.

14. Mr. AREBI (Libyan Arab Jamahiriya), referring to part III of document CDDH/253, suggested that it would be preferable for each article to be read out before a vote was taken, in order to identify clearly the article on which representatives were voting.

15. The PRESIDENT said that it would lead to a great loss of time if each article was read out in five languages.

16. Mr. AREBI (Libyan Arab Jamahiriya) said that he did not insist on his proposal, but considered that if adopted it would provide an additional guarantee that certain articles would not be misunderstood.

17. Mr. MILLER (Canada) said that it was true that at certain conferences, where perhaps there were not so many articles to be considered, articles were read out before the vote. However, his delegation supported the President. As a rule, an article should not be read out before the vote unless a representative specially asked for it.

18. The PRESIDENT agreed that if a representative asked for a certain article to be read out he would naturally agree to do so.

19. Mr. GRIBANOV (Union of Soviet Socialist Republics) said that his delegation supported the President and agreed that an article should be read out only if a representative so requested.

20. Mr. AL-FALLOUJI (Iraq) supported the representative of the Libyan Arab Jamahiriya and suggested that the title at least of the article to be voted upon should be read out in order to avoid any ambiguity.

21. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic), referring to the first sentence of part IV of document CDDH/253, said that it contradicted the rules of procedure of the Conference, rule 29 of which stated that "As a general rule, no proposal shall be discussed or put to the vote at any meeting of the Conference unless copies of it had been circulated to all delegations not later than the day preceding the meeting".

22. According to the first paragraph of part IV of document CDDH/253, "Any amendment proposed to the articles of the draft Protocols for consideration in plenary will be submitted to the Secretariat in writing by 6 p.m. on the second day preceding the day on which the Conference is to consider the article to which the amendment relates". Nothing was said about when the Secretariat would circulate the text of the amendments in order that representatives might be able to study them. He therefore suggested that it would be better to specify in part IV an earlier time-limit for the submission of amendments.

23. The PRESIDENT said that he wished to assure the representative of the Ukrainian Soviet Socialist Republic that the rules of procedure of the Conference were applicable. It was precisely in order to ensure respect for those rules that the first paragraph of part IV had been drafted to allow for a forty-eight hour period to elapse between the submission and the consideration of amendments.

24. Mr. KHALIL (Qatar) pointed out that the Arabic text of part IV of document CDDH/253 differed from the other language versions, in that it stated that amendments should be submitted by "6 p.m. on the day preceding the day on which the Conference was to consider the article to which the amendment relates."

25. The PRESIDENT agreed that typographical errors had occurred in the Arabic text and said that a correction would be issued.

There being no objection, parts IV and V of document CDDH/253 were adopted.

Document CDDH/253, as a whole, as amended, was adopted.

INTRODUCTION OF THE REPORTS OF COMMITTEES I, II AND III

Report of Committee I (CDDH/405; CDDH/I/381)

26. Mr. de ICAZA (Mexico), Rapporteur of Committee I, introducing the draft report of that Committee (CDDH/405; CDDH/I/381) said that at its first session in 1974 the Committee had held sixteen meetings and had adopted Article 1 of draft Protocol I. At the second session the Committee had held twenty-five meetings and had adopted eighteen articles. At the third session the Committee had held eighteen meetings and had adopted seven articles only. At the fourth session the Committee had held twelve meetings only, but had adopted thirty articles together with two titles and two Preambles.

27. The texts of draft articles had been discussed in great detail at the first three sessions, as could be seen in the summary records and the reports. Working groups in which all delegations could participate were held in open debate. It had been decided at the current session that, owing to lack of time, the texts of amendments would not be discussed in Committee but in the Working Groups. Unfortunately, no record of the debates existed except in the reports of the Working Groups. Certain representatives had criticized that procedure, especially in the case of controversial articles, considering that it might lead to lengthy debates in plenary.

28. Members of Committee I had worked very hard and the Committee's success in adopting so many articles was to a great extent due to an excellent Secretariat.

29. The PRESIDENT thanked the Rapporteur and expressed his gratitude to the Chairman and Rapporteur of Committee I.

30. Mr. OFSTAD (Norway), speaking as Chairman of Committee I, said that in the course of one month the Committee had considered forty-six draft articles and adopted thirty. Among the difficult and controversial articles considered he mentioned those on reprisals, the International Fact-Finding Commission, reservations, and the proposed new Article 86 bis on the establishment of a Committee to study and adopt recommendations concerning the prohibition or the restriction, for humanitarian reasons, of the use of certain conventional weapons. The application with which Committee I had dealt with such difficult problems was due to the spirit of co-operation and understanding shown by all concerned. He wished to

pay a special tribute to the Rapporteur and to the Chairmen of the three Working Groups of Committee I, and thanked the two Vice-Chairmen who during his prolonged absence had chaired Committee I. He also thanked the Secretariat of the Committee.

The Conference took note of the report of Committee I.

Report of Committee II (CDDH/406; CDDH/II/467)

31. Mr. EL HASSEEN EL HASSAN (Sudan), Rapporteur of Committee II, introducing the draft report of Committee II (CDDH/406; CDDH/II/467), said that the Committee had set up two Working Groups which in turn had set up sub-working groups. Thanks to its Chairman and Secretariat the Committee had been able to approve all the articles assigned to it.

32. He then read out a note concerning modifications made by the Drafting Committee to articles adopted by the Committee. The note would be circulated shortly as a document.

33. Mr. NAHLIK (Poland), speaking as Chairman of Committee II, expressed his gratitude to all those who had contributed to the success of the Committee's work, throughout which a spirit of co-operation and mutual understanding had prevailed.

34. It had been a pleasure for him to chair the Committee's meetings at which so many articles of legal, political and ethical importance had been considered.

35. He expressed his thanks to the Vice-Chairmen of the Committee, the Rapporteur, the Chairmen and Rapporteurs of the Working Groups and sub-groups and the Committee Secretariat.

The Conference took note of the report of Committee II.

Report of Committee III (CDDH/407; CDDH/III/408)

36. Mr. ALDRICH (United States of America), Rapporteur of Committee III, introducing the draft report of that Committee (CDDH/407; CDDH/III/408) said that the Committee had considered a number of difficult articles, especially Article 42, Article 42 quater on mercenaries and Article 65 on fundamental guarantees. In addition, the Committee had reconsidered and modified some articles which it had considered and adopted at earlier sessions.

37. Mr. SULTAN (Egypt), speaking as Chairman of Committee III, thanked all who had participated in the work of the Committee, which he had chaired for three out of the four sessions of the Conference. He wished to express his special gratitude to the Rapporteur of the Committee.

38. Twenty-seven of the thirty-three articles of draft Protocol I and fifteen articles of draft Protocol II had been adopted by Committee III by consensus. He hoped that the plenary meeting would also adopt those articles by consensus.

The Conference took note of the report of Committee III.

ADOPTION OF THE ARTICLES OF DRAFT PROTOCOL I (CDDH/401)

Article 1 - General principles and scope of application

39. The PRESIDENT invited the Conference to consider Article 1.

40. Mr. HESS (Israel) said that his delegation could accept paragraphs 1, 2 and 3 of Article 1, but would have to ask for a separate vote on paragraph 4.

41. Mr. ABADA (Algeria) said that his delegation had hoped that in order to save time, Article 1 would be adopted by consensus. If Israel insisted on a separate vote on paragraph 4, however, he would ask that the vote be taken by roll-call.

42. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) pointed out that paragraph 4 in the English text was numbered paragraph 2 in the Russian text.

43. The PRESIDENT said that paragraph 4 was numbered correctly in the English, French and Spanish texts. The mistake in the numbering of the Russian text would be corrected.

44. Mr. AL-FALLOUJI (Iraq) said that his delegation supported the Algerian representative's request for a roll-call vote. If Article 1 was not adopted by consensus, the vote on it would be of historic significance.

45. Mr. SKALLI (Morocco) said that, since Article 1 had already been approved at the first session, he regretted that one delegation should seek to prevent it from being adopted unanimously. He supported the representatives of Algeria and Iraq in their request for a roll-call vote.

46. Mr. de ICAZA (Mexico) pointed out that the text of paragraph 4 had originally been proposed as an amendment by his delegation and others. Under rule 39 of the rules of procedure, he would insist that any vote should be taken on the article as a whole.

47. The PRESIDENT asked the representative of Israel if he wished to press his motion for a separate vote on paragraph 4.

48. Mr. HESS (Israel) said he regretted that he would have to insist on a separate vote on paragraph 4.
49. Mr. GRIBANOV (Union of Soviet Socialist Republics) proposed that the Conference should vote on Article 1 as a whole.
50. Mr. EL-FATTAL (Syrian Arab Republic) supported that proposal.
51. The PRESIDENT said that under rule 39 of the rules of procedure, "a representative may move that parts of a proposal or an amendment shall be voted on separately. If objection is made to the request for division, the motion for division shall be voted upon." He therefore put to the vote the motion by the representative of Israel for a separate vote on paragraph 4.

The motion was rejected.

52. Mr. ALDRICH (United States of America) asked whether Article 1 could now be adopted by consensus.
53. Mr. HESS (Israel) said that although his delegation could accept paragraphs 1, 2 and 3, it would have to ask for a vote on Article 1 as a whole.
54. Mr. ABADA (Algeria) said that his delegation insisted on a vote by roll-call.
55. Mr. AREBI (Libyan Arab Jamahiriya) said that since paragraph 4 had led to discussion, he would ask the Secretary-General to read out the text of the paragraph in full, in order to make it perfectly clear that it dealt with the struggle of peoples against colonial domination, alien occupation and racist régimes.
56. The SECRETARY-GENERAL read out the full text of paragraph 4.
57. Mr. MBAYA (United Republic of Cameroon) said that, since Article 1 had already been adopted, a two-thirds majority vote on that article would be necessary.
58. The PRESIDENT pointed out that Article 1 had already been adopted in Committee but not in plenary.

At the request of the Algerian and Egyptian representatives, the vote on Article 1 as a whole was taken by roll-call.

Lesotho, having been drawn by lot by the President, was called upon to vote first.

In favour: Lebanon, Liechtenstein, Luxembourg, Madagascar, Mali, Malta, Morocco, Mauritania, Mexico, Mongolia, Mozambique, Nicaragua, Nigeria, Norway, New Zealand, Oman, Uganda, Pakistan, Panama, Netherlands, Peru, Philippines, Poland, Portugal, Qatar, Syrian Arab Republic, Republic of Korea, German Democratic Republic, Democratic People's Republic of Korea, Socialist Republic of Viet Nam, Byelorussian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic, United Republic of Tanzania, Romania, Holy See, Senegal, Somalia, Sudan, Sri Lanka, Sweden, Switzerland, Czechoslovakia, Thailand, Tunisia, Turkey, Union of Soviet Socialist Republics, Uruguay, Venezuela, Yemen, Democratic Yemen, Yugoslavia, Zaire, Afghanistan, Algeria, Saudi Arabia, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, United Republic of Cameroon, Chile, Cyprus, Colombia, Costa Rica, Ivory Coast, Cuba, Denmark, Egypt, United Arab Emirates, Ecuador, Finland, Ghana, Greece, Honduras, Hungary, India, Indonesia, Iraq, Iran, Libyan Arab Jamahiriya, Jamaica, Jordan, Kenya, Kuwait.

Against: Israel.

Abstaining: Monaco, United Kingdom of Great Britain and Northern Ireland, Federal Republic of Germany, Canada, Spain, United States of America, France, Guatemala, Ireland, Italy, Japan.

Article 1 was adopted by 87 votes in favour, one against and 11 abstentions.

Explanations of vote

59. Mr. HESS (Israel), speaking in explanation of vote, said that his delegation regretted that it had been forced to vote against Article 1 as a whole. It fully accepted paragraphs 1, 2 and 3, but totally objected to paragraph 4 for the following reasons:

60. First, it felt that any reference to the motives and cause for which belligerents were fighting was in clear contradiction to the spirit and accepted norms of international humanitarian law and to the preamble to Protocol I. Any delimitation between international and non-international conflicts should be based on objective criteria. It should apply to the just and the unjust, to the one who might be considered the aggressor by some and the victim by others. A rule which was intended to apply only to one type of belligerent was not a legal norm; it might well be a carefully-drafted condemnation of a well-deserved benediction, but it was not a norm of international humanitarian law.

61. Secondly, draft Article 1, paragraph 4 had within it a built-in non-applicability clause, since a party would have to admit that it was either racist, alien or colonial - definitions which no State would ever admit to. By including such language, the Conference had, to his regret, ensured that no State by its own volition would ever apply that article.

62. Thirdly, when drafting Article 1, paragraph 4, it had been pointed out by a number of delegations that since obligations were being placed on non-State entities, it would be necessary carefully to rewrite the other articles of the Protocol in order to ensure the necessary changes to enable non-State entities to apply it.

63. However, the Conference had refrained from doing so and was now faced with a Protocol with detailed regulations which obligated non-State entities but could not be applied by them. For example, there were detailed regulations as to courts, tribunals, legal systems and appeals, but non-State entities by definition did not possess such organs. What remained were obligations without any international responsibility, a system which could not work.

64. Lastly, he said that instead of drawing up concise, clear and valid rules that would have ensured correct treatment to all guerrilla fighters, the Conference had attempted to introduce political resolutions that were properly the responsibility of political organizations such as the United Nations into rules of international humanitarian law, and in so doing had achieved nothing but long-term damage to those rules by such politization.

65. Mr. GRIBANOV (Union of Soviet Socialist Republics) said that in his delegation's view, Article 1 of draft Protocol I was one of the basic articles aimed at the reaffirmation and development of the 1949 Geneva Conventions. The purpose of Protocol I was to find the most effective means of applying the provisions of the Conventions in the context of present-day international relations. Article 1, which was of particular importance in that respect, correctly reflected such relations not only in confirming the provisions of Article 2 common to the four Geneva Conventions of 1949, but also in defending the rights of peoples fighting against colonial domination and alien occupation, and against racist régimes, in order to exercise their right to self-determination as enshrined in the Charter of the United Nations and in the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

66. The establishment of a direct defence for the victims of colonialism, racism and aggression represented an important reaffirmation of the rules of international humanitarian law and a strengthening of the authority and practical application of those rules in armed conflict. His delegation fully supported the provisions of Article 1 of draft Protocol I, which had been drawn up by the joint efforts of delegations participating in the Conference.

67. The right of peoples to self-determination and their right to fight against colonialism, racism and aggression was a generally-recognized principle of international law. The Soviet Union, which throughout its history had consistently opposed colonialism and actively supported those who were struggling for their national liberation from colonial and racist domination, attached particular importance to the article.

68. Mr. ABI-SAAB (Egypt) said that his delegation deeply regretted that, despite the United States representative's appeal, the attitude of a single delegation had prevented the adoption of the fundamental provisions of Article 1 by consensus. Paragraph 4 of the article was based on the principle of self-determination, which had been accepted by all members of the international community. As had been shown by the fact that the vast majority had voted in its favour, the paragraph should not have caused any problem to any State recognizing the principle of self-determination. It had been stated that the problem lay in the use of political language. Struggles against colonial domination, alien occupation and racist régimes were, however, specific applications of the principle of self-determination, which was unquestionably a legal principle: was it political to take into consideration some of the atrocious and murderous armed conflicts being waged in the present-day world? It had been stated that the language of the paragraph had been imported from the United Nations, which was a political forum, and was unsuited to a Conference which was a legal and humanitarian body. The vast majority of representatives at the Conference also represented their countries at the United Nations and would hardly put forward differing views in the two bodies on the same legal subject of the reaffirmation and development of humanitarian law.

69. It had also been said that the other articles of the Protocol had not been adjusted to the adoption of Article 1, paragraph 4, and that that situation would result in unequal treatment of the Parties. Almost throughout the second session of the Conference, an informal working group, representing all the regional groups, and working with the participation of several delegations which had just abstained in the vote on Article 1, had met to examine the consequential effects of the adoption of that article in Committee.

The Working Group had unanimously concluded that no consequential change was needed in any article, beyond the addition of a new paragraph to Article 84 concerning the accession of liberation movements to the Protocol.

70. International practice on the universal, regional and bilateral levels had established beyond doubt the international character of wars of national liberation. The purpose of the amendment which had been adopted as paragraph 4 of Article 1 had not been to introduce a new and revolutionary provision, but to bring written humanitarian law into step with what was already established in general international law, of which humanitarian law was an integral part.

71. His delegation therefore considered that the importance of the article lay in narrowing future divergencies in interpretation rather than in introducing new solutions. That in itself was a great advance, since experience had shown that the basic problem of humanitarian law had lain in the application of general principles to specific situations rather than in the acceptance of such general principles. All the provisions which bridged the gap between those two levels, beginning with paragraph 4 of Article 1, constituted the real advances achieved by the Conference, since such provisions closed the door to spurious interpretations and evasive attitudes when States were called upon to honour, by their action, the humanitarian principles and obligations which they readily accepted in abstract terms.

72. Mr. ULLRICH (German Democratic Republic) said that in adopting Article 1 of draft Protocol I, the Conference had taken an important decision. The result of the vote was an expression of the will of most States represented at the Conference to reaffirm the peoples' right to fight against colonial domination, alien occupation and racist régimes in the exercise of the right to self-determination. The peoples could thereby rely on 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, as well as on numerous resolutions adopted by the United Nations General Assembly.

73. The recognition of a people's struggle for liberation as an international armed conflict in the sense of Article 2 common to the four Geneva Conventions of 1949, represented an important extension of the field of application of the Conventions and of the Protocol. It took into account present realities and necessities.

74. Considering the efforts for peace and security and the promotion of world détente to be the most important international task, his Government saw in those efforts an inseparable connexion with the guarantee of the peoples' right to self-determination. It therefore consistently stood for the peoples' struggle for liberation in the exercise of their right to self-determination, and opposed any attempt to falsify the content of Article 1 or to restrict its field of application.

75. His delegation was of the opinion that Article 1 positively enhanced international humanitarian law and that its present wording would be necessary as long as colonial domination and racist régimes existed.

76. Mr. DI BERNARDO (Italy) said that his delegation had abstained in the vote on Article 1 as a whole because of considerations which had remained unchanged since the adoption of the Article by Committee I.

77. Article 1 as adopted brought a vagueness into the concept of international conflict - a concept which was fundamental to the aim of respect for international humanitarian law. It could not be denied that the conflicts covered by paragraph 4 were indefinable from the point of view of objective elements. The struggle of an armed group against a Government within the meaning of Article 1 of Protocol I could be considered as an international or as an internal conflict not on the basis of appreciable objective elements but on that of a largely subjective element: the aim of the struggle. That factor seriously prejudiced the uncontroversial application of the rules of international law, since it completely blurred the borderline between international and non-international armed conflicts.

78. His delegation had consistently supported the practical application of the principle of self-determination of peoples, but it was convinced that, by giving scope for wide differences in interpretation, Article 1 of Protocol I as adopted could not serve the legitimate interests of peoples, since it rendered uncertain both the legal system applicable to their struggle and the guarantees to which those peoples were entitled.

79. Mr. HERCZEGH (Hungary) said that his delegation had voted for Article 1, considering it to be one of the key provisions of Protocol I. It attached particular importance to paragraph 4, which represented a great step forward in the development of international humanitarian law. The right of peoples to self-determination included their right to struggle against colonial domination and foreign occupation and against racist régimes. They should therefore enjoy the full protection of Protocol I in their struggle.

After the adoption of Article 1 and its paragraph 4, no one could in good faith deny the international character of armed conflicts in which peoples exercised their right to self-determination.

80. Mr. AL-FALLOUJI (Iraq) said that his delegation had noted with great satisfaction the result of the vote on Article 1, in which only a single voice had been raised against the vast majority who had voted in favour of the historic article. His delegation attached particular importance to the first vote, which had shown that the Conference considered the article indivisible.

81. The most important paragraph of Article 1 was paragraph 3, stating that the Protocol supplemented the Geneva Conventions. Paragraph 4, which filled out that key paragraph, also contained a fundamental principle. There was no trend in the present-day world that was more inevitable than decolonization. Paragraph 4, which recognized that objective truth, thus filled a gap in international humanitarian law.

82. Mr. FREELAND (United Kingdom) said that his delegation had voted in favour of the motion for division because it had traditionally taken the position, in the proceedings of international bodies, that a delegation which asked for a separate vote should generally be allowed the opportunity to express its position in that way. It had seen no reason to depart from that position on the present occasion.

83. His delegation had abstained in the vote on Article 1 as a whole and would have abstained on paragraph 4 if a separate vote had been taken on it. At the first session of the Conference the United Kingdom delegation had voted against the amendment to include the paragraph now appearing as paragraph 4, partly because it had seen legal difficulty in the language used, which seemed to be cast in political rather than legal terms. The main reason for its opposition, however, was that the paragraph introduced the regrettable innovation of making the motives behind a conflict a criterion for the application of humanitarian law.

84. His delegation had nevertheless fully understood the wish of those who in 1974 had sponsored the amendment now appearing as paragraph 4 to classify as international armed conflicts various conflicts which by traditional criteria would have been considered internal but in which the international community was taking a keen interest. Those conflicts had been mentioned during the debates in 1974. They were conflicts which had been of major concern to the United Nations, all of them outside Europe; some of them had fortunately come to an end since 1974.

85. Not wishing to see the Protocol founder on that difference of opinion, his delegation had joined in the efforts at the subsequent three sessions of the Conference to fit the new idea contained in the amendment into the framework of the Protocol. One of its primary concerns at the first session had been that it might be argued that different rules of law should apply to opposing sides in a conflict to which the paragraph applied and that the text of other articles might be amended accordingly. His delegation had been relieved to find that that had not been so and that the cardinal principle of equality of application to all participants had been respected. In a spirit of co-operation, rather than in the unfortunate atmosphere of confrontation which had prevailed at the first session, solutions had been found to the problem of integrating the amendment and its consequences into the Protocol.

86. Thus, while still having certain doubts about paragraph 4 of the article for the reasons of law he had stated, his delegation had been able to move from a negative vote in 1974 to abstention on the article as a whole on the present occasion.

87. He wished to make a general point of interpretation which applied not only to the class of armed conflicts referred to in paragraph 4 but also to the traditional class of inter-State conflicts referred to in paragraph 1. In either case, for Protocol I to apply there must be armed conflict. That term was defined neither in the Conventions of 1949 nor in Protocol I. His Government considered, however, that the term "armed conflict" in that context implied of itself a certain level of intensity of fighting which must be present before the Conventions or the Protocol could apply in any situation.

88. In Article 1 of Protocol II, dealing with internal armed conflicts, Committee I had defined the level of intensity which must be reached before Protocol II could apply. That definition, which had been adopted by consensus, had been worked out carefully and after long debate. In his delegation's view, the armed conflicts to which Protocol I would apply could not be of less intensity than those to which Protocol II would apply. His delegation would accordingly interpret the term "armed conflict" as used in Protocol I in that sense.

89. Mr. CLARK (Nigeria) said that his delegation had voted for the article because it embodied the present state of international law applicable in armed conflict. The article was essential to draft Protocol I as a whole.

90. When his delegation had joined in sponsoring the proposal that had led to Article 1, paragraph 4, it had realized that the Conference was taking an important and innovative step in recognition of the legitimacy of the struggle of the national liberation movements in Africa and elsewhere against colonial domination, alien occupation, apartheid and racist régimes. The principle of self-determination which the article endorsed went beyond political notions; it was now a part of international law, as enshrined in the Charter of the United Nations and several multilateral instruments, including the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations. It was of historic importance that the increasingly intensive armed struggles for freedom and independence taking place in Namibia, Zimbabwe and South Africa would now be recognized by the world as international conflicts under international humanitarian law.

91. Mr. PAOLINI (France) said that his delegation had abstained in the vote on Article 1 for the reasons it had indicated in Committee I. Its abstention was justified by its concern at the lack of criteria for a precise distinction between non-inter-State armed conflicts covered by Protocol I and those covered by Protocol II. The confusion in paragraph 4 with regard to conflicts coming into one or other of those categories was bound to be a constant source of trouble and confusion both legally and politically.

92. Mr. MILLER (Canada) agreed with the view that the basic problem facing the Conference was the application of humanitarian law in specific situations of the present day. The point of concern to his delegation was whether the article fulfilled the task for which it was designed. Canada's support on many occasions for the right of peoples to self-determination was a matter of record. That right was a fundamental principle of the Charter of the United Nations and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. It was not, however, the issue on the present occasion. The Conference was not seeking through the article to give peoples the right to self-determination. The discussions in the United Nations and elsewhere on colonial domination, alien occupation and racist régimes had already been given an international character and it was to be hoped that they would result in the elimination of the causes and the rectification of the results of such practices.

93. His delegation was concerned about another equally important principle: that of non-discrimination in humanitarian law, which the article had breached. Paragraph 4 might now encourage the very States that were alleged to be guilty of colonial domination or alien occupation, or of being racist régimes, not to apply the Protocol.

94. At the first session of the Conference his delegation had endeavoured to suggest alternative ways of dealing with the specific situations it wished to see covered, and it regretted that its suggestions had not been accepted. That was why it had been obliged to abstain on the article as a whole. It would have preferred to see the article adopted by consensus, and would then have made a similar statement to the present one. He hoped the situations intended to be covered by paragraph 4 would indeed be covered, but he had doubts on that score. If they were not, it was important that the other provisions of international humanitarian law on which the Conference was working should apply to them.

95. Mr. MBAYA (United Republic of Cameroon) said that his delegation wished to express its deep satisfaction at the adoption of Article 1 of draft Protocol I. The Conference had the dual task of reaffirming and developing international humanitarian law applicable in armed conflicts. It would have failed to fulfil the second of those two functions if it had not adopted the article. In doing so, the Conference had courageously taken into account the facts of the modern world by giving national liberation movements their rightful status and ensuring them adequate protection.

96. It was because of those considerations that his delegation had voted in favour of the admission of national liberation movements as observers at the Conference and had consistently supported the provisions for their protection which had been approved in committee by the vast majority of delegations.

97. There was a principle of international and domestic law that conventions must be interpreted and applied in good faith. A Party to a convention that was not in good faith would always find a pretext to dispute the nature of any provision, however clear it might be.

98. Mr. JEICHANDE (Mozambique) said that it was well known that the People's Republic of Mozambique was the result of an armed struggle for national liberation during which several countries had supported the massacre of people fighting for their freedom. He was surprised that certain delegations had abstained in the vote on Article 1 when women and children of Angola, Mozambique and Viet Nam had been murdered and the fighters of those countries had been executed without trial for no other crime than having rejected slavery, foreign domination and exploitation and having struggled against apartheid, racism and exploitation in favour of a society in which human rights would no longer be mere empty words.

99. Despite the nobility and justice of their cause, there had hitherto been no international legal instrument to cover the situation of freedom fighters. His delegation therefore welcomed the adoption of the article, which was of fundamental importance to the peoples of Zimbabwe, Namibia, South Africa, Palestine and all other peoples who were fighting for their freedom, independence and human rights. The article was the very essence of the Protocol and should not be the subject of any reservations.

100. Mr. MENCER (Czechoslovakia) said that his delegation had voted in favour of Article 1, which was a key article of Protocol I. It attached particular importance to paragraph 4, which was an indispensable provision based on the exercise of the right of peoples to self-determination. The wording of the paragraph, which expressed in legal terms the reality of existing situations, had opened a new page in the history of international humanitarian law applicable in armed conflicts. Its adoption represented a development of international humanitarian law and was undoubtedly one of the major successes of the Conference. It also accorded with the views of the overwhelming majority of public opinion.

101. Mr. CERDA (Argentina) said that, as a sponsor of the amendment on which paragraph 4 of Article 1 had been based, his delegation welcomed the adoption of the article by so vast a majority. The paragraph undoubtedly represented the fundamental content of the article in that it reflected international recognition of the final liquidation of the colonial era -- a process which had begun at the end of the Second World War -- and recognition of the supreme nature of the human being which allowed of no form of discrimination. The right of all peoples to sovereignty over their own territory and the right to fight against unequal treatment were recognized in the definition of international aggression recently adopted by the United Nations General Assembly. The international community therefore had a duty to protect those participating in the struggle by making applicable to them the humanitarian rules of the Geneva Conventions of 1949 and of the Additional Protocols. It was in paragraph 4 that the overriding importance of Article 1 lay.

102. Mr. ABADA (Algeria) said that Article 1 was one of the most straightforward and clearest in the whole Protocol and that it was difficult to understand the mistrust and criticism with which it had been received. He welcomed, therefore, the overwhelming majority by which it had been adopted. By endorsing the principle of self-determination, which was already a universally accepted principle of international law, paragraph 4 contributed to the development of humanitarian law and helped to bring it into line with existing conditions. The article clearly constituted one of the fundamental elements of Protocol I, without which it would lose its consistency and validity, and even its acceptability. Any reservations with regard to the article would indicate a deep misunderstanding of the whole work of the Conference.

103. Mr. de BREUCKER (Belgium) said that his delegation had voted for the article because it could not but approve an article which restated, in paragraphs 1 and 2, the lofty general principles governing the application of humanitarian law. It had no comments to make on the first three paragraphs. With regard to paragraph 4, the Belgian delegation considered that it referred to a special type of armed conflict linked with the process of decolonization and very limited in duration and scale, and that it could in no way modify the respective scope of application of the two Protocols, one of which related to international and the other to non-international conflicts.

104. Mrs. ANCEL-LENNERS (Luxembourg) said that her delegation had voted for the article for the reasons given by the Belgian representative.

105. Mr. SAWAI (Japan) said that his delegation had been one of those which had opposed draft Article 1 when it had been voted on in Committee I during the first session of the Conference. Its reasons for doing so had been stated at the fifth meeting of Committee I. It had subsequently noted that a number of provisions having a bearing on paragraph 4 of the article had been adopted in the main Committees either by consensus or by a large majority on the assumption that Article 1 would eventually be incorporated into Protocol I. Taking that development into account, his delegation had abstained on Article 1.

106. Mr. EL-FATTAL (Syrian Arab Republic) said that the vote on Article 1 was a historic occasion of great legal, humanitarian and political significance. Hitherto, international humanitarian law had suffered from a tragic lacuna, in that it provided no protection for combatants exercising their right to self-determination by struggling against foreign occupation, racism and colonialism. The right to self-determination was universally recognized by international lawyers, which made it imperative to provide the necessary protection for those fighting to defend that right in Africa and in other parts of the world.

107. The fact that one delegation had voted against the article came as no surprise. That delegation had already unashamedly declared that its Government did not apply the fourth Geneva Convention of 1949; it was not to be expected, therefore, that such a country would vote for an article which protected the people whose territory it was occupying. That disquieting voice had become as familiar as it was obnoxious and, as could now be seen, it was completely isolated from the civilized world.

108. Mr. MOKHTAR (United Arab Emirates) said that the adoption of Article 1 showed that the peoples of the world had a high respect for international humanitarian law and wished to enrich it for the sake of present and future generations. He failed to understand the assertion that the article politicised legal conference. To support the cause of oppressed peoples fighting for their fundamental rights was not a political matter, but essentially one of supporting right against wrong. The wide support which the article had received spoke for itself; he would merely stress, therefore, that the article was very important from the humanitarian standpoint and that, by adopting it, the nations concerned had stood up for their humanitarian aims. In voting for the article, his delegation had been guided by the same humanitarian principles.

109. Mr. TODORIĆ (Yugoslavia) said that the adoption of the article was of historic value for the peoples fighting against colonial domination, foreign occupation and racist régimes. The provisions of the article constituted an important element in the progressive development of international humanitarian law. The result of the vote had clearly confirmed the will of the international community to apply the principles of the United Nations Charter and the United Nations General Assembly resolutions on the right of peoples to self-determination, to which his country attached overriding importance.

110. Mr. KAKOLECKI (Poland) wished to express his delegation's profound satisfaction at the adoption of Article 1, with paragraph 4, by an overwhelming majority. It was a fact of great importance that the Conference had clearly confirmed and incorporated in Protocol I the existing principle of international law which recognized the international character of armed conflicts in which peoples were fighting in the exercise of their right to self-determination. That historic decision was a logical and indispensable reaffirmation and development of international law. The article should be applied as adopted and should not be the subject of any reservations. His delegation sincerely hoped that it would help to ensure humanitarian legal protection to freedom fighters struggling against colonial domination, alien occupation and racist régimes.

111. Mr. GHAREKHAN (India) said that his delegation had voted for the article in conformity with India's consistent policy of support for wars of liberation for self-determination against alien occupation and colonialism. At the first session, his delegation had co-sponsored the proposal now embodied in paragraph 4 of Article 1.

It would have preferred the article to have been adopted unanimously by acclamation; the need for a vote was regrettable. It was satisfactory, however, that the article had been adopted by such an overwhelming majority; it would indeed have been ironical if it had been adopted without paragraph 4. His delegation noted with great satisfaction that representatives of national liberation movements who had been present as observers in 1974 were now attending the Conference as representatives of fully sovereign Governments, and hoped that the same would apply at future international gatherings to those still attending the Conferences as representatives of national liberation movements. The adoption of Article 1, with its paragraph 4, was an important achievement in the development of international humanitarian law.

112. Mr. GAYNOR (Ireland) said that his delegation had abstained in the vote for the same reasons for which it had abstained when Article 1 was adopted in Committee I. While his delegation fully sympathized with the aims behind the provisions of Article 1, it nevertheless regretted that a clearer and more precise definition of the situations to which paragraph 4 would apply had not been produced.

113. Mr. ARMALI (Observer for the Palestine Liberation Organization), speaking at the invitation of the President, expressed his deep satisfaction at the result of the vote, by which the international community had re-confirmed the legitimacy of the struggles of peoples exercising their right to self-determination. That had already been confirmed by a number of international texts, including resolutions of the United Nations General Assembly. All those present would doubtless recall with emotion the occasion on which the representatives of national liberation movements had taken their rightful places in the Conference to the unanimous applause of the international community. Ever since then, those representatives had co-operated in good faith, and, he believed, usefully, in the development of international humanitarian law and in the promotion of justice for peoples fighting for self-determination. Today's vote was the culmination of their concerted efforts. The overwhelming majority against the single vote cast by the Zionist representative was a source of deep satisfaction and would also be an encouragement to the peoples of southern Africa waging a just struggle for self-determination.

114. The Arab people of Palestine fell within all three of the categories mentioned in paragraph 4: they were under colonial domination; their territory was under foreign occupation, despite the assertions of the terrorist Begin; and they were suffering under a racist régime, since Zionism had been recognized in a United Nations resolution as a form of racism. He wished to express his gratitude to the justice- and peace-loving peoples who had given their support to the struggles of all peoples fighting for self-determination.

115. Mr. de ICAZA (Mexico) said that Article 1 was a well-balanced article. Paragraph 1 affirmed that the Protocol should be respected in all circumstances, thus excluding the possibility of distinctions being made between the circumstances surrounding, motivating or producing international armed conflicts. Paragraph 2 reiterated the well-known Martens clause. Paragraph 3 reaffirmed the application of the Protocol to the situations referred to in Article 2 common to the Geneva Conventions of 1949. Paragraph 4, resulting from an amendment sponsored by the delegations of Argentina, Honduras, Mexico, Panama and Peru reflected the development of international law since the adoption of the Geneva Conventions of 1949, by recognizing that the fight of peoples for self-determination constituted an international armed conflict. It was in line, therefore, with General Assembly resolution 1514 (XV) and with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

116. His delegation was glad to have contributed to the drafting and adoption of the article. It had opposed a separate vote because the deletion of one of the paragraphs would have destroyed the unity of the article and, thereby, its faithful reflection of existing international law.

117. Mr. AL-ATTIYA (Qatar) welcomed the adoption of Article 1 of Protocol I by such an overwhelming majority. In its present formulation, with its four paragraphs, the article constituted a decisive turning point in and confirmation of international humanitarian law. Paragraph 4 was a particularly important achievement since it embodied the principles of law established over the past thirty years concerning self-determination and the struggle against foreign domination and occupation and against racial segregation.

118. Mr. NAOROZ (Afghanistan) said that the importance of Article 1 was revealed by the fact that only one delegation had insisted on a vote on paragraph 4. The moment, as many previous speakers had said, was undoubtedly an historic one. His delegation had voted wholeheartedly in favour of the article, which embodied the fundamental right to self-determination and the right to struggle against alien domination. Much energy, effort and time had been put into the formulation of the article, which his delegation regarded as one of the key provisions of Protocol I. It was glad that it had been voted by such an overwhelming majority.

119. Mr. ALEXIE (Romania) said that his delegation had voted for Article 1, which it regarded as one of the fundamental articles of Protocol I. By giving specific recognition to the right of peoples to self-determination, enshrined in the United Nations Charter, Article 1 constituted a reaffirmation and development of international humanitarian law and an appropriate supplement to the 1949 Geneva Conventions. Romania had always supported the just struggle of peoples against colonial domination, foreign occupation and racist régimes in the exercise of their right to self-determination. It welcomed the adoption of an article of such great humanitarian value.

120. Mr. BRECKENRIDGE (Sri Lanka) said that his delegation had, from the beginning, supported Article 1 in the form in which it had been adopted today. As current co-ordinator of the non-aligned countries, it wished to mark the historic development of international humanitarian law contained in the article, since it reflected the principles which the non-aligned countries had always stood for and actively promoted. It wished to emphasize the importance of the article in the context of the final acceptance and application of the Protocol as a whole.

121. Mr. TOPERI (Turkey) said that his delegation was satisfied with the result of the vote, although it would have preferred the article to have been adopted by consensus. His delegation had voted for the article, which it regarded as one of the key provisions of Protocol I. The Turkish Government had always supported peoples struggling against colonial domination, foreign occupation and racist régimes in the exercise of their right to self-determination. In its view, the article applied to armed conflicts recognized by regional intergovernmental organizations such as the League of Arab States or the Organization of African Unity, which were universally and widely accepted.

122. Mr. ROUCOUNAS (Greece) said that his delegation had voted for Article 1 as a whole, regarding it as a humanitarian provision of great importance. Paragraph 4 was fully in accordance with modern international law as expressed in the United Nations Charter and as it had been applied during recent years. Since the first session of the Conference, the internal situation in Greece had changed, with the re-establishment of democratic legality. His delegation was therefore glad to take the opportunity to confirm his country's support for the right of peoples to self-determination and its opposition to any form of domination and foreign occupation. Paragraph 4 provided the necessary protection for peoples fighting in the exercise of those rights.

123. Mr. AREBI (Libyan Arab Jamahiriya) said that he had been glad to hear a very large number of delegations express the view that Article 1 was the cornerstone of Protocol I. On the other hand, he had been surprised to hear a certain number of delegations state that paragraph 4 would not be of benefit to peoples struggling for self-determination. Perhaps that view was not so surprising when one noted which delegations had abstained in the vote.

124. Mr. ALKAFF (Democratic Yemen) said that his delegation had voted for Article 1, which constituted an important factor in the development of international humanitarian law. The provision of all possible forms of protection to peoples struggling against foreign occupation and racist régimes in the exercise of their right to self-determination was indeed an essential element of international humanitarian law. Democratic Yemen, which had achieved its independence through armed struggle, was fully aware of the significance of the article, which embodied a basic principle of Protocol I and should not be the subject of any reservations. The article could have been adopted by consensus had it not been for a single delegation which had insisted on a vote, thereby sabotaging international unanimity. However, the result of the vote had been satisfactory and would serve the development of international humanitarian law in the interests of all peoples.

125. Mr. BEN REHOUMA (Tunisia) expressed his delegation's satisfaction at the adoption of the article by a very large majority. By reiterating the universally recognized right of peoples to self-determination, the article extended the protection of international humanitarian law to millions of people who had placed their hopes in the Conference. The humanitarian concern expressed in the article was clear. It constituted a noteworthy landmark on the road to the abolition of colonialism and racism. There was no justification for invoking legalistic arguments as a pretext for obstructing the extension of humanitarian law to peoples exercising their right to self-determination.

126. Mr. EL HASSEEN EL HASSAN (Sudan) said that his delegation had voted in favour of Article 1, which, in its view, constituted the cornerstone of Protocol I. Sudan had always assisted, with money, arms and training, national liberation movements struggling against colonialism and racism; some members of such movements were now sitting as representatives of independent States. The fact that, a few years before, there had been serious difficulty in securing acceptance of their right to attend the Conference as observers was eloquent proof of the importance of Article 1 and of the need to apply it.

127. Mr. SHERIFIS (Cyprus) said that his delegation could not but have voted in favour of Article 1. It regarded Article 1 as the cornerstone upon which Protocol I was based, since it stated the guiding principles of the Protocol and defined its scope of application. His delegation's vote was also dictated by certain cardinal principles which his Government had constantly followed since Cyprus had emerged from colonial rule to independence and statehood. Those principles were enshrined in the United Nations Charter, and high among them was the right of peoples to self-determination. Above all, his country, for easily comprehensible reasons, stood against occupation and aggression. All those principles were embodied in paragraph 4 of the article. He welcomed its adoption in such overwhelming fashion.

128. Mr. QAAWANE (Somalia) said that his delegation had voted for the article and shared the satisfaction expressed by a majority of speakers. He was glad that justice and democracy had prevailed and that humanitarian rights had been restored to all those waging a just struggle for national liberation and self-determination.

129. Mgr. LUONI (Holy See) and Mrs. CONTRERAS (Guatemala) stated that their explanations of votes would be submitted in writing.

Article 2 - Definitions

Article 2 was adopted by consensus.

Article 3 - Beginning and end of application

Article 3 was adopted by consensus.

Article 4 - Legal status of the Parties to the conflict

Article 4 was adopted by consensus.

The meeting rose at 6.20 p.m.

ANNEX

to the summary record of
the thirty-sixth plenary meeting

EXPLANATIONS OF VOTE

AUSTRALIA

Original: ENGLISH

Article 1 of draft Protocol I

The Australian delegation voted in favour of Article 1 because it contains principles which are consistent with the purpose of this Protocol and because it extends international humanitarian law to armed conflicts which can no longer be considered as non-international in character.

In requiring the High Contracting Parties to undertake to respect and to ensure respect for Protocol I in all circumstances, paragraph 1 affirms the fundamental obligation which binds each Party to the Protocol.

Neither Protocol I nor any other international agreement covers all the situations which may arise in international conflicts and it is important to affirm the applicability of international legal humanitarian principles to situations not so covered. Paragraph 2 does this.

Paragraph 3 provides that Protocol I shall apply to all the situations in which the Geneva Conventions of 1949 are applicable. This paragraph is essential if the Protocol is to supplement the Conventions.

In applying Protocol I to armed conflicts involving national liberation movements, paragraph 4 is a significant development in international humanitarian law and one which my delegation supported at the first session of the Conference. This development of humanitarian law is the result of various resolutions of the United Nations, particularly resolution 3103 (XXVIII), and echoes the deeply felt view of the international community that international law must take into account political realities which have developed since 1949. It is not the first time that the international community has decided to place in a special legal category matters which have a special significance.

In supporting paragraph 4, the Australian delegation should not be understood as expressing an opinion on the legitimacy of any particular national liberation movement.

In supporting Article 1 as a whole, Australia understands that Protocol I will apply in relation to armed conflicts which have a high level of intensity. Furthermore, Australia understands that the rights and obligations under the Protocol will apply equally to all parties to the armed conflict, and impartially to all its victims.

CYPRUS

Original: ENGLISH

Article 3 of draft Protocol I

My delegation welcomes the unanimous adoption of Article 3, establishing the beginning and end of application of the Conventions and of Protocol I. We consider that the provision in paragraph (b) constitutes a forward development of humanitarian law in as much as it expands its application and as such we warmly welcome it. My delegation voices particular satisfaction because it is unequivocally stipulated in Article 3 (b) that "in the case of occupied territories" the application of the Conventions and of the Protocol shall cease only at the termination of the occupation, with one exception alone, and that is the right direction, namely concerning the persons whose final release, repatriation or re-establishment takes place thereafter and who will benefit until then from the relevant provisions concerning them.

Thus, people subjugated by the might of a foreign army will aspire to the protection of the humanitarian law until their plight is ended. It is only to be hoped that the Occupying Power will respect its provisions.

GERMANY, FEDERAL REPUBLIC OF

Original: ENGLISH

Article 1 of draft Protocol I

The delegation of the Federal Republic of Germany would have preferred to pronounce itself on the different paragraphs of Article 1 separately, for it attributes great importance to the obligations enshrined in the first three paragraphs of this article.

The Federal Republic of Germany welcomes the inclusion of the Martens clause in an operative article of Protocol I.

Since the delegation of the Federal Republic of Germany could only pronounce itself on the article as a whole, it decided to abstain in the vote. Its apprehensions regarding the disadvantages of paragraph 4 in the humanitarian context have outweighed its positive attitude towards the first three paragraphs.

The Federal Republic of Germany recognizes that the protection provided for in Protocol I should, in principle, be extended also to situations which were not regarded as international armed conflicts under traditional international law. It was in favour of broadening the field of application of Article 38 of draft Protocol II.

In order to extend the scope of application of draft Protocol I to conflicts which traditionally have not been regarded as international, it would have been necessary to find appropriate criteria of a basically legal character which can and will be applied in practice. However, the criteria contained in paragraph 4 as now adopted by the Conference do not meet these requirements. The terms "colonial domination", "alien occupation", "racist régimes" are not objective criteria but lend themselves to arbitrary, subjective and politically motivated interpretation and application. Moreover, they have been chosen rather with a view to short-term political problems and objectives, and thus do not fit well into a legal instrument intended to be of long-term value.

For these reasons the delegation of the Federal Republic of Germany decided to abstain in the vote.

GUATEMALA

Original: SPANISH

Article 1 of draft Protocol I

The delegation of Guatemala abstained in the vote by which Article 1 as a whole of draft Protocol I was adopted, for this delegation maintains reservations with respect to paragraph 4 of that article.

The Government of Guatemala respects and supports the principle of the self-determination of peoples provided that, in conformity with resolution 1514 (XV) of the General Assembly of the United Nations, the territorial integrity of a State is not infringed.

HOLY SEE

Original: FRENCH

Article 1 of draft Protocol I

The delegation of the Holy See voted for Article 1 of Protocol I as a whole.

It would have preferred the article to be adopted by consensus, in view of the very real value of paragraph 2, which explicitly mentions the Martens principle and invokes the dictates of universal conscience, a term which the Holy See delegation prefers to "public conscience".

Since it was not adopted by consensus, the Holy See finds itself obliged to express certain reservations both as to the merits of paragraph 4 of the article adopted, which clearly reflects a particular historical situation undergoing rapid development, and as to its applicability in practice, given that different judgements may be passed on the same or similar situations. In such judgements, subjective factors often outweigh objective criteria.

Finally, the Holy See delegation took its decision in the belief that paragraph 4 does not mean any substantive change in the scope of application of Protocol I, since it will cover certain conflicts that might otherwise not be covered either by Protocol I or by Protocol II, because of their special nature and their extent.

The Holy See delegation considers that it is in the interests of the international community that all armed conflicts should be covered by humanitarian law. From that standpoint, it is clear that the adoption of Article 1 of Protocol I will not represent a genuine development of humanitarian law unless it is followed by the adoption of Protocol II.

Only if both Protocols are adopted will there be an assurance that in the future all armed conflicts will really be covered by humanitarian law and that a due balance will be preserved in the protection of the victims of such conflicts.

INDONESIA

Original: ENGLISH

Article 1 of draft Protocol I

My delegation voted in favour of Article 1 of Protocol I as a whole, as it also did when this article was put to the vote in Committee I during the first session of the Diplomatic Conference in 1974.

However, as was also the case in 1974, my delegation voted in favour with the understanding that the liberation movements referred to in paragraph 4 of Article 1 are limited only to those liberation movements which have already been recognized by the respective regional intergovernmental organizations concerned, such as the Organization of African Unity and the League of Arab States.

By making our vote conditional to the factor of recognition by these regional intergovernmental organizations, we endeavour to insert an element of objectiveness in evaluating whether a movement can be regarded as a liberation movement or not.

NEW ZEALAND

Original: ENGLISH

Article 1 of draft Protocol I

At the first session of this Conference, the New Zealand delegation summarized its position in relation to draft Article 1 of Protocol I in the following way. It recognized, first, that the protection of the Protocol should not be applied only to the classical situations dealt with in existing international instruments, but should extend to contemporary situations, taking into account United Nations doctrine; secondly, the delegation stressed the need to ensure that the rules of the Protocol should apply equally to the adverse parties, and that its application should not require political judgements to be made by the International Committee of the Red Cross or by any protecting agency; and, thirdly, the delegation noted that the provisions of the article should not seem to give any encouragement to disruptive forces within a national society.

The New Zealand delegation believes that the problems relating to the article have not been completely surmounted: in particular, a great deal is left to subjective appreciation, in deciding whether or not a situation falls within the ambit of Article 1, paragraph 4. Nevertheless, the text of the article does in large measure satisfy the requirements stated in the foregoing paragraph. For this reason, and because Article 1 as a whole is the very foundation of Protocol I, the New Zealand delegation has supported the adoption of the article.

SPAIN

Original: SPANISH

Article 1 of draft Protocol I

Availing itself of the option, recently granted to delegations taking part in the Conference, to explain their votes in writing, the Spanish delegation wishes to say that it abstained in the vote on Article 1 of Protocol I on account of the wording of paragraph 4.

The terms of that paragraph give the impression that the legal treatment of an armed conflict might be connected with the motives or aims that may have actuated the Parties to the conflict, and that might in turn be interpreted as a reflection of the philosophy, not now admitted by anyone, according to which the end justifies the means.

Moreover, the paragraph in question includes the concept of national liberation movements, which it is very difficult to define objectively and which, in the opinion of our delegation and for the above-mentioned reasons that were explained at the proper time, is out of place in this article.

The Spanish delegation expresses its respect for and understanding of the line of thought followed by the delegations which advocated and approved paragraph 4 and, lastly, it emphasizes its agreement with the preceding three paragraphs of the article.

SUMMARY RECORD OF THE THIRTY-SEVENTH PLENARY MEETING

held on Tuesday, 24 May 1977, at 11.15 a.m.

President: Mr. Pierre GRABER Federal Councillor,
Head of the Federal
Political Department of
the Swiss Confederation

ADOPTION OF THE ARTICLES OF DRAFT PROTOCOL I (CDDH/401) (continued)

Article 5 - Appointment of Protecting Powers and of their substitute

Article 5 was adopted by consensus.

Explanations of vote

1. Mr. ABDINE (Syrian Arab Republic) said that his delegation considered that Article 5 did not serve its purpose, for it left the Parties to a conflict to decide whether to designate and accept a Protecting Power. The article contained no mandatory provisions in the event of the Parties concerned failing to appoint a Protecting Power, and that was all the more serious because the designation and appointment of a substitute also depended on the goodwill of those Parties. The fact that the provisions of Article 5 were optional jeopardized the whole system. Moreover, the article made no contribution to the development of the relevant provisions of the Geneva Conventions of 1949. His delegation would have preferred a mandatory solution to fill the gaps in the 1949 Conventions, and regretted that the Conference had not adopted such a solution because of an outmoded concept of absolute sovereignty.
2. Mr. SULTAN (Egypt) said that his delegation reserved the right to provide an explanation of its vote in writing within twenty-four hours.
3. Mr. DI BERNARDO (Italy) said that although his delegation had participated in the drafting of Article 5 and had joined the consensus reached in that connexion, it considered that the text represented too limited a degree of improvement on the Geneva Conventions of 1949.
4. With regard to the establishment of machinery designed to ensure the observance of humanitarian law, the Conference would have disappointed those who shared his delegation's view concerning the need to set on foot systems that were effective, impartial and as automatic as possible, in order to meet the humanitarian requirements of the victims of armed conflicts.

The obvious inadequacies of Article 5 in that respect were not offset by Article 79 bis, which laid down an optional procedure relating to the observance of humanitarian rules in a specific situation but did not provide for continuous supervision designed to ensure compliance with those rules in respect of the conflict as a whole.

5. His delegation nevertheless recognized the usefulness of Article 5, which ought to be accepted because it improved, albeit moderately, the system of Protecting Powers. Under its provisions, Protecting Powers or substitutes were clearly mandatory in all conflicts and their absence would constitute a violation by the Parties to the conflict of the obligations incumbent upon them under those provisions.

6. His delegation therefore understood Article 5 to mean that a Party which at any stage refused to comply with the system or hindered its operation would be committing an illegal act under humanitarian law.

7. Mr. GRIBANOV (Union of Soviet Socialist Republics) said that his delegation had voted in favour of Article 5, because it believed that it would further the aims of the Conventions and Protocols. His delegation believed that conscientious implementation of those instruments by all Parties, and especially by the Parties to a conflict, was essential.

8. Article 5 was a step forward in the system of appointing a substitute for a Protecting Power, because it clearly defined the circumstances in which such a substitute could operate.

9. His delegation considered Article 5 to be one of the basic articles in draft Protocol I, since it was designed to protect the interests of innocent victims of armed conflict.

10. Mr. GREEN (Canada) said that his delegation was in favour of strengthening the role and functions of the Protecting Power, although it would have preferred a mandatory system. Since the system proposed in the Geneva Conventions of 1949 had not proved satisfactory in conditions of armed conflict, his delegation supported the attempt made in Article 5 to strengthen that system, and in particular the proposals for the introduction of a substitute when it proved impossible to select a Protecting Power. It was grateful to the ICRC for its willingness to step in when necessary. His delegation was glad Article 5 referred to the absence of delay, thus providing a sense of purpose and importance.

The provision requiring action to be taken with the consent of States was merely an acknowledgement of the realities of political life, as was the statement that the appointment of a Protecting Power did not affect the legal status of the parties.

11. Paragraph 6 acknowledged the fact that diplomatic relations might not be severed when an armed conflict occurred, and reaffirmed that the formal existence of such relations should not be construed as an obstacle to the appointment of a Protecting Power.

12. In his delegation's view the whole purpose of Article 5 was to provide an alternative mechanism to supplement the institution of the Protecting Power, through the medium of the substitute and when necessary by means of the ICRC. His delegation's understanding was that, to the extent that Article 5 of draft Protocol I did not reproduce the content of the Conventions on the matter, the provisions of the latter remained valid.

13. Mr. VALLARTA (Mexico) said that his delegation welcomed the obligation which Article 5, paragraph 4, placed upon the Parties to the conflict to accept an offer by the ICRC or any other impartial organization to act as a substitute. It regretted that the approach embodied in Proposal I of the ICRC draft (CDDH/1) had not been accepted and that the functioning of the substitute was subject to the consent of the Parties to the conflict. It further regretted the rejection of the proposed text for a paragraph 4 bis submitted to Committee I, according to which the United Nations would have been able to designate a body to perform the functions of substitute when some or all of the functions incumbent upon the designated Protecting Power had not been carried out.

14. Mr. MARTIN HERRERO (Spain) pointed out that his delegation had submitted an amendment to Article 5, designed to prevent a situation in which an armed conflict could arise without a system of Protecting Powers being in force. His delegation, however, aware of the need for due regard to be given to the principle of the sovereignty of States, had divided its proposal into stages, the first maintaining the principle of free determination, the second the mandatory nature of the system.

15. His delegation had joined in the consensus on Article 5, believing the text to be a considerable improvement over the status quo. Nevertheless the text was unsatisfactory to the extent to which it departed from the Spanish delegation's own objectives.

16. Mr. EL HASSEEN EL HASSAN (Sudan) drew attention to certain errors in the Arabic version of Article 5.

17. The PRESIDENT said that the Drafting Committee would be requested to correct those mistakes.

18. Mrs. MANTZOULINOS (Greece) said that her delegation wished to refer again to its amendment CDDH/I/31.

19. The Greek delegation was of the opinion that Article 5, as adopted, was not an efficacious development of the system of Protecting Powers and their substitute.

20. In that connexion her delegation wished to reiterate its amendment CDDH/I/31, submitted at the first session of the Conference, which proposed that if despite the procedure laid down for the designation of the Protecting Power none was appointed the Parties to the conflict should accept the ICRC as substitute in so far as that was compatible with its own activities.

Article 6 - Qualified persons

Article 6 was adopted by consensus.

Article 7 - Meetings

Article 7 was adopted by consensus.

Article 8 - Terminology

Article 8 was adopted by consensus.

Article 9 - Field of application

21. Mrs. SUDIRDJO (Indonesia) said that her delegation, although generally in favour of Article 9, had some doubts concerning paragraph 2 (c). It had therefore abstained when a vote had been taken on that paragraph at Committee level.

22. In her delegation's view, the organization mentioned in that paragraph must fulfil the qualifications of being genuinely impartial and humanitarian. It was essential, therefore, that paragraph 2 (c) should be more specific, for instance by adding the words "such as the International Committee of the Red Cross or the League of Red Cross Societies". To leave paragraph 2 (c) in its present form would give room for organizations to declare

themselves "impartial and humanitarian", while in fact they were an instrument of certain political or ideological views. It was difficult for her delegation to accept paragraph 2 (c) in its present form and it was on that understanding that it joined in the consensus.

Article 9 was adopted by consensus.

Article 10 - Protection and care

Article 10 was adopted by consensus.

Article 11 - Protection of persons

23. Mr. PAOLINI (France) said that his delegation was in favour of the adoption of Article 11. With regard to paragraph 3, however, it regretted that the provision for donations of blood for transfusion or of skin for grafting had not been limited to cases of emergency. The condition concerning the free consent of the donor was open to question in the case of prisoners of war or inhabitants of occupied territories. The wording of paragraph 3 left room for abuses. In his delegation's view, the provision should have stipulated that the recipients should belong to the same Party to the conflict as the donors.

24. With regard to paragraph 4, he welcomed the fact that his delegation's amendment limiting application of the article to "any person who is in the power of a Party other than the one on which he depends" had been adopted. The text thus took into account the obligation of the Parties to the conflict to respect national legislation in the absence of any deontological text of an international nature.

25. Mr. AREBI (Libyan Arab Jamahiriya) said that his delegation fully supported the views expressed by the representative of France concerning paragraph 3.

26. Mr. EL HASSEEN EL HASSAN (Sudan) pointed out two typing errors in paragraph 3 of the Arabic text and the omission of one word in the first line of paragraph 4 after the word "Protocol".

27. Mr. WOLFE (Canada) supported the statement by the representative of France and said that paragraph 4 in its present form limited the application of the article to a country's own nationals.

Article 11 was adopted by consensus.

Article 12 - Protection of medical units

Article 12 was adopted by consensus.

28. Mr. RABARY-NDRANO (Madagascar) said that his delegation joined in the consensus concerning paragraphs 1, 2 and 3. It considered, however, that paragraph 4 should be mandatory for mobile as well as fixed medical units, especially in view of the lack of resources of developing countries. Furthermore it could happen that a factory or similar establishment already situated next to a fixed medical unit could be taken over for military purposes after the outbreak of war.

29. Mr. WOLFE (Canada), raising a drafting point, said that in his view the phrase "and shall not be the object of attack" in paragraph 1 was redundant and did not appear elsewhere in the Protocol where the phrase "respected and protected" was used.

30. Mr. URQUIOLA (Philippines) said that the word "sited" in paragraph 4 was too vague. He would prefer the word "situated".

Article 13 - Discontinuance of protection of civilian medical units

Article 13 was adopted by consensus.

Article 14 - Limitations on requisition of civilian medical units

Article 14 was adopted by consensus.

Article 15 - Protection of civilian medical and religious personnel

Article 15 was adopted by consensus.

31. Mr. SHERIFIS (Cyprus) expressed satisfaction at the adoption by consensus of Article 15. His delegation attached great importance to paragraph 3 of the article and hoped that the provisions in that paragraph would be respected by all concerned, both at present and in the future.

Article 16 - General protection of medical duties

Article 16 was adopted by consensus.

Article 17 - Role of the civilian population and of aid societies

Article 17 was adopted by consensus.

Article 18 - Identification

Article 18 was adopted by consensus.

32. Mr. HUSSAIN (Pakistan) drew attention to the fact that paragraph 5 still contained blanks for the numbers of annexes, which would have to be filled in later, in the final text.

Article 19 - Neutral and other States not Parties to the conflict

Article 19 was adopted by consensus.

Article 20 - Prohibition of reprisals

Article 20 was adopted by consensus.

33. Mr. AREBI (Libyan Arab Jamahiriya) and Mr. ABDINE (Syrian Arab Republic) drew attention to a mistake in the Arabic text, which should be corrected by the Drafting Committee.

34. Mr. CHARRY SAMPER (Colombia) said that his delegation was opposed to any kind of reprisals and expressed regret that the term had not been adequately defined.

35. Mr. de ICAZA (Mexico) said that his delegation intended to submit a statement on reprisals in writing.

Article 20 bis - General principle

Article 20 bis was adopted by consensus. *

Article 20 ter - Missing persons

Article 20 ter was adopted by consensus. **

36. Mr. SHERIFIS (Cyprus) said that his delegation wished to record its satisfaction at the unanimous adoption of Article 20 ter, which was an essential provision for the alleviation of the suffering of persons who did not know the fate of their loved ones. He expressed the hope that the article would be implemented by all Parties concerned.

Article 20 quater - Remains of deceased

Article 20 quater was adopted by consensus. ***

37. Mr. MORENO (Italy) said the Italian delegation warmly welcomed the fact that Articles 20 bis, 20 ter and 20 quater had been approved by consensus. Those articles - covering missing persons and the disposal of the remains of the deceased - were of great humanitarian value and had led the delegation to give them its strongest support. It was with particular satisfaction that the delegation noted that the articles incorporated all the suggestions it had made.

* Article 32 in the final version of Protocol I.
** Article 33 in the final version of Protocol I.
*** Article 34 in the final version of Protocol I.

38. Mr. FREELAND (United Kingdom) said that his delegation would submit a brief statement in writing.

39. After a brief procedural discussion, in which Mr. BINDSCHIEDLER (Switzerland), Mr. ABDINE (Syrian Arab Republic), Mr. PAOLINI (France), Mr. ARMALI (Observer for the Palestine Liberation Organization), Mr. MBAYA (United Republic of Cameroon), Mr. AREBI (Libyan Arab Jamahiriya) and Mgr. LUONI (Holy See) took part, the PRESIDENT suggested that, since the documentation for the subsequent articles had not yet been circulated in all languages, further consideration of Protocol I should be postponed until the following meeting.

It was so agreed.

REPORT OF THE AD HOC COMMITTEE ON CONVENTIONAL WEAPONS (CDDH/IV/225)

40. Mr. EATON (United Kingdom) introduced the report of the Ad Hoc Committee on Conventional Weapons (CDDH/IV/225) on behalf of the Rapporteur, Mr. Taylor (United Kingdom), who, for medical reasons, was unable to attend the current meeting.

41. The report had been adopted by the Ad Hoc Committee only that morning. A number of amendments had been made to it and would be issued in due course as a corrigendum.

42. As in previous years, the report was rather different in style and content from those of the other Committees, because the Ad Hoc Committee's task had not been to approve articles of the two draft Protocols, but rather to consider the question of, and proposals for, the prohibition or restriction of the use of specific categories of conventional weapons. The report was therefore essentially the record of a debate which had centred on specific proposals.

43. At the current session the Ad Hoc Committee had modified its previous working methods by establishing a Working Group, which had examined proposals in some detail and identified areas of agreement and disagreement. Working papers submitted in the Working Group had been annexed to its report, which, in turn, was annexed to the Ad Hoc Committee's report. The proposals submitted to the Ad Hoc Committee would be grouped in a convenient comparative table, as had been done at the third session. Thus, the documents before the Committee and its Working Group, together with a full and accurate record of the discussions in both bodies, would be available for reference in the future work which all delegations had agreed would be necessary, even though there were differences of opinion as to where and how that work might best be carried on.

44. Varying degrees of satisfaction or disappointment had been expressed concerning the results achieved at the current session. The only comment which the Rapporteur wished to make in that connexion was that comparison of the present report with those of previous years showed, as many delegations had observed, that some progress had been made in the number of proposals submitted, the detailed consideration given to them and, in particular, the measure of agreement - however modest - that had been reached.

45. Mr. CHARRY SAMPER (Colombia), speaking as Chairman of the Ad Hoc Committee on Conventional Weapons, said that the Committee had reached agreement on the question of fragments non-detectable by X-ray, and had moved some way towards identifying areas of agreement with respect to mines and booby-traps. Small-calibre projectiles, fuel-air explosives and incendiary weapons had been discussed, but no agreement had been reached on them. Differences of opinion existed on the question of future action or follow-up, which had not been discussed in great detail. While the Ad Hoc Committee might not have made as much progress as the other Committees, it had certainly achieved better results than in previous years.

46. Mr. de ICAZA (Mexico) expressed his delegation's disappointment that after four sessions of the Diplomatic Conference and two sessions of the Conference of Government Experts on the Use of Certain Conventional Weapons, no provisions prohibiting or restricting the use of conventional weapons that caused unnecessary suffering or had indiscriminate effects had been adopted.

47. The number of international armed conflicts that had taken place during recent decades and the alarming increase in the number of their civilian victims were matters of concern to his delegation, which in 1974, together with other delegations, had submitted proposals designed to meet the need for instruments in that field, for it was useless to talk about the development of international humanitarian law if no rules were laid down to prohibit or restrict the use of certain conventional weapons. Both in the Ad Hoc Committee and at the two sessions of the Conference of Government Experts his delegation had submitted proposals on incendiary weapons, "anti-personnel" fragmentation weapons, fléchettes, high-velocity projectiles, land mines, mines and booby-traps, non-detectable fragments and time-fused weapons and on machinery for further study. Those proposals had met with indifference or delaying tactics on the part of military Powers, which had never put forward any proposals themselves and which had described as negative the efforts made to ensure that all the work done was not lost in a vacuum.

48. His delegation was not, however, discouraged by the failure to arrive at prohibitions. The progress made towards identifying areas of agreement and disagreement could form the basis for future negotiations within the framework of international humanitarian law. It was stated in document CDDH/DT/2 and Add.1, submitted by Egypt, Mexico, Norway, Sudan, Sweden, Switzerland and Yugoslavia to the first session of the Conference, that should the efforts fail to prohibit the use of specific weapons and to create mechanisms for review, the temptation to produce new and cost-effective - but inhumane - weapons would be strong. Specific prohibitions had not been adopted, but the Mexican delegation would continue to fight for the establishment of a mechanism.

49. The PRESIDENT said that delegations would have an opportunity to discuss the substance of the matter when Article 86 bis of draft Protocol I and the draft resolution submitted by a number of States were taken up by the Conference.

The Conference took note of the report of the Ad Hoc Committee on Conventional Weapons (CDDH/IV/225).

The meeting rose at 12.45 p.m.

ANNEX

to the summary record of
the thirty-seventh plenary meeting

EXPLANATIONS OF VOTE

AUSTRALIA

Original: ENGLISH

Article 11 of draft Protocol I

The Australian Government sees it as a considerable advance in the development of humanitarian law that a provision has been introduced in Article 11 whereby a person "in the power of a Party other than the one on which he depends" is enabled to make a free gift of two life-saving therapeutic substances which are available only from human sources.

The group of persons with which this article deals are extremely vulnerable in time of armed conflict and the Australian delegation considers that they should be given maximum protection against any unjustified act or omission which endangers their physical or mental health.

Hence paragraph 4 makes it a grave breach for any person to fail to comply with the safeguards set out in the article protecting the donor of blood or of skin. This is the most severe sanction available in the context of the Conventions or the Protocol.

Article 11 is intended to develop Article 4 of the fourth Geneva Convention of 1949 and the Australian delegation considers that the article, and in particular paragraph 4 thereof, should be interpreted in the same way as the words "persons who at a given moment and in any manner whatsoever find themselves in case of conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they are not nationals" which appear in Article 4 of the fourth Geneva Convention of 1949.

BELGIUM

Original: FRENCH

Article 5 of draft Protocol I

Since the beginning of the proceedings the Belgian delegation has taken the keenest interest in all matters relating to the control and application of the four Geneva Conventions.

Article 5 complements the formula expressed in Article 8 of the first three Geneva Conventions of 1949 (Article 9 of the fourth Convention). It gives shape to and adjusts a mechanism which, by complementing the 1949 provisions, should make it possible to ensure their prompt and proper implementation. In that respect, the words "from the beginning of that conflict" in the first three paragraphs and the words "without delay" in paragraphs 2, 3 and 4 are of particular significance. In the mechanism described by this article, the designation in paragraph 3 of the ICRC as a body offering its good offices for the designation of a Protecting Power is, in our view, perfectly appropriate. It bears witness to the decades of confidence that States have shown in ICRC for its devotion to the humanitarian cause. Paragraph 4, based on the hypothesis - which in future should be an exceptional case - that there is no Protecting Power, again refers to the ICRC but this time as a substitute. In the view of the Belgian delegation, the essential point of paragraph 4 is that any offer the ICRC might make should be left to the wisdom of ICRC in its consultations with the Parties and that there is an obligation on the Parties to do all they can to facilitate the operations of the substitute. Lastly, although Article 5 essentially reaffirms Article 8 of the first three Geneva Conventions of 1949 (Article 9 of the fourth Convention) and the first paragraph of Article 10 of the first three Conventions (Article 11 of the fourth Convention), the specific obligations incumbent on the detaining Power under the terms of paragraphs 2 and 3 of that Article 10 (Article 11 of the fourth Convention) are in no way either weakened or called into question by the provisions of this Article 5 inserted in the Protocol. Our delegation would have liked, however, to see those paragraphs reaffirmed.

EGYPT

Original: ENGLISH

Article 5 of draft Protocol I

The Egyptian delegation has participated in the consensus, in spite of the disappointment and misgivings it entertains in regard to this article. Since the two sessions of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts and throughout the work of Committee I on this article, the Egyptian delegation has staunchly advocated a water-tight system for the implementation of the Geneva Conventions of 1949 and the Protocol. For experience has amply demonstrated since 1949 that the main weakness of the Conventions lies in their system of implementation. The Conventions consider the institution of Protecting Power an essential cog in their mechanism, and the great care they took in providing for a whole series of substitutes in common Article 10 of the Conventions

reflects the same concern to provide an instance of implementation in all circumstances. But the system did not work, precisely because of the voluntary procedure of the appointment of the Protecting Power or its substitute, with the exception of the third paragraph of common Article 10.

We have tried hard during the elaboration of this article in Committee to fill this gap and to provide for an automatic appointment of a substitute, by virtue of the Protocol itself, in the event of the Parties failing to agree. In spite of the verbal support of a large majority of delegations, this solution, which would have closed an important gap in the Geneva Conventions, was rejected, and its rejection was justified by the search for a consensus. But this consensus was basically between East and West, but not so much with the countries of the third world, the main victims of recent armed conflicts, which preferred a more compulsory system of implementation.

In spite of the procedural advances the present article achieves, it has failed to grapple with the real weakness of the Conventions and remains within the traditional realm of the will of the Parties.

Moreover, paragraph 4 of the article is also dangerous, because it falls short of common Article 10, third paragraph (Article 11 in the fourth Convention), which imposes on the Parties a much stricter obligation than the present paragraph 4 of Article 5, to request or accept the offer of the services of a humanitarian organization to fulfil the humanitarian tasks of the Protecting Power. The proper interpretation of this last paragraph is that the detaining Power is legally obliged to accept such an offer once it is made. This provision remains in force and cannot be prejudiced by the adoption of Article 5. In consequence, it cannot be retroactively interpreted in the light of paragraph 4 of Article 5 to dilute its stricter obligation and reduce it to the purely voluntary level of the article just adopted.

While participating in the consensus on Article 5, the Egyptian delegation regrets that the Conference has missed the opportunity to achieve an important advance in the system of implementation of humanitarian law; and implementation is, after all, the real test of law.

Article 20 of draft Protocol I

The Egyptian delegation considers that the application of Article 20 of draft Protocol I makes it imperative that both Parties to the conflict should equally abide by it.

In the case of a breach by a Party to the conflict of the provisions of Article 20, the other Party shall be entitled to take action accordingly.

GREECE

Original: FRENCH

Article 5 of draft Protocol I

The Greek delegation considers that the system of Protecting Power and substitutes as adopted is not an efficacious development of the institution of Protecting Powers. In this connexion, the Greek delegation reiterates the amendment which it submitted at the first session of the Conference (CDDH/I/31) and which proposed that, if despite the procedure provided for the designation of a Protecting Power, there should be no such Power, the ICRC would automatically act as substitute.

HOLY SEE

Original: FRENCH

Article 17 of draft Protocol I

The delegation of the Holy See joined in the consensus of the Conference for the adoption of Article 17 of Protocol I - "Role of the civilian population and of aid societies".

The delegation of the Holy See did so in the conviction that the reference to the national Red Cross (Red Crescent, Red Lion and Sun) Societies does not imply any limitation on the initiative and the action of other aid societies.

ISRAEL

Original: ENGLISH

Article 8 of draft Protocol I

With regard to paragraph 12 of Article 8 of draft Protocol I, the delegation of Israel wishes to declare that Israel uses the Red Shield of David as the distinctive emblem of the medical services of its armed forces and of the National Aid Society, while respecting the inviolability of the distinctive emblems of the 1949 Geneva Conventions.

Article 11 of draft Protocol I

With regard to paragraph 5 of Article 11 of draft Protocol I, the delegation of Israel wishes to declare that, in its opinion, the discretion is always a medical one and is to be used by medical

personnel treating the persons mentioned in the article. Article 11, paragraph 5, can in no circumstances be used as an excuse for not providing correct medical treatment.

Article 15 of draft Protocol I

With regard to paragraph 5 of Article 15 of draft Protocol I, the delegation of Israel wishes to declare that Jewish religious personnel of Israel will identify themselves by the Red Shield of David. Any different interpretation, according to which such Jewish personnel would have to identify themselves by another emblem, would not be acceptable.

Article 17 of draft Protocol I

With regard to Article 17 of draft Protocol I, the delegation of Israel wishes to declare, that, in accordance with the views expressed in Committees II and III, the protection provided by Article 17 applies also to persons parachuting from an aircraft in distress and to other persons hors de combat.

MADAGASCAR

Original: FRENCH

Article 12 of draft Protocol I

My delegation joined in the consensus, but while it has no difficulty in interpreting paragraphs 1, 2 and 3 of the text adopted, it is rather puzzled by paragraph 4, where it is stated that "Under no circumstances shall medical units be used in an attempt to shield military objectives from attack".

The text does not specify whether the medical units in question are fixed or mobile. My delegation would have no difficulty in the case of mobile medical units, since to place them near military objectives in an armed conflict would be tantamount to a deliberate attempt to protect the military objective concerned from military attacks.

The case of fixed medical units is anything but clear, for a fixed medical unit may have been situated in peacetime at the side of an undertaking or a workshop, for instance, a power station, which because of circumstances might suddenly become a military objective. A power station might supply electricity both to the fixed medical unit and to an undertaking which happened to contribute to the war effort. My delegation would find it difficult to allow the adverse party to consider such a situation to be one in which the fixed medical unit concerned was providing legal protection for a military objective - the power station, for instance - against attack.

NIGERIA

Original: ENGLISH

Article 5 of draft Protocol I

We wish to indicate our support for the consensus reached on Article 5 of draft Protocol I.

However, we would like to express the following views, which should be reflected in the records of this Diplomatic Conference.

1. The duty of the Parties to a conflict referred to in paragraph 1 of this article does not, in our view, imply the imposition of a duty which a third party will attempt to discharge for either Party without due regard for the wishes of the Party concerned. It is the hope of my delegation that no attempt will be made by a Protecting Power to discharge any duty under this article without the express consent or agreement of the Party on whose behalf such a duty is being discharged.
2. Determination of the scope of the duty of a Party to a conflict by that Party should be in full exercise of the sovereignty of that Party.
3. With regard to the mention "of any other impartial humanitarian organization to do likewise" in paragraph 3 of the article, we are of the opinion that the important role that relevant regional organizations, like the Organization of African Unity can play and is expected to play in this regard should be welcome. Such a role is in line with the Principles and Purposes of the Charter of the United Nations.

SPAIN

Original: SPANISH

Article 7 of draft Protocol I

The Spanish delegation voted against this article since owing to its lack of clarity it is impossible to know with certainty the scope of the obligations it entails. It will be necessary to know how and in conformity with what norms or criteria the nature of the breaches committed and the responsibilities any High Contracting Party may have incurred will be decided. It will also be necessary to establish how and in what manner the eventual co-operation between the High Contracting Parties, to which the article refers, will be established. Consequently it is uncertain whether such co-operation would conform to the standard established by the Charter of the United Nations.

UNITED KINGDOM OF
GREAT BRITAIN AND NORTHERN IRELAND Original: ENGLISH

Article 20 quater of draft Protocol I

The United Kingdom delegation was pleased to be able to join in the consensus on this article, in the elaboration of which we played an active part. We wish to record our understanding that paragraph 4 of the article in no way prevents the exhumation of the remains in temporary graves at the end of an armed conflict by or on behalf of a Graves Registration Service for the purpose of providing permanent grave sites, as was done after the last two European conflicts.

UNITED STATES OF AMERICA Original: ENGLISH

Article 11 of draft Protocol I

My delegation was a co-sponsor of the formula adopted as Article 11 - Protection of Persons. My Government believes it important that its understanding of paragraphs 1 and 2 be stated as a matter of record.

Paragraphs 1 and 2 apply to:

1. "Persons who are in the power of an adverse Party". This includes all prisoners of war and all civilians protected by the fourth Geneva Convention of 1949, whether in the territory of the detaining Power or in occupied territory. It includes those who are relatively free to pursue their normal pursuits, as well as those who are interned or otherwise deprived of liberty. It applies also to

2. other persons, including the Party's own nationals, who are interned, detained, or otherwise deprived of liberty as a result of hostilities or occupation.

It is the further understanding of my Government that the evils against which this article is directed are "unjustified acts or omissions, by or on behalf of the occupying or detaining Power or by any detaining authorities that endanger the physical or mental health or integrity of the persons described in paragraph 1."

SUMMARY RECORD OF THE THIRTY-EIGHTH PLENARY MEETING

held on Tuesday, 24 May 1977, at 3.20 p.m.

President: Mr. Pierre GRABER Federal Councillor,
Head of the Federal
Political Department of
the Swiss Confederation

later Mr. E. KUSSBACH (Austria)

TRIBUTE TO THE MEMORY OF MR. CHRISTOPHE ASSAMOI, A MEMBER OF THE DELEGATION OF THE IVORY COAST

On the proposal of the President, the participants in the Conference observed a minute of silence in tribute to the memory of Mr. Christophe Assamoi, a member of the delegation of the Ivory Coast.

1. Mr. NAHLIK (Poland), speaking as Chairman of Committee II, of which Mr. Assamoi had been a very active member, Mr. SULTAN (Egypt), speaking on behalf of the African Group and again on behalf of the Arabic Group, Mr. AL-FALLOUJI (Iraq), speaking on behalf of the Asian Group, Mr. CARNAUBA (Brazil), speaking on behalf of the Latin-American Group, Mr. von MARSCHALL (Federal Republic of Germany), speaking on behalf of the Western European and Others Group, Mr. PAOLINI (France) and Mr. VANDERPUYE (Ghana) asked the Head of the delegation of Ivory Coast to transmit their sincere condolences to his Government and to the family of the deceased.

2. Miss BOA (Ivory Coast), speaking on behalf of the Head of her delegation, thanked the speakers for their condolences, which would be duly transmitted to the Government and to the family of the deceased.

ADOPTION OF THE ARTICLES OF DRAFT PROTOCOL I (CDDH/401) (continued)

3. The PRESIDENT invited delegations to resume consideration of the articles of draft Protocol I, starting with Article 22.

Article 22 - Medical vehicles

4. Mr. EL HASSEEN EL HASSAN (Sudan) pointed out that the text of the article, and of many others, was not available in Arabic. While he agreed with the substance of Article 22, he reserved his right to comment on the Arabic text when it was ready.

5. The PRESIDENT said that the delay was due to exceptional circumstances, despite the efforts of the Secretariat and of those responsible for the Arabic version. The Arabic texts of articles would be submitted to representatives for approval as soon as possible.
6. Mr. AL-FALLOUJI (Iraq) said that the Arab working group could certainly not be blamed for the delay. In his view, it was not necessary to give special consideration to the Arabic texts, a large number of which could be adopted at the following meeting.
7. Mr. ABDINE (Syrian Arab Republic) drew attention to the fact that the French texts of many articles had also not been available at the beginning of the meeting.
8. Mr. FODHA (Oman) speaking on a point of order, said that texts should be available in all languages twenty-four hours before they were considered.
9. Mr. HUSSAIN (Pakistan) said that he shared the views expressed by the representatives of Oman now and of the Libyan Arab Jamahiriya at the thirty-seventh meeting. The Conference could not work haphazardly any more than could those responsible for the preparation of the texts. He suggested that the Conference should take up articles the text of which had been circulated earlier, leaving the others until the thirty-ninth meeting.
10. Mr. PARTSCH (Federal Republic of Germany) and Mr. de ICAZA (Mexico) concurred in that view.
11. The PRESIDENT pointed out that the texts which had been circulated just before or during the meeting had all been discussed at great length elsewhere and had all been adopted by consensus.
12. In his view, it would not be desirable to go back on the decision taken by the Conference to consider articles in their numerical order; if that were done, the proceedings would inevitably become disorderly.
13. He suggested that the meeting should be adjourned for half-an-hour, after which the non-controversial articles, which delegations would then have had time to read, would be considered.

It was so agreed.

The meeting was suspended at 3.55 p.m. and resumed at 4.35 p.m.

Article 22 was adopted by consensus.*

Article 23 - Hospital ships and coastal rescue craft

14. The PRESIDENT said that the following corrections should be made to the English, French and Spanish texts: in paragraph 1 the words in square brackets should be deleted; in paragraph 2 (b) all words after "organization" should be deleted. Those corrections had already been made in the Russian text.

15. Mr. MOHIUDDIN (Oman) pointed out that the deletion of the words in square brackets in paragraph 1 would mean that the text adopted by the Drafting Committee was not the same as the text adopted by Committee II.

16. Mr. MBAYA (United Republic of Cameroon) said that the second sentence of paragraph 3 was not clear. Did it mean that in the case of a conflict involving three Parties, each Party would have to inform the other two?

17. Mrs. SUDIRDJO (Indonesia) said that she would be submitting a statement in writing on paragraph 2 (b).

18. Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, replying to the point raised by the representative of Oman, said that the Drafting Committee had decided by consensus to delete the words in square brackets because they were no longer necessary. He suggested that the United States representative, who had spoken on the matter in the Drafting Committee, might explain the position.

19. Mr. SOLF (United States of America) explained that Article 23 as adopted by Committee II on 8 April 1975 (CDDH/II/304), contained a reference to categories of civilians mentioned in Article 13 of the second Geneva Convention of 1949. At that time, Committee II had not known whether or not there would also be a category of civilians entitled to the status of prisoner of war under Article 42. Since neither Article 41 nor Article 42, as adopted by Committee III, included any categories of civilians entitled to be prisoners of war, the reference to Articles 41 and 42 in square brackets should be deleted from paragraph 1 of Article 23.

20. Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, said that the reference to the International Committee of the Red Cross and the League of Red Cross Societies in paragraph 2 (b) had been deleted in accordance with the decision of the Main Committee concerned.

* Article 21 in the final version of Protocol I.

21. The PRESIDENT suggested that the point raised by the representative of the United Republic of Cameroon regarding paragraph 3 should be referred to the Drafting Committee, since it appeared to be a matter of language.

22. Mr. NAHLIK (Poland), Chairman of Committee II, suggested that the French text of that paragraph should be made to conform to the English text which was the original and seemed perfectly clear and correct.

23. Mr. GLORIA (Philippines) suggested that in paragraph 3 the words "other Parties to that conflict" should be replaced by "one another".

Article 23 was adopted by consensus, subject to review by the Drafting Committee.*

24. Mr. DIXIT (India) asked if representatives could be given a list of all the amendments made by the Drafting Committee, together with the reasons for them.

25. Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, said that that would be a matter for the administrative services, which were already overburdened with work. In any case, representatives themselves normally compared the texts adopted by the Drafting Committee with those adopted by the main Committees.

26. The PRESIDENT said that a list of all amendments together with explanations would entail a great deal of work and would not be really useful. It was open to representatives to ask for explanations of particular points, where necessary.

27. Mr. DIXIT (India) said that he had made his suggestion solely in the interests of saving work. In the circumstances he withdrew it.

28. Mr. de ICAZA (Mexico) stressed that the Drafting Committee had made no changes of substance, but only of drafting. Moreover, it was open to all participants in the Conference to attend the meetings of the Drafting Committee and to follow its work.

29. Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, said that if representatives compared the texts as adopted by the Committees with those issued for the final plenary meetings, the reasons for the changes would, for the most part, be obvious. Where they were not obvious, he, or an expert in the particular language, would gladly give an explanation.

* Article 22 in the final version of Protocol I

30. Mr. GLORIA (Philippines) said he thought that the work of the Conference might proceed more expeditiously if corrections were made in the plenary meeting as drafting points arose.

31. The PRESIDENT, supported by Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, said that, on the contrary, he considered that if the plenary meeting went into details of drafting, time would be lost. Where it seemed appropriate, articles would be referred back to the Drafting Committee. Moreover, any representative who noticed a lack of concordance in the wording of any article was at liberty to draw it to the attention of the Drafting Committee.

Article 24 - Other medical ships and craft

32. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said that, in the third sentence of paragraph 2, the passive should be used in the Russian text to bring it into line with the English "be diverted".

33. The PRESIDENT said that the point would be referred to the Drafting Committee.

34. Mr. SALAS (Chile) said that in the Spanish text, in the third line of paragraph 6, the word "en" should be deleted before "el articulo 42".

35. Mr. DIXIT (India) enquired why the reference to Article 42 had been omitted from the second sentence of paragraph 6.

36. Mr. SOLF (United States of America) said that the first sentence contained a reference to Article 42 because that article defined a new category of combatants entitled to prisoner-of-war status. The second sentence of the paragraph referred to civilians, who did not form the subject of Article 42. The explanation was therefore the same as he had given concerning Article 23.

37. Mr. MBAYA (United Republic of Cameroon) said that in the French text, in the third sentence of paragraph 2, the phrase "d'une autre manière" was not clear. However, if he had understood aright, the Drafting Committee had already considered in detail and taken a definite position on most of the articles which the plenary Conference had decided to refer back to it. If that was so, there seemed little point in referring them back. Also, he considered that the plenary should be informed of the Drafting Committee's reasons for the position it had taken on any given article.

38. Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, said that the representative of the United Republic of Cameroon had correctly understood the position. It was his intention, whenever a drafting point was raised, to ask an expert competent in the matter and language concerned to explain why the choice in question had been made. Accordingly, he would ask a French-speaking expert to answer the point raised by the representative of the United Republic of Cameroon.

39. Mr. PAOLINI (France) said that in the French version paragraph 2 of Article 24 was admittedly not clear. In particular, the first part of the third sentence ending with the words "d'une autre manière", was not well phrased. A possible alternative would be to replace those words by "Ils ne peuvent pas être utilisés à d'autres fins"; that, however, would involve a change of substance affecting all the working languages, which was why, after detailed consideration, the Drafting Committee had decided against it. If, however, some delegation cared to propose an amendment to that effect, the Conference might wish to adopt it.

40. Mr. DIXIT (India) said that not to allow articles to be referred back to the Drafting Committee would be contrary to accepted international practice. Many representatives had not been able to attend the Drafting Committee and some of them might perceive certain implications which that Committee had not noticed. If such matters gave rise to difficulties, there was no reason why they should not be referred back to the Drafting Committee. It could then either endorse the original text or remit the matter to the plenary with its recommendation for a final decision.

41. Mr. de BREUCKER (Belgium) noted that the replies to the various drafting points raised had been given in a somewhat random manner. While it was obviously not possible to reply to all such points at once, it would be advisable to observe a certain degree of order. He would therefore suggest either that they should be referred to the Drafting Committee or that the Chairman of the Drafting Committee should request a competent person to answer them immediately. The plenary could then adopt the article in question on the understanding that the necessary drafting changes would be made.

42. Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, said that each article had been reviewed, in all the working languages, by an expert in the language concerned. He agreed that the plenary was entitled to have an immediate reply to any drafting points raised. If the explanation given was not satisfactory, the article in question could then be referred back to the Drafting Committee, which would be glad to look into the matter. He would, however, appeal to the plenary not to refer every point back to the Drafting Committee automatically.

43. The PRESIDENT, noting that those explanations were acceptable to the representative of the United Republic of Cameroon, invited the plenary to adopt Article 24 by consensus.

Article 24 was adopted by consensus.*

Mr. Kussbach (Austria), Vice-President, took the Chair.

Article 26 - Protection of medical aircraft

44. Mr. DIXIT (India) asked what the words "this Part" referred to.

45. Mr. SOLF (United States of America) explained that the reference was to Part II, which consisted of three Sections: Section I dealing with general protection and Section II, which dealt with medical transports and included Article 26. There would be a Section III dealing with the missing and dead.

46. Mr. SANDOZ (International Committee of the Red Cross) pointed out that, while Section II was confined to matters relating to medical air transport, Part II covered the whole area of respect and protection.

47. Mr. DIXIT (India) said he considered that, for the sake of clarity, the words "this Part" should be replaced by "Part II".

48. Mr. NAHLIK (Poland) said that some misunderstanding might have arisen because, from the outset, the word "Titre" had been used in the French text and "Part" in the English. That, however, was in accordance with the practice always followed in international treaties.

49. The PRESIDENT, noting that there were no further comments, invited the Conference to adopt Article 26 as drafted.

Article 26 was adopted by consensus.**

Article 26 bis - Medical aircraft in areas not controlled by an adverse Party

Article 26 bis was adopted by consensus.***

The meeting rose at 5.50 p.m.

* Article 23 in the final version of Protocol I.

** Article 24 in the final version of Protocol I.

*** Article 25 in the final version of Protocol I.

ANNEX

to the summary record of
the thirty-eighth plenary meeting

EXPLANATION OF VOTE

INDONESIA

Original: ENGLISH

Article 23 of draft Protocol I -

The observation of the Indonesian delegation regarding Article 9 concerning impartial humanitarian organizations applies also to Article 23. Paragraph 2 (b) of this article should be more specific, for instance by adding the words "such as the ICRC or the League of Red Cross Societies", so that there will be a guarantee of their being genuinely impartial and humanitarian.

With this understanding in mind my delegation has joined the consensus on this article.

SUMMARY RECORD OF THE THIRTY-NINTH PLENARY MEETING

held on Wednesday, 25 May 1977, at 2.40 p.m.

President: Mr. Pierre GRABER Federal Councillor,
Head of the Federal
Political Department of
the Swiss Confederation

ORGANIZATION OF WORK

1. The PRESIDENT said that, since the plenary meeting had opened a little later than had been arranged, all articles up to 41 had been circulated in time in the five official languages. Articles 42 to 53 would be circulated in all languages during the afternoon, and the remainder sufficiently in advance for all delegations to be able to take note of them. He therefore hoped that the efforts of the Arabic-speaking representatives would enable the Conference to work thenceforth in the five languages without problems, and that the Arabic texts could be adopted at the same time as the others. Articles 11 to 26 bis had been circulated in Arabic.
2. Document CDDH/253/Corr.1 modified part II of document CDDH/253 and gave the order in which the documents submitted to the Conference would be adopted. The dates, of course, pertained only to the adoption of the draft Protocols. The calendar was therefore incomplete, and provision would have to be made for consideration of the resolutions and the report of the Credentials Committee, and also for adoption and signature of the Final Act.
3. Document CDDH/257 gave the calendar of the plenary Conference up to Saturday, 28 May 1977. On Thursday, 26 May, or the morning of Friday, 27 May, delegations would receive another calendar for the early part of the following week or for the whole week. The proposed calendar was purely indicative, for it was impossible to foresee the pace at which the Conference's work would proceed.
4. In reply to a question by Mr. GRIBANOV (Union of Soviet Socialist Republics) concerning document CDDH/253 and Corr.1, the PRESIDENT stated that the Conference should in principle consider, on 8 June, the Preambles to draft Protocols I and II, but that the consideration of the Preambles could, if necessary, be continued on 9 June.

5. Mr. ABDINE (Syrian Arab Republic), supported by Mr. AL-FALLOUJI (Iraq), accepted the President's proposal that the Arabic texts of the articles should thenceforth be adopted in the same way as the others, provided, however, that the translation of certain terms into Arabic was revised by the Drafting Committee.

It was so agreed.

6. The PRESIDENT proposed that the Arabic texts of Articles 11 to 26 bis should be taken as having been adopted by the plenary Conference, subject to the reservations made by the representatives of the Syrian Arab Republic and Iraq.

It was so agreed.

ADOPTION OF THE ARTICLES OF DRAFT PROTOCOL I (CDDH/401) (continued)

Articles 27 to 41

7. The PRESIDENT proposed that the plenary Conference should consider Articles 27 to 41 of draft Protocol I.

Article 27 - Medical aircraft in contact or similar zones

Article 27 was adopted by consensus. *

8. Mr. KHAIRAT (Egypt) said he did not oppose the consensus, but reserved the right to submit in writing explanations concerning his delegation's position on the second sentence of paragraph 1.

9. In reply to a question by Mr. DIXIT (India), Mr. EL HASSEEN EL HASSAN (Sudan), Rapporteur of Committee II, explained that "friendly forces" was a military expression designating forces belonging to the same Party to the conflict.

10. Mr. KRASNOPEEV (Union of Soviet Socialist Republics) said he would transmit to the Secretariat in writing certain amendments for bringing the Russian text of Article 27 into line with the others. He would also do likewise for the Russian texts of Articles 28 to 31.

11. The PRESIDENT said that the Russian text of those articles would be examined by the Drafting Committee in the light of the amendments submitted by the Soviet Union.

* Article 26 in the final version of Protocol I.

Article 28 - Medical aircraft in areas controlled by an adverse Party

12. Mr. MBAYA (United Republic of Cameroon) pointed out that, during the discussions in the Working Group, there had been a desire to avoid the use of the adjective "reasonable". For uniformity's sake, it would perhaps be better to delete that adjective in paragraph 2. Moreover, the expression "reasonable efforts" was not very clear. He asked whether the Drafting Committee had any particular reasons for retaining that adjective?

13. Mr. PAOLINI (France), speaking as a member of the Drafting Committee, said that "reasonable efforts" corresponded to a legal concept that posed no difficulties in French.

14. The PRESIDENT observed that the expression denoted a concrete and relevant legal concept and that, in any case, the word "efforts" must be qualified.

15. Mr. MBAYA (United Republic of Cameroon) said that the adjective "reasonable" was borrowed from the Anglo-Saxon system, and that the representatives of countries which applied that system had been unable to say exactly what it meant. The fact of the matter was that what was reasonable for one Party might be unreasonable for another. He would not, however, press for the deletion of the adjective.

16. Following an exchange of views between Mr. BOTHE (Federal Republic of Germany) and Mr. AL-FALLOUJI (Iraq), Mr. SADI (Jordan) said that the word "reasonable" was used in all languages with the same meaning. There had been very sound reasons for keeping the word. The matter had been discussed at length, and the Drafting Committee had decided to retain the word in Article 28.

Article 28 was adopted by consensus. *

Article 29 - Restrictions on operations of medical aircraft

17. The PRESIDENT drew attention to a typographical error in the second sentence of paragraph 2, which should read "... the definition in Article 3 (6)".

18. Mr. MBAYA (United Republic of Cameroon), supported by Mr. PAOLINI (France), proposed that, in the French text, the words "à ces usages" in the first sentence of paragraph 2 should be replaced by the words "à ces fins".

It was so agreed.

* Article 27 in the final version of Protocol I.

19. Mr. DIXIT (India) noted that in several articles, including Article 29, the word "forbidden" in the English text had been replaced by the word "prohibited", and he asked what the difference was between the two terms.
20. The PRESIDENT reminded representatives that he had asked them at the thirty-fifth plenary meeting to submit any comments on drafting direct to the Drafting Committee. He appealed to all delegations to avoid, in a spirit of collaboration, any unnecessary delay in the work of the plenary Conference.
21. Mr. DIXIT (India) replied that he had not worked on the Drafting Committee and was only asking questions because it seemed to him indispensable to do so in order to keep his Government informed of the work of the Conference.
22. The PRESIDENT replied that the Drafting Committee was open to all delegations, and he invited the Indian delegation to arrange to be represented on it.
23. Miss AL-JOUA'N (Kuwait) and Mr. EL HASSEEN EL HASSAN (Sudan) criticized certain terms used in the Arabic text. They said they would be making proposals on the matter to the Secretariat.
24. Mr. NAHLIK (Poland), speaking as a lawyer and as Chairman of Committee II, said that both in that Committee and in the Drafting Committee every effort had been made to use terms in current use in international phraseology, so as to avoid difficulties of interpretation subsequently. The words "reasonable" and "prohibited", for example, were terms frequently encountered in international treaties.
25. Mr. VANDERPUYE (Ghana) observed that in the fifth line of paragraph 2 in the English text, the word "personal" should be replaced by the word "personnel".
26. The PRESIDENT said that due note would be taken of that observation.
27. Mr. MBAYA (United Republic of Cameroon) endorsed the Indian representative's comments. To work fast was not everything: it was also important to work well. If the plenary Conference could reach rapid agreement on a form of words and adopt it, the Drafting Committee's work would be much lightened.

28. As for the Polish representative's comment on the word "reasonable", he said that the word had already created problems in some legal systems and might well give rise to more in the future. A word might be in current use without necessarily being the right one to use.

29. Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, said that the word "forbidden" had been replaced by the word "prohibited" at the express request of Mr. Baxter, an eminent professor with a world-wide reputation, who had pointed out that the word "prohibited" was more often used in international legal phraseology. The word had been unanimously accepted by the Drafting Committee.

30. Mr. DIXIT (India) thanked the Chairman of the Drafting Committee for his explanation.

Article 29 was adopted by consensus. *

Article 30 - Notifications and agreements concerning medical aircraft

31. Mr. MBAYA (United Republic of Cameroon) said he wondered whether, if the words "ces propositions" in the last line of paragraph 3 (c) of the French text related to the "contre-propositions" of the preceding line, it would not be better to amend the last part of the sentence to read "elle doit en informer l'autre Partie".

32. Mr. SANDOZ (International Committee of the Red Cross) confirmed that the words "ces propositions" related to the "contre-propositions" of the preceding line.

33. The PRESIDENT said that due note would be taken of the Cameroonian representative's comment.

34. In replying to a question by Mr. MBAYA (United Republic of Cameroon) regarding the use of the word "instruites" in paragraph 5, Mr. PAOLINI (France) confirmed that that was the correct word.

35. Mr. GLORIA (Philippines) said that, in the English text of paragraph 3 (c), it might be better to replace the last phrase by the words "of its acceptance of those proposals".

36. Mr. SOLF (United States of America), speaking as a member of the Drafting Committee, agreed that such an alteration would improve the drafting but suggested that proposed amendments of form should be left to the Drafting Committee.

* Article 28 in the final version of Protocol I.

37. The PRESIDENT said that the observation by the Philippines representative would be noted.

Article 30 was adopted by consensus.*

Article 31 - Landing and inspection of medical aircraft

38. Mr. MBAYA (United Republic of Cameroon) drew attention to a typing error in the last sentence of the French version of paragraph 2, from which the word "états" should be deleted. In the last sentence of paragraph 3, the words "shall be free to continue the flight without delay" seemed to suggest that it was for the aircraft to take the initiative; it would be better to say "shall be allowed to continue ...", a formula which, moreover, was used in paragraph 3 of Article 32.

39. Mr. AMIR-MOKRI (Iran) said that there was a disparity between the English and the French versions of the last sentence of paragraph 4 which affected the scope of the provision. The French text read "Au cas où un aéronef ainsi saisi", whereas the English text read "Any aircraft seized".

40. Mr. PAOLINI (France) considered the remark pertinent and suggested that the French text should read: "Au cas où l'aéronef saisi ...".

41. Mr. ALDRICH (United States of America) agreed that it was the French and not the English version which should be amended; he urged the Conference not to turn itself into a drafting committee but to leave it to the official Drafting Committee to make drafting amendments.

42. Mr. SADI (Jordan) said that, while he thought that the Cameroonian representative's comment was pertinent, he agreed with the United States representative that it was for the Drafting Committee to deal with any drafting changes needed.

43. The PRESIDENT said that the observations by the representatives of the United Republic of Cameroon and Iran would be taken into account.

Article 31 was adopted by consensus. **

Article 32 - Neutral or other States not Parties to the conflict

44. Mr. DI BERNARDO (Italy), referring to the fifth sentence of paragraph 3 of Article 32, said that he could not understand why, in the case of a landing in a neutral State by what was proved to be a medical aircraft, an exception would be made of those of its occupants "who must be detained in accordance with the rules of

* Article 29 in the final version of Protocol I.

** Article 30 in the final version of Protocol I.

international law applicable in armed conflict ...". The clause was not clear and he wondered whether it should be interpreted in the light of the provisions of Article 29. Conversely, if the aircraft was not a medical one, it was provided that its occupants would be "treated in accordance with paragraph 4". Paragraph 4, however, dealt only with wounded, sick and shipwrecked persons and, in that case, the aircraft in question might easily be carrying persons who fell into none of those categories. There was a gap there which should be filled on the basis of the relevant provisions of international law concerning neutrality. His delegation would not, however, dissociate itself from the consensus on that article.

45. Mr. BOTHE (Federal Republic of Germany), replying to the Italian representative in connexion with paragraph 3, explained that a clause similar to that quoted by the Italian representative appeared in the first and second Geneva Conventions of 1949. It related to the general rules of international law concerning neutrality. The clause had been adopted on the basis of an amendment submitted by some permanently neutral States. It was true that paragraph 4 dealt only with wounded, sick and shipwrecked persons, but that did not preclude the application of other relevant rules concerning the treatment of other persons aboard the aircraft.

46. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said that he attached great importance to Articles 22 to 32 concerning medical transport. The corresponding articles of the Geneva Conventions permitted a different interpretation of the conditions of protection of medical transport, particularly Article 36 of the first Geneva Convention of 1949, which provided for the agreement of the adverse Party and thus made protection more difficult. It should be borne in mind that aircraft enabled the wounded to be evacuated more rapidly and more easily. In that respect Article 32 was well balanced and provided protection for the sick and wounded while at the same time protecting medical aircraft and troops. The provisions of the article showed clearly that the idea was to make the best use of medical aircraft in combat areas and to lay down rules to that end with a view to improving the lot of the sick and wounded. His delegation therefore supported the article.

Article 32 was adopted by consensus. * -

Article 33 - Basic rules

47. Mr. de ICAZA (Mexico) said he understood that, in the French version, the expression "maux superflus" in paragraph 2 of Article 33 adequately rendered the terms used in the English (superfluous injury or unnecessary suffering) and Spanish (males superfluos o sufrimientos innecesarios).

* Article 31 in the final version of Protocol I.

48. His delegation welcomed the reaffirmation of the principles set out in the Declaration of St. Petersburg of 1868 and in The Hague Regulations annexed to The Hague Convention No.IV of 1907 concerning the Laws and Customs of War on Land.

49. His delegation's support for paragraph 3 of Article 33 could in no way be construed as a change in its Government's attitude to the Convention entitled "Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques", in which the words "widespread, long-lasting or severe effects" appeared. Those words had not the same scope as they had in the context of the Protocol.

50. Mr. DIXIT (India) expressed surprise that two articles of the draft Protocol, namely Articles 33 and 43, could both have the same title "Basic rules".

51. The PRESIDENT pointed out that Article 33 appeared in Part III of draft Protocol I whereas Article 43 appeared in Part IV. The articles dealt with different matters and there could be basic rules for each of the two cases.

52. Mr. GOZZE-GUČETIĆ (Yugoslavia) said that paragraph 2 of Article 33 stated a general rule which would have to be put into concrete form. It should specify which were the weapons which caused superfluous injury, for otherwise the rule would be of very limited value. Unfortunately, the Ad Hoc Committee on Conventional Weapons which had been dealing with the matter had failed to achieve its objective. That being so, his delegation considered that the follow-up of the study of conventional weapons causing superfluous injury was extremely important. For the same reason, his delegation was convinced that the question of prohibiting and restricting such weapons and methods or means of warfare came under humanitarian law and not under disarmament negotiations. In humanitarian law, of course, it was essential to bear in mind present-day realities and it would be impossible to devise any abstract and purely humanitarian rules.

53. Mr. CHAVEZ GODOY (Peru) said that his country had always spoken in favour of prohibiting the employment of methods likely to cause damage to the environment. Nevertheless, he pointed out that the fact that it supported Article 33, paragraph 3, did not prejudice the position of Peru with respect to the Convention entitled "Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques".

54. Mr. FREELAND (United Kingdom) and Mr. AL GHUNAIMI (Egypt) said that their delegations would provide the Secretariat with written explanations of their position on Article 33.

Article 33 was adopted by consensus. *

55. Mr. PAOLINI (France) said that Article 33, which set forth the basic rules of Part III on methods and means of warfare, was the first of a series of articles which went beyond the strict confines of humanitarian law and in fact regulated the law of war. Although the general provisions of Article 33 had been formulated with a humanitarian aim, they had direct implications for the defence and security of States. That was why the French delegation, while it had not opposed the adoption of Article 33 by consensus, wished to make it clear that it would have abstained if a vote had been taken.

Article 34 - New weapons

Article 34 was adopted by consensus. **

56. Mr. GRIBANOV (Union of Soviet Socialist Republics) said he wished to emphasize the importance of Article 34, which covered not only the manufacture of such weapons but also their purchase abroad and the means and methods of warfare. Article 34 was the logical consequence of Article 33. It placed on the High Contracting Parties the obligation of determining whether or not their weapons were prohibited. The Conference therefore strengthened humanitarian law in the matter of the sovereignty of States, which were not obliged to apply to a supranational control organization. By signing Protocol I, Governments assumed that obligation. All States at present had facilities for determining specifically whether a particular kind of weapon was prohibited. The development and acquisition of new weapons by a State might arise out of fears for its security.

57. That was why his delegation attached great importance to Article 34.

58. Mr. FREELAND (United Kingdom) said that he had been glad to join in the consensus on Article 34. In the past provisions of international law had in his country been taken into account informally during the process of weapons development; as a result, no weapons were in service with the British Armed Forces which would infringe international obligations on the design and use of weapons in armed conflict. The codification and development of international law in that field, which would come out of the

* Article 35 in the final version of Protocol I.

** Article 36 in the final version of Protocol I.

Additional Protocols, had provided an opportunity for the codification of existing practice and his country was therefore at present establishing a formal review procedure to ensure that future weapons would meet the requirements of international law.

59. Mr. DI BERNARDO (Italy) said that his delegation had joined in the consensus on Articles 33 and 34, bearing in mind above all the principles which inspired them. It could not, however, conceal its perplexity about the wording of those provisions, which could not be interpreted as introducing a specific prohibition operative in all circumstances attendant on the study, development, acquisition or adoption of particular weapons and methods of warfare.

60. Mr. PAOLINI (France) said that although the provisions of Article 34 had been drawn up for a humanitarian purpose, they were by their nature connected with the general problem of disarmament. His delegation had always maintained that the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts was not an appropriate forum for dealing with such problems. That was why the French delegation, although it had not opposed the consensus on the adoption of Article 34, wished to make it clear that it would have abstained if a vote had been taken.

61. Mr. de ICAZA (Mexico) said that Article 34 was the logical consequence at the national level of the principles set forth in Article 33. It was deplorable that so far those principles had had no logical consequences at the international level in respect of existing weapons.

62. Mr. BINDSCHEDLER (Switzerland) associated himself with the important statement by the USSR representative. Article 34 was especially important since it had not been possible to specify in or to complete Article 33 by the adoption of the proposals submitted to the Conference on the prohibition or restriction of the use of certain weapons. Article 34's sole purpose was to complete Article 33 and it had nothing to do with disarmament. Article 34 imposed an obligation on States and it was for each State to take that into account.

63. Mr. AL-FALLOUJI (Iraq) said that his delegation had noted with deep regret that the Conference had lacked courage in respect of the prohibition of new weapons. His delegation considered that no progress in the field of humanitarian law was conceivable without an effective approach to the problem of weapons. It had hoped that the present Conference would tackle the problem; it still hoped, however, that through the committee on weapons newly established by the Conference the deficiency would be remedied.

In the present dangerous kind of co-existence based on the atomic bomb, the world could not remain indifferent to the plight of those who suffered and it was time to give a warning to all mankind.

64. Mr. ABADA (Algeria) pointed out that Articles 33 and 34 were part of the very substance of draft Protocol I and of the work of the present Conference. What was involved was the humanitarian law to which States wished to give recognition and shape in the text, so that weapons would be in conformity with the principles adopted and the texts would not remain purely theoretical.

Article 35 - Prohibition of perfidy

Article 35 was adopted by consensus. *

Article 36 - Recognized emblems

Article 36 was adopted by consensus. **

Article 37 - Emblems of nationality

65. Mr. ROMAN (Chile) recalled that when Article 37 had been discussed in Committee III he had objected to the mention of espionage in paragraph 3. In fact, espionage was already defined in Article 29 of The Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Law and Customs of War on Land, on which Article 40, paragraph 1, of draft Protocol I was based. According to the criminal law of most States, a criminal act included the orders given to the criminal. That being so, the change made in Article 37 by the mention of espionage and the idea expressed in Article 40, paragraph 1, did not make sense. Consequently, although his delegation had joined in the consensus on the article, it had expressed reservations which it wished to reiterate in the plenary meeting.

66. Mr. JOMARD (Iraq) said that his delegation had opposed the amendment of Article 37, paragraph 3, by the mention of espionage. While it had not opposed the consensus, it had expressed reservations and it maintained them.

Article 37 was adopted by consensus. ***

Article 38 - Quarter

Article 38 was adopted by consensus. ****

67. Mr. AL-FALLOUJI (Iraq), replying to a question by the representative of Egypt, said that in his view the content of Article 38 was perfectly consistent with the title, but, as Chairman of the Drafting Committee, he said that that Committee was prepared to consider any suggestions.

* Article 37 in the final version of Protocol I.

** Article 38 in the final version of Protocol I.

*** Article 39 in the final version of Protocol I.

**** Article 40 in the final version of Protocol I.

68. Mr. ALDRICH (United States of America) assured the representative of Egypt that in the English text the title corresponded perfectly to the content of the article.

69. The PRESIDENT said that the same was true of the French text.

Article 38 bis - Safeguard of an enemy hors de combat

Article 38 bis was adopted by consensus.*

Article 39 - Occupants of aircraft (CDDH/413, CDDH/414)

70. The PRESIDENT called the Conference's attention to two amendments submitted respectively by the delegation of the Philippines (CDDH/413) and sixteen Arab States (CDDH/414).

71. Mr. ONG (Philippines), introducing the Philippine amendment (CDDH/413), said that his delegation had joined, in Committee III, in the consensus for the adoption of Article 39 as it appeared in document CDDH/401. After further reflection, however, and taking into particular account the last sentence of paragraph 15 of the draft report of Committee III (CDDH/III/408), which said "It goes without saying that any airman who, while descending, commits a hostile act, such as firing a weapon at those on the ground, forfeits his immunity from attack", his delegation had considered that paragraph 1 should not be so worded as to give the impression that absolute immunity from attack was granted to a person parachuting from an aircraft in distress, even if that person committed a hostile act during the descent. His delegation had therefore thought that Article 39 should be supplemented by the statement in its amendment, which reflected the unanimous opinion of Committee III as set forth in its report.

72. Mr. ABDINE (Syrian Arab Republic) said that there were two important reasons underlying the amendment submitted by sixteen Arab States (CDDH/414). The first was that there could not be different regulations for identical situations. And the situation provided for in Article 39 was analogous to that envisaged in Article 38 bis, except that it was very hard to determine whether a person descending by parachute had hostile intentions or not. If Article 38 bis deprived a person in the field of the protection envisaged and of immunity from attack if he attempted to escape, why should more privileged treatment be given to a person descending by parachute who was obviously trying to escape to a territory controlled by his country, or by a friendly country? It was difficult to see what humanitarian considerations justified protection in one situation, and deprivation of such protection in another, completely analogous, situation. The second reason was that technical advances in aviation gave aircraft crews advantages

* Article 41 in the final version of Protocol I.

out of all proportion to the devastation they could wreak, and consequently protection could not be granted in the case of operations that might be turned into surprise attacks. The possibility that distress might be simulated with a view to launching an attack should be largely taken into account, and consequently parachuting from an aircraft ostensibly in distress should not be given unconditional protection. The purpose of the proposed amendment was to restore balance and fairness in dealing with two identical situations.

73. The PRESIDENT asked if any delegation wished to comment on the amendments that had been submitted to Article 39.

74. Mr. GENOT (Belgium) said that he questioned the utility of the Philippine amendment (CDDH/413), because application of the provision it contained followed from that of Articles 35 and 38 bis. He was therefore unable to support the amendment.

75. Mr. BINDSCHEDLER (Switzerland) said that he understood the idea behind the Philippine delegation's amendment. It was theoretically sound, but he failed to see its practical bearing.

76. Mr. IPSEN (Federal Republic of Germany) said that he agreed with the Belgian representative that the amendment submitted by the Philippines did not add to the clarity of Article 39. It even involved some risk, because it might be very widely interpreted. He was therefore firmly against it.

77. Mr. de GABORY (France) said he thought there was absolutely no reason for the Philippine amendment. He knew from personal experience that it was impossible for a person parachuting from an aircraft to use his weapons during the descent, for at that time his sole concern was to prepare for landing. He would therefore oppose the amendment.

78. Mr. SADI (Jordan) said he believed that the reasons underlying the Philippine amendment were very valid ones, and that a pilot descending by parachute could easily use his weapons. Even if some people thought that was impossible, there was no harm in inserting the proposed clause in paragraph 1. He would therefore support the amendment.

79. Mr. AREBI (Libyan Arab Jamahiriya) said that although he lacked the French representative's experience, he thought it quite conceivable that a parachutist could commit a hostile act immediately after landing. He would therefore support the amendment, which had been very ably introduced by the Philippine delegation.

80. Mr. DI BERNARDO (Italy) said he could not support the amendment, for the reasons given by the delegations which had questioned its utility.

81. Mr. AMIR-MOKRI (Iran) said that he, too, was unable to accept the amendment, because, apart from the reasons already stated, he thought such a provision might lead to abuse, for once a parachutist had been fired on, it would be easy to find reasons to justify that action.

82. Mr. ABDINE (Syrian Arab Republic) pointed out that the Conference was now making laws for one or more decades to come, and that all legislation should be worked out against the background of the technical advances which might be made in the future and which might create situations in which a parachutist could commit hostile acts. He would therefore support the Philippine amendment.

83. Mr. RABARY-NDRANO (Madagascar), Miss AL-JOUA'N (Kuwait) and Mr. MOKHTAR (United Arab Emirates) agreed with the representative of the Syrian Arab Republic and said that they would support the Philippine amendment.

84. Mr. VANDERPUYE (Ghana) said that he would abstain in the vote on the Philippine amendment, for which he thought there was insufficient justification.

85. The PRESIDENT put the amendment to Article 39 submitted by the Philippine delegation (CDDH/413) to the vote.

There were 29 votes in favour, 27 against and 34 abstentions.

Not having obtained the necessary two-thirds majority, the Philippine amendment was rejected.

86. Mr. MBAYA (United Republic of Cameroon), speaking in explanation of vote, said that if the only point at issue had been the desirability of the Philippine amendment, he would have abstained. As it was, and for the same reasons as those given by the representative of Iran, he had been compelled to vote against it.

87. The PRESIDENT asked members of the Conference to comment on the amendment to Article 39 submitted by sixteen Arab States (CDDH/414).

88. Mr. PICTET (International Committee of the Red Cross) said that the ICRC had noted with satisfaction the text of Article 39 as proposed by Committee III in document CDDH/401. At the third session of the Conference the ICRC had been alarmed about the insertion in paragraph 1 of the words: "... 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". It was that addition, which Committee III had rejected, that was being put forward again by the sixteen Arab States in their amendment (CDDH/414). He wished to point out that to adopt that wording would be to introduce into the Conventions an element that was outside their framework and contrary to their spirit. So far, the Geneva Conventions had contained only provisions to protect the victims of conflicts; they had not given States any rights against those victims.

89. It would be a matter of infinite regret to the ICRC if a provision which would allow war victims to be killed were included in the purely protective rules. The serviceman who, to save his life, parachuted from an aircraft in distress was a victim, shipwrecked as it were in the air, and that was the idea which should have precedence. Whether an airman landed in friendly or hostile territory, whether he rejoined his unit or was taken prisoner, should remain secondary considerations. A shipwrecked person was a victim of the conflict and should be protected in all circumstances.

90. In 1864, in agreeing to protect the war-wounded although those same wounded might return to the fight once they were well again, the States which had signed the Geneva Convention of August 22, 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field had agreed to give up a small fraction of their rights for the benefit of mankind and in response to the dictates of humanity. In so doing, they had committed themselves once and for all. The matter could not be re-opened and their concession had since been extended to other categories of victims of hostilities. If there had been occasions when, in exceptional circumstances, airmen in distress had been fired on, such was not the rule which prevailed in international practice. All national manuals on the conduct of hostilities said that airmen parachuting from an aircraft to save their lives were not to be fired on. The ICRC would be dismayed to see a provision making it lawful to kill an unarmed enemy who was not himself in a position to kill introduced into law which had hitherto been purely humanitarian. It would set a dangerous precedent and he urged the Conference to adopt Article 39 without the proposed addition and in the form in which it had been submitted by Committee III.

91. Mr. FELBER (German Democratic Republic) said he wholeheartedly endorsed the statement of the ICRC representative and considered that the adoption of the amendment proposed by the Arab States would be a retrograde step for the Conference. The wording of the Drafting Committee had, after all, been adopted by an overwhelming majority. That being so, it would be desirable for the sponsors of the amendment to reconsider their position and for the Conference to adopt the article by consensus. Otherwise, every country would be compelled to alter its military regulations.

92. Mr. IPSEN (Federal Republic of Germany) opposed the amendment vigorously. As the ICRC representative had stated, those who parachuted from an aircraft should be regarded as shipwrecked, in conformity with the second Geneva Convention of 1949. That was, moreover, confirmed by the existing rules of aerial warfare which appeared in military manuals and were becoming increasingly customary. The Conference could therefore not risk adopting an amendment which neither reaffirmed nor developed humanitarian law.

93. Mr. SKALA (Sweden) stated that he was firmly against the amendment, which would be retrograde and might well lead to violations owing to its ambiguity. His delegation endorsed the statement of the representative of the ICRC and the remarks of the representative of the Federal Republic of Germany.

94. Mr. FREELAND (United Kingdom) said that he fully shared the humanitarian concern expressed by the ICRC and was opposed to the amendment. He hoped that the sponsors would decide not to put it to the vote.

95. Mr. ALDRICH (United States of America) said that he endorsed the ICRC view and considered the proposed amendment inadmissible. The sponsors should withdraw their draft, which had the added drawback of being in contradiction with paragraph 3 of Article 38 bis.

96. Mr. AL-FALLOUJI (Iraq) observed that he was glad to hear the humanists' voice, but feared that their lofty sentiments were one-way. Mass massacres were nothing new, indeed, but reprisals against those responsible for them regularly aroused howls of indignation. That being so, why stop short at exterminating civilian populations? Even today, whole populations lived under the threat of fierce bombing; and that was the moment chosen to prohibit the shooting of the airmen who dropped the bombs.

97. Supposing - and that was in no way intended to offend the French or the Swiss - that French airmen flattened Geneva beneath their bombs and got back to Evian by parachute, to the shelter of their own frontier. No, it was not possible to remain a mere spectator in the midst of ruins and the dead, and to watch the descent of airmen ready to start again at the first opportunity. In the name of the appointed victims, he urged that the green light could not be given to the aircraft of death; for that would be a one-way humanism.

98. Mr. KUSSBACH (Austria) endorsed what had been said by the ICRC representative and by the representatives of the Federal Republic of Germany and the United States of America; he hoped that the sponsors would withdraw their amendment.

99. Mr. de BREUCKER (Belgium) stressed the humanitarian interest of the ICRC statement and noted the lively tone the discussion had assumed. He was afraid the sponsors of the amendment had not foreseen all the consequences of their proposal. His own delegation, believing that the sponsors might change their minds if given time to reconsider their draft, formally proposed that the meeting be adjourned for about ten minutes.
100. In reply to the PRESIDENT, Mr. ABDINE (Syrian Arab Republic) stated categorically that an adjournment of the meeting would in no way alter the sponsors' way of thinking.
101. In reply to the PRESIDENT, Mr. de BREUCKER (Belgium) said that he withdrew his proposal.
102. Mr. GREEN (Canada) endorsed on all points the statement of the ICRC representative. He hoped the amendment would not be put to a vote.
103. Mr. AREBI (Libyan Arab Jamahiriya) said that he considered it normal that countries which had never suffered destruction should contest the Arab countries' amendment. But was it human to give a chance to pilots ordered to destroy countries which had already suffered only too much? Besides, when a country was threatened, the pilot was more deadly than the aircraft.
104. Mr. BINDSCHEDLER (Switzerland) welcomed the explanations given by the ICRC representative, and said that humanitarian considerations should take precedence over military ones. In any event, those who carried the gravest responsibilities were not the pilots but the men who gave them orders, and especially the Governments. What was more, the elimination of a few pilots was not a decisive way of winning a war. His delegation therefore hoped that the Arab delegations would see their way to withdraw amendment CDDH/414.
105. Mr. de ICAZA (Mexico) said he considered that the aim of any armed conflict was to overcome the opposing forces; he would abstain from voting, however, because the amendment might lead to abuses.
106. Mr. SADI (Jordan) said that an aviator parachuting during or after a bombing mission had committed murders and destruction contrary to the Geneva Conventions.
107. Mr. AMIR-MOKRI (Iran) said he agreed with the Mexican delegation.

108. Mr. ABDINE (Syrian Arab Republic), using his right of reply, pointed out to the ICRC representative that a person who had simply been shipwrecked could not be compared with an aviator trying to return to his territory, for the aviator was not hors de combat and was attempting to escape. Under Article 38 bis, however, anyone attempting to escape could not be given protection. Could there be a double standard? In reply to the representative of the Federal Republic of Germany, he recalled that Oppenheim, in his treatise entitled "International Law" (Longman Group Ltd., London), as well as a number of other writers, affirmed that practices arising from the Second World War gave a right to shoot at a pilot trying to escape; that confirmed that the Arab countries' amendment enshrined a customary rule.

109. In reply to the representative of Mexico, he expressed the view that all the provisions of the Protocol had led to abuses. Why should Article 39, if amended, do so more than the others?

110. The PRESIDENT put the amendment of the Arab countries to the vote.

The amendment of the Arab countries was rejected by 47 votes to 23, with 26 abstentions.

111. The PRESIDENT invited delegations to state their position on Article 39, as proposed by Committee III.

112. Mr. BLOEMBERGEN (Netherlands), recalling that his delegation had given a lengthy explanation in Committee III of its positive attitude to the two amendments, considered nevertheless that there was no point in re-opening the discussion, and that it would be better to keep to the Committee's decision.

113. The PRESIDENT put Article 39 as a whole to the vote.

Article 39 was adopted by 71 votes to 12, with 11 abstentions.*

114. Mr. EL HASSEEN EL HASSAN (Sudan) said that he would give an explanation of his vote in writing.

Article 40 - Spies

115. Mr. CERDA (Argentina) said that paragraph 2 of Article 40 reflected Article 29 of The Hague Regulations of 1907, which provided that persons in uniform seeking information should not be regarded as spies. Under Articles 41 and 42 of draft Protocol I, however, the wearing of a uniform was no longer an essential criterion of the status of a combatant, although combatants had to distinguish themselves from the civilian

* Article 42 in the final version of Protocol I.

population when participating in an attack or preparations for an attack. Moreover, Article 43 provided that a distinction should always be made between the civilian population and combatants. Under the circumstances, the two texts might conceivably be misinterpreted: for instance, what scope should be given to the last part of paragraph 2 of Article 40 in the case of combatants who were not required to wear uniform and who, in any case, had no chance of wearing one? He paid a tribute to the efforts made by the Rapporteur of Committee III, but said that in the view of the Argentine delegation, paragraph 2 of Article 40 should contain a provision establishing minimal conditions for identifying persons without uniform engaging in intelligence work, to avoid their being regarded as spies.

116. Mr. ALDRICH (United States of America), Rapporteur of Committee III, pointed out that paragraph 2 was the counterpart of paragraph 1, and that the Drafting Committee had not considered it worth while to give further details of provisions which would in future come under customary law. Furthermore, the comments of the representative of Argentina were more closely related to paragraph 3 than to paragraph 2. In the case of paragraph 2, the word "uniform" obviously applied not only to a uniform in the conventional sense but to any distinctive sign which warranted that the activity in question had nothing clandestine about it.

117. Mr. GLORIA (Philippines) said he agreed with the interpretation of the Argentine representative, because a spy was a spy whether he wore a uniform or not.

Article 40 was adopted by consensus.*

Article 41 - Armed forces

Article 41, as amended, was adopted by consensus.**

The meeting rose at 6 p.m.

* Article 46 in the final version of Protocol I.

** Article 43 in the final version of Protocol I.

ANNEX

to the summary record of
the thirty-ninth plenary meeting

EXPLANATIONS OF VOTE

ARGENTINA

Original: SPANISH

Article 33 of draft Protocol I

If Article 33 had been put to the vote, the Argentine delegation would have abstained.

Moreover, the Argentine delegation interprets the provision which has now been approved as in no way connected with the work of the Conference of the Committee on Disarmament, which culminated in the Convention of the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, in respect of which the Argentine Government had made its position clear at the appropriate time.

DEMOCRATIC YEMEN

Original: ARABIC

Article 39 of draft Protocol I

My delegation is one of the sponsors of a draft amendment appearing in document CDDH/414, which proposes the addition of the following phrase at the end of paragraph 1 of Article 39:

"... 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;"

My delegation considers that the addition of this phrase is necessary, because the pilot who attacks quite indiscriminately, and thus often causes the death of a considerable number of innocent civilians, including children, women and old people, should not, for humanitarian reasons, be parachuted into the territory of the Party to which he belongs or to that of an ally of that Party, since he would thus be able to repeat his attacks and his bombing, which are contrary to the principles of international humanitarian law. Consequently any humanitarian protection granted to him must depend on his landing on the territory of the adverse Party, since at that time he will no longer be in a position to return to the attack and to participate

in hostile acts. In our view such an interpretation is endorsed by the customary rules of international law and is in accord with humanitarian logic, since a more general humanitarian protection must always prevail over a particular and partial humanitarian protection.

My delegation followed with great interest the arguments advanced by those who opposed this amendment. We note that they go too far and exaggerate both the scope of this amendment and its aims in a way that seems to us contrary to the facts and to the real situation.

My delegation wishes to express its regret that this amendment has been rejected. We accordingly voted against Article 39 as put to the vote.

At the same time, my delegation wishes to state that the development of international humanitarian law applicable in armed conflicts will always be a matter of consideration and concern to us.

EGYPT

Original: ARABIC

Articles 27 and 33 of draft Protocol I

Draft Protocol I, which is drawn up on the basis of a strict harmonization of humanitarian factors and military considerations, does not seek changes in or amendments to the Geneva Conventions of 1949, but rather their reaffirmation and development.

While Article 36 of the first Geneva Convention of 1949 stipulates the necessity for a prior agreement between the belligerents concerned for flights of medical aircraft over combat areas, the second sentence of paragraph 1 of Article 27 of Protocol I contains a new provision which changes the above-mentioned Article 36.

The Egyptian delegation believes that, for the protection of medical aircraft, prior agreement is absolutely necessary for aircraft to fly over contact or similar zones.

The Egyptian delegation emphasizes the fact that its acceptance of Article 33, paragraph 3, in no way prejudices its country's position on the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques.

GERMANY, FEDERAL REPUBLIC OF Original: ENGLISH

Article 33 of draft Protocol I

The delegation of the Federal Republic of Germany joined in the consensus on Article 33 with the understanding that paragraphs 1 and 2 reaffirm customary international law, while paragraph 3 of this article is an important new contribution to the protection of the natural environment in times of international armed conflict.

Bearing in mind the special scope of application of additional Protocol I, it is the understanding of the Federal Republic of Germany that the interpretation of the terms "widespread", "long-term" and "severe" has to be consistent with the general line of thought as it emerged from the deliberations on this article in Committee III, as reflected in its report (CDDH/215/Rev.1).

In no case should it be interpreted in the light of the respective terminology of other instruments of environmental protection that have a different scope of application altogether.

INDIA

Original: ENGLISH

Article 33 of draft Protocol I

The Indian delegation has agreed to join the consensus on Article 33 with the understanding that the basic rules contained in this article will apply to all categories of weapons, namely nuclear, bacteriological, chemical, or conventional weapons or any other category of weapons. Secondly, the term "superfluous injury or unnecessary suffering" means those physical injuries which are more severe than would be necessary to render an adversary hors de combat or to make the enemy surrender and which are not justified by considerations of military necessity.

ISRAEL

Original: ENGLISH

Articles 35, 36, 39, 40 and 41 of draft Protocol I

Article 35

With regard to Article 35 of draft additional Protocol I, the delegation of Israel wishes to declare that Israel regards this article, and in particular its paragraph 1 (c), as an essential and basic provision. It reaffirms the fundamental distinction made by customary international law between combatants and non-combatants.

Article 36

With regard to Article 36 of draft additional Protocol I, the delegation of Israel wishes to declare that it attaches special importance to the second sentence of paragraph 1. This sentence forbids the misuse of any other protective emblem which has been recognized by States, or has been used with the knowledge of the other Party.

Article 39

The provisions relating to the protection of persons parachuting from an aircraft in distress are a declaratory codification of customary international law as set out inter alia in Article 20 of The Hague Rules of Air Warfare 1922/1923.

Article 40

With regard to Article 40, paragraph 3, of draft Additional Protocol I, the delegation of Israel wishes to declare that the expression "while engaging in espionage" at the end of the paragraph includes all the stages of the act of espionage till the completion of the transmission of the information to the enemy.

Article 41

With regard to Article 41, paragraph 1, of draft Additional Protocol I, the delegation of Israel wishes to declare that the enforcement of compliance with the rules of international law applicable in armed conflict is a conditio sine qua non for qualification as armed forces. Moreover, it is not sufficient that the armed forces be subject to an internal disciplinary system which can enforce compliance with the laws of war, but - as the expression "shall enforce" indicates - there has to be effective compliance with this system in the field.

MALI

Original: FRENCH

Article 35 of draft Protocol I

My delegation, in associating itself with the consensus, wishes to specify that this article, and more particularly paragraph 1 (c), must not lie open to a wrongful interpretation calculated to call in question the provisions of Article 42.

In other words, a combatant who fulfils the requirements of Article 42, paragraph 3, cannot be accused of perfidy under Article 35, paragraph 1 (c).

SUDAN

Original: ARABIC

Article 39 of draft Protocol I

My country's delegation voted against Article 39 as a whole, being fully convinced that in modern warfare the pilot constitutes one of the most dangerous factors. On his own, and from his aircraft, he is able to reduce a vast area to ruins. The area might be a whole town with all its inhabitants, its old people, its women and children. This is not idle speculation. It is a fact which has occurred over and over again, especially in the period from the Second World War to the present time, and could occur again anywhere in the world. Thus, in an air raid, the aircraft, together with its equipment and crew - and, I repeat, its crew - constitute the first target which the other side must destroy; else its own destruction will inevitably follow.

A pilot forced to bale out from a doomed aircraft should not be considered to be hors de combat if he attempts to land on territory controlled by his own side or its allies, for his attempt indicates his intention to land in a safe place and to continue fighting immediately he has landed. It follows that he should be prevented in any way possible for that is the way to neutralize the enemy.

The distinguished representative of Iraq gave us a definite example of the absurdity of the notion contained in paragraph 1 of this article. I hope that the city of Geneva, to which we are most attached, may never be the scene of an incident such as the one which the Iraqi representative recounted.

My country's delegation adopted the amendment which appears in document CDDH/414 in an humanitarian spirit which goes far beyond a desire to save a pilot baling out of an aircraft in distress. Our aim is to protect towns, together with their inhabitants including women, children and old people.

The same pilot, if protected, may take part in a more successful raid, destroying towns and villages. Our aim is in line with the overriding objective of this Conference, which has been meeting for four years, to adopt this additional Protocol I and Protocol II which follows on from it. Both Protocols are designed to afford protection to such persons, not to combatant pilots who are forced to bale out for whatever reason.

This in short is what I wished to explain. If this article had been put to the vote, paragraph by paragraph, we should have voted against paragraph 1 and in favour of paragraphs 2 and 3.

UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

Original: ENGLISH

Article 33 of draft Protocol I

The United Kingdom joined in the consensus on Article 33. In relation to paragraph 3 of this article, however, I wish to state, as we stated on adoption of this article in Committee, that we regard this paragraph as otiose repetition of Article 48 bis and would have preferred that paragraph 3 not be included in this article. We consider that it is basically in order to protect the civilians living in the environment that the environment itself is to be protected against attack. Hence, the provision on protection of the environment is in our view rightly placed in the section on protection of civilians. Now that Article 33 has been adopted with paragraph 3, we shall interpret that paragraph in the same way as Article 48 bis, which in our view is a fuller and more satisfactory formulation.

VENEZUELA

Original: SPANISH

Article 33 of draft Protocol I

The Venezuelan delegation approved Article 33 (Basic rules) of draft Protocol I, adopted by consensus at the thirty-ninth plenary meeting of the Conference, on the understanding that this approval is without prejudice to Venezuela's position on the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

SUMMARY RECORD OF THE FORTIETH PLENARY MEETING

held on Thursday, 26 May 1977, at 11.10 a.m.

President: Mr. Pierre GRABER Federal Councillor,
Head of the Federal
Political Department of
the Swiss Confederation

ADOPTION OF THE ARTICLES OF DRAFT PROTOCOL I (CDDH/401) (continued)

Article 42 - New category of combatants and of prisoners of war

1. Mr. HESS (Israel) said that his delegation was unable to accept the consensus on Article 42 and requested that it be put to the vote, in accordance with the rules of procedure.
2. Mr. RABARY-NDRANO (Madagascar), supported by Mr. VAN LUU (Socialist Republic of Viet Nam), asked that the vote should be taken by roll-call.
3. Mr. MBAYA (United Republic of Cameroon) pointed out that the title of Article 42, "New category of combatants and of prisoners of war", did not correspond to the text which followed. The ICRC's original draft contained a definition which was lacking in the present wording.
4. Mr. ALDRICH (United States of America), Rapporteur of Committee III, and Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, declared that full discussions on the subject of the present title had already taken place both in Committee III and in the Drafting Committee.
5. Mr. ABADA (Algeria) drew attention to the fact that the ICRC's initial draft contained only one article dealing with a new category of prisoner of war. In the latest draft Protocol I, several articles in fact dealt with that question. He suggested that consideration of the title of Article 42 should be deferred and an attempt made to improve it, taking into account the actual text of that article and draft Protocol I as a whole.
6. Mr. ABDINE (Syrian Arab Republic) thought that the wording at the end of paragraph 2, namely, "except as provided in paragraphs 3 and 4" was rather unsatisfactory and proposed that it should be replaced by "subject to the provisions of ...".

7. Mr. DI BERNARDO (Italy), supported by Mr. AL-FALLOUJI (Iraq), urged that the discussions in plenary meeting should not be unduly prolonged.

8. Mr. GLORIA (Philippines) expressed the view that a definition of the persons referred to was indispensable for a proper understanding of the text of Article 42.

9. Mr. LONGVA (Norway) pointed out that the text of Article 42 went further than the title would lead one to suppose; it dealt with the status of prisoners, duties of combatants, protection of the civilian population, a code of conduct, sanctions, protection of the wounded, etc.

10. Mr. IPSEN (Federal Republic of Germany), having proposed that the following title: "Certain rights and duties of combatants" be given to Article 42, the PRESIDENT expressed the fear that an improvised wording in one language would give rise to translation difficulties.

11. After a brief discussion in which Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, the PRESIDENT and Mr. MBAYA (United Republic of Cameroon) took part, Mr. MBAYA agreed that the title of Article 42 should be reconsidered by the Drafting Committee.

12. Mr. PILLOUD (International Committee of the Red Cross), referring to the comments made by the representative of the Syrian Arab Republic, agreed that the wording of paragraph 2 of Article 42 was not particularly well chosen, but reminded the meeting that it was the precise translation of an English text every word of which had been carefully weighed. It had, therefore, not been possible for the Drafting Committee to amend it.

13. As for the title of Article 42, the comments of several representatives had had to be borne in mind: some of them had pointed out that the persons referred to were not only prisoners but also combatants; others had laid stress on the novelty of the provisions adopted.

14. Mr. SADI (Jordan), supported by Mr. ABADA (Algeria), moved the closure of the debate on the title of Article 42 and the referral of that question back to the Drafting Committee.

15. The PRESIDENT invited the Chairman of the Drafting Committee to arrange for a meeting of his Committee at the end of the current plenary meeting and before the afternoon meeting, to improve the title of Article 42.

It was so agreed.

As requested by the representative of Madagascar, a vote by roll-call was taken on Article 42 of draft Protocol I.

Chad, having been drawn by lot by the President, was called upon to vote first.

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

Against: Israel.

Abstaining: Thailand, Uruguay, Federal Republic of Germany, Argentina, Australia, Brazil, Canada, Chile, Colombia, Spain, Guatemala, Honduras, Ireland, Italy, Japan, Nicaragua, New Zealand, Philippines, Portugal, United Kingdom of Great Britain and Northern Ireland, Switzerland.

Article 42 was adopted by 73 votes to one, with 21 abstentions.*

Explanations of vote

16. Mrs. LAPIDOTH (Israel) said that her delegation had voted against Article 42 for several reasons.

17. It was true that guerrillas and irregular combatants deserved to be properly protected by humanitarian law, but Article 42, paragraph 3, could be interpreted as allowing the combatant not to distinguish himself from the civilian population, which would expose the latter to serious risks and was contrary to the spirit and to a fundamental principle of humanitarian law. In the case of guerrilla warfare it was particularly necessary for combatants to distinguish themselves because that was the only way in which the civilian population could be effectively protected. As had been pointed out

* Article 44 entitled "Combatants and prisoners of war" in the final version of Protocol I.

at the XXIst International Conference of the Red Cross at Istanbul in 1969, to allow the man with a bomb who looked exactly like any other civilian to enjoy prisoner-of-war status would mean that in future no civilian would be safe, since the regular combatant in uniform would no longer know who was the enemy and who was not. Moreover, once combatants were freed from the obligation to distinguish themselves from the civilian population the risk of terrorist acts increased. Thus, according to that interpretation of paragraph 3, a terrorist in civilian clothes who was about to set off an explosive device was not in fact bearing arms, and was not obliged to distinguish himself from the civilian population because in his case there was no "deployment". The civilian population could not protect themselves against his act, and in addition would be an object of suspicion to the other party, the regular combatant, who would have to search for and fight his enemy in the midst of the civilian population. Neither the principle of the distinction between combatants and civilians, nor that of respect for the laws of war, which were basic principles of humanitarian law as embodied in the international conventions in force and in the original ICRC draft, were to be found in the text as thus interpreted.

18. Moreover, some of the wording of Article 42 was ambiguous or contradictory. It was illogical that paragraph 4 should grant the protection reserved for prisoners of war to persons who had lost the right to be so considered; in paragraph 3 (b), the term "deployment" had already given rise to widely divergent interpretations in Committee III; and the expression "visible to the adversary" was equally unclear.

19. In the view of her Government, prisoner-of-war status depended on two essential conditions: first, respect for the rules of international law applicable in armed conflicts (for the members of regular forces there was a praesumptio juris et de jure that that condition had been met); secondly, a clear and unmistakable distinction between the combatants and the civilian population. They were two sine qua non conditions established in international custom and in numerous instruments.

20. Mr. DI BERNARDO (Italy) said that his delegation had abstained essentially because of the ambiguity of paragraphs 3 and 4 of Article 42, but considered that the article was not unacceptable in itself if its true meaning according to the Italian delegation could be detected.

21. Paragraph 3 embodied and reaffirmed without amendment or derogation a basic rule of existing international law, the need for combatants to distinguish themselves from the civilian population.

The same paragraph made the announcement an exception to the abovementioned rule. As an exception to the rule was concerned it would be necessary to interpret it in a restrictive manner.

22. The particular situations to which the second phrase of paragraph 3 referred were evidently those which occurred in occupied territory or in other identical situations so far as substance was concerned, that was to say where resistance movements were organized. Besides the hypothesis of international conflicts mentioned in the last paragraph of Article 1 of Protocol I, Article 42 aimed at the protection of members of resistance movements in occupied territories.

23. With regard to the minimum conditions to be met, his delegation noted with satisfaction the fact that the combatants concerned must carry their arms openly during each military engagement and during the military deployment preceding the launching of an attack. That would of course include any movement of the military formation towards the place from which the attack was to be launched.

24. It was essential that the distinction principle should remain the basis of international humanitarian law, because on respect for that principle depended the protection of the civilian population.

25. If the distinction principle was confirmed, the title adopted was unhappily not as clear as the Italian delegation would have wished. It followed that the text could open the way to interpretations differing from those of the Italian delegation and that would be unacceptable to that delegation.

26. Furthermore, paragraph 4, providing that combatants failing to meet the requirements set forth in paragraph 3 should nevertheless be given protections equivalent to those accorded to prisoners of war, obviously meant that such combatants lost their right to be regarded as prisoners of war and could consequently be prosecuted and punished as non-protected belligerents, while still benefiting from the other guarantees to which prisoners of war were entitled.

27. Mr. AL-FALLOUJI (Iraq) said that his delegation had been absent during the vote in Committee III. His delegation had taken the view that Article 42 did not provide adequate guarantees for national liberation movements and their captive members. But in the light of the debate in Committee III, and in view of the profound significance of the vote taken in the plenary, a vote that had divided the supporters of liberation struggles from the supporters of aggression, his delegation had been led to vote in favour of the text, in other words in favour of combatants resisting aggression and those of them that were taken captive.

28. Mr. NAHLIK (Poland) said that Article 42 was one of the Conference's great triumphs. The existing rules of treaty law were ambiguous concerning the treatment of members of resistance or national liberation movements and guerrillas. As Mr. Veuthey, author of the excellent monograph published in 1976, had clearly shown, those rules implied some balance of forces between the parties to the conflict. But resistance movements intervened when that balance was upset, out of all proportion to the benefit of one of the parties. The 1949 Geneva Conventions, being too inflexible and unrealistic, had therefore needed to be amended in order to accord the members of such movements the status of combatants. Committee III had succeeded in performing that task after lengthy and difficult discussions, and had drafted a body of balanced rules that reflected the legitimate concerns of delegations.

29. Mr. CERDA (Argentina) said that his delegation, throughout the four sessions, had never ceased to support the substance of Article 42. It was the necessary complement to Article 1, which, as a result of an amendment co-sponsored by Argentina, extended the idea of international armed conflict to the situation of peoples fighting against colonial domination, foreign occupation and racist régimes.

30. However, his delegation had always maintained that the guarantees given to combatants must be compatible with the protection of the civilian population not taking part in the hostilities.

31. In the extreme cases referred to in paragraph 3, the fact of carrying arms openly was not always sufficient to distinguish combatants from the civilian population. Many devices might be technically or legally regarded as weapons and some military operations were carried out without weapons. The distinction was thus difficult if not impossible.

32. To ensure the protection of the civilian population, which was also one of the primary aims of humanitarian law, his delegation had therefore proposed an addition that would have filled the gap.

33. The text adopted did not guarantee the civilian population the minimum protection it needed, which was a serious matter, particularly since the provisions of Article 42 were applicable not only to struggles against colonial domination, but also to traditional conflicts between States, which put many non-combatant civilians in danger.

34. Argentina had always supported peoples who sought their freedom from colonial domination. It had also upheld human rights. It therefore regretted the fact that draft Protocol I did not contain the provisions on protection of the civilian population that were called for by a progressive development of international law. That was why his delegation had abstained.

35. Mr. CLARK (Nigeria) said that he had voted for Article 42 because it was one of the significant features of draft Protocol I. Not only did it reaffirm the traditional provisions of protection due to all prisoners of war, but it was a logical development of humanitarian law already recognized in Article 1, paragraph 4, of draft Protocol I, which henceforth accorded international status to armed conflicts in which peoples were fighting against colonial domination, alien occupation and racist régimes, in the exercise of their right of self-determination. Its adoption was therefore, as already pointed out by his delegation, a triumph of reason and justice. It was a triumph of reason because it was hardly realistic to deny freedom fighters who fell into the hands of the adversary the protection and privileges due to them as prisoners of war under humanitarian law. It was a victory of justice because it recognized the right of freedom fighters engaged in wars of national liberation in Namibia, Zimbabwe, South Africa and other areas, i.e. fighting against a militarily superior adversary in special combat situations, the right to compete with the armies of their oppressors, who usurped the natural resources of the freedom fighters' countries in order to arm themselves for the unequal combat.

36. His delegation was glad to note that Article 42 had been adopted by an overwhelming majority. That was a clear reaffirmation of the determination of the world community to uphold the legitimacy of the armed struggle of peoples fighting against colonial oppression and racial injustice. The vote was in line not only with present realities but also with the resolutions adopted by the United Nations.

37. The Government of Nigeria would not recognize any reservations made by any Party to Protocol I in respect of Article 42. The text was free of ambiguities and represented a compromise reached after weeks of debate. Those who had voted against it ought to have a change of heart, particularly since they were directly responsible for the intolerable situation which compelled freedom fighters to resort to armed resistance in defence of human dignity and national liberation.

38. Mr. KUSSBACH (Austria) said that his delegation had voted for Article 42, which represented a compromise reached in Committee III after lengthy and difficult negotiations conducted with great competence and energy by the Rapporteur of that Committee.

39. His delegation had, from the outset of those negotiations, declared its warm support for the basic humanitarian ideas in which the article was rooted. It therefore welcomed the result achieved, while regretting the fact that the compromise text had some shortcomings. The article was obviously too cumbersome and complicated and thus difficult to apply. Moreover, it was open to several interpretations and the traditional distinction between the civilian population and combatants had been so reduced as to be virtually non-existent. Despite those weaknesses, the text was acceptable to his delegation because it took into account important humanitarian principles to which Austria had long subscribed.

40. Mr. ABADA (Algeria) welcomed the fact that the adoption of Article 42, which gave combatant and prisoner-of-war status to fighters in national liberation movements, had been so resoundingly confirmed by the plenary Conference.

41. According to the writer Bernanos, people often blamed their memories, but never their intelligence. Some of the statements made regarding the content of that important article shared the same lack of responsibility. It was really too easy to come before the Conference at the present stage and claim that the wording of Article 42 was not very clear, that it lacked precision, that it was vague, that it contained ambiguities and other evils, not to mention those representatives who were now in plenary, trying to outdo one another in a manner that was quite out of place.

42. Article 42 had been discussed, examined, negotiated and recast during three sessions of the Conference. At each stage of the work, every delegation could have made its contribution and enlightened with its wisdom and advice those who had embarked on the apparently impossible task of arriving at an acceptable wording. When it came to the actual work, however, the only ones to be seen had been those with enough courage, lucidity, intelligence and goodwill to initiate the dialogue which had led to the present result. The persons and delegations concerned were known and had already been paid the tributes due to them.

43. His delegation wished nevertheless to express its thanks once again to Mr. Aldrich, Rapporteur of Committee III, and Mr. Van Luu, Head of the delegation of the Socialist Republic of Viet Nam. The particularly active part played by those two men in the group which had drafted the final wording of the article was in itself a symbol of the genuine co-operation there had been and an indication of the profound significance of the work done. To those who continued to hesitate, making all kinds of mental reservations and going in for somewhat byzantine interpretations - fortunately they were very few - he would merely say that while it was too late for a dialogue it was not too late to show understanding.

44. The basic idea emerging from Article 42, paragraph 3, which was aimed at realistically safeguarding certain fundamental principles of humanitarian law, was a comprehensive one that should be absolutely clear to anyone who made the effort to understand it.

45. Lastly, his delegation considered it necessary to make it clear that as far as it was concerned Article 42 and Article 1 of draft Protocol I were not open to any reservations whatsoever. If there were to be any reservations, Algeria would consider the whole of draft Protocol I as unsound and unacceptable.

46. Mrs. MANTZOULINOS (Greece) said that her delegation had voted for Article 42 in line with the position it had taken in Committee III.

47. The provisions of that article had been discussed at length in the Committee. However, to make her delegation's position quite clear, she wished to add that the situations described in the second sentence of paragraph 3, which were quite exceptional, could exist not only in occupied territories but also in armed conflicts as described in paragraph 4 of Article 1 of draft Protocol I. That clarification seemed necessary to her after the adoption of Article 1 of Protocol I by the Conference.

48. As regards combatants who failed to meet the minimum requirements specified in the second sentence of paragraph 3, such combatants, as her delegation understood it, forfeited their combatant status and could therefore be tried and punished as persons who had committed unlawful acts.

49. Mr. MAHONY (Australia) said that his delegation had abstained in the vote on Article 42 because some of its provisions raised interpretative difficulties.

50. According to the Rapporteur of Committee III, Article 42 restated the obligation of the guerrilla fighter to distinguish himself clearly from the civilian population while engaged in an attack or a military operation preparatory to an attack, and accepted the carrying of arms openly as an adequate minimum sign of distinction. His delegation was in full agreement with that provision, on which it placed particular importance. It was obvious that in order to take advantage of paragraph 3 of Article 42 a combatant should carry his arms openly, first, during each military engagement, and secondly, during the time that he was visible to his adversary while engaged in a military deployment preceding the launching of an attack in which he was to participate.

51. Any departure from the requirements of paragraph 3 must inevitably result in a most regrettable lessening of that security which the Protocol provided for civilian populations. He endorsed the point made in paragraph 90 of the report of Committee III on the third session (CDDH/236/Rev.1), namely, that paragraph 4 was not, in any event, intended to protect terrorists who acted clandestinely to attack the civilian population.

52. If a combatant complied with the requirements of paragraph 3 of Article 42, he was entitled to prisoner-of-war status. If he failed to comply with the second sentence of paragraph 3 and was captured, he would be entitled to protection equivalent to that given to prisoners of war by the third Geneva Convention of 1949. Accordingly, his status after capture did not provide any inducement to comply with the provisions of paragraph 3. The sanction designed to induce a guerrilla to comply with Article 42 was liability to trial and punishment for an offence under the applicable laws of war or criminal law - a liability arising immediately upon loss of combatant status by reason of non-compliance with paragraph 3. If a combatant who had not complied with the requirements of paragraph 3 fell into the power of an adverse Party while not engaged in an attack or a military operation preparatory to attack, he was a prisoner of war. However, he would remain liable for trial and punishment for offences that he might have committed while in breach of the second sentence of paragraph 3, e.g. perfidy. A guerrilla who was captured while in breach of that sentence was liable to be tried and punished under the criminal law.

53. His delegation was concerned at the lack of precision in the term "deployment". It had previously expressed the view that deployment should be interpreted as including "a movement by a combatant to an attack", and it adhered to that view. The failure to use precise terms in the article would cause unnecessary confusion to the detriment of combatants and civilians alike.

54. Mr. MATHANJUKI (Kenya) said that his delegation had voted in favour of Article 42 because it was a development of international law and in particular of the Geneva Conventions of 1949. Article 3 common to those Conventions was not very clear with regard to resistance movements. Paragraph 3 of Article 42 cleared up the ambiguity.

55. Humanitarian law should take account of all new forms of combat whilst seeking to ensure protection of the civilian population. Article 42, as a whole, met those requirements.

56. Prior to the adoption of the article, liberation movements had had no other way of fighting against the ills of colonialism and racism; Article 42 provided the necessary framework. The Conference had already adopted Article 1 of draft Protocol I, but the adoption of Article 42 clarified still further the principle expressed in paragraph 4 of Article 1.

57. Mr. KABIRITSI (Uganda) said that his delegation had voted in favour of Article 42 because it represented a step forward in the reaffirmation and development of international humanitarian law applicable in armed conflicts. The article was, indeed, one of the key articles of draft Protocol I and no reservations should be made to it.

58. By adopting the article, the Conference had done justice to those peoples who were fighting against colonial domination, foreign occupation, racist régimes and apartheid. The nature of the war those peoples were waging was such that to require them to distinguish themselves from the civilian population in the same way as combatants engaged in conventional warfare would be tantamount to requesting them to surrender and be slaves in their own homeland.

59. By adopting the article the Conference had reassured those peoples who were fighting for their freedom that it recognized their right to their homeland and to self-determination.

60. His delegation wished to thank all the delegations that had voted in favour of Article 42, and appealed to those who had abstained to reconsider their position when it came to the signing and ratification of Protocol I.

61. Mr. ALEXIE (Romania) said that his delegation had voted in favour of Article 42 because Romania had always attached particular importance to the need to regulate, by precise rules of international law, the status of combatants and prisoners of war in national liberation movements and in movements to resist aggression. Romania had always worked to that end both in the Diplomatic Conference and in the preparatory meetings of experts.

62. The new provision in Article 42 represented a reaffirmation and a progressive development of international humanitarian law. It was a set of rules which took into account the realities of the present-day world and, first of all, of the extraordinary role and magnitude that the struggle for national liberation had assumed over the past few decades. The main advantage of Article 42 was that it offered increased legal protection to a large number of participants in international armed conflicts, to combatants and to prisoners of war belonging to liberation movements and resistance movements opposing aggression.

63. Article 42 was also closely linked with Article 1 of draft Protocol I, which covered 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, in accordance with a principle 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.

64. Although the new provision represented an advance on the 1949 Geneva Conventions, Article 42 was nevertheless restrictive because of the conditions which had to be fulfilled by the combatants in order to be recognized as enjoying the right to benefit from the protection provided for by the rules of international humanitarian law applicable in armed conflicts.

65. Although fully aware of the limits prescribed by the new set of rules, the Romanian delegation considered that Article 42, in the form in which it had been adopted, constituted an acceptable compromise.

66. Mr. BINDSCHIEDLER (Switzerland) said that his delegation had been unable to vote in favour of Article 42, and explained the reasons for its abstention.

67. In the first place, a misunderstanding continued to prevail; Article 42 had not been specially conceived in the interests of liberation movements: it was a rule of general scope, applicable to all armed conflicts and even to conflicts among imperialist Powers.

68. Furthermore, paragraph 3 of Article 42 fully maintained the principle that combatants were obliged to distinguish themselves from the civilian population; but that fundamental distinction was in danger of disappearing. Situations of armed conflict in which, because of the hostilities, the combatants were unable to distinguish themselves from the civilian population were not defined, but left to each party to appraise as it pleased and

arbitrarily. The conditions added in sub-paragraphs (a) and (b) were without value. The Swiss delegation was therefore afraid that the article would only have the effect of doing away with the distinctions between combatants and civilians. The consequence would be that the adverse party could take draconian measures against civilians suspected of being combatants.

69. Lastly, the explanations of vote by the delegations which had spoken on that article made it clearly apparent that no unity of view existed concerning it. Every one interpreted it as he thought fit. Indeed, its interpretation involved reference to the discussions which had taken place when it was being drafted. The general principles of interpretation recognized in international law did not suffice; and even if that method were applied, it would not be possible to arrive at uniform interpretations. There were, moreover, glaring contradictions in Article 42. Paragraph 7 of the article, for instance, was in conflict with paragraph 3. Thus, Article 42 was not a rule of law, since it lacked the precision of a legal standard; furthermore, it was subject to reservations.

70. Mr. GILL (Ireland) said that he would convey his delegation's explanations of vote to the Secretariat in writing.

71. Mr. QUENTIN-BAXTER (New Zealand) said that his delegation had already abstained from voting on the adoption of Article 42 in Committee III. It had not modified its position since then, because the varying interpretations placed upon the article did little to dispel his delegation's fears, or to reassure it that soldiers and civilians would thenceforth receive the crystal-clear guidance on which respect for the law of armed conflict so greatly depended.

72. His delegation did, however, recognize that the principle underlying the article deserved a place in contemporary law. Theory and practice would, it was to be hoped, refine and crystallize the scope of that principle. As its title implied, the article was only concerned with the treatment of combatants after capture, based on their behaviour before capture. Even within those proper limits, however, the article gave rise to many differences of interpretation and application. Nevertheless, the greater danger was that it would wrongly be considered to give unequal protection to adversaries in combat. Those who benefited from the provisions of Article 42 after capture were combatants before capture: as such, they faced the same risks as other combatants, and were legitimate military targets. The recognition that combatants might distinguish themselves in

different ways, having regard to the nature of the hostilities, gave them greater possibilities of retaining their status as combatants. Its purpose was not to enable them, while combatants, to shelter among the civilian population. If that distinction were to be blurred, it was not only the value of Article 42 that would be at risk, but also the whole system of protection contained in the law of Geneva, which depended on enabling belligerents to identify clearly who was and who was not a combatant.

73. Mr. FREELAND (United Kingdom), explaining why his delegation had abstained, observed that while it shared the desire to accord humanitarian protection as prisoners of war to a greater number of combatants, that had to be balanced against the need to maintain the protection given to the civilian population. During the debate in Committee III his delegation had pointed out that in the case of guerrillas, those considerations must be opposed to each other and that any failure to distinguish between combatants and civilians could only put the latter at risk. That risk might well become unacceptable unless a satisfactory interpretation could be given to certain provisions of Article 42. In its explanation of vote at the Committee stage, his delegation had described its doubts on those matters and the points of particular concern to it. Those doubts had unfortunately not been resolved to an extent which would enable it now to support the article. He therefore thought it necessary to restate the main aspects of his delegation's interpretation of Article 42, particularly in relation to its paragraph 3.

74. In the first place, it was his delegation's understanding that the basic rule contained in the first sentence of that paragraph meant that combatants had to distinguish themselves throughout military operations in a clearly recognizable manner. Secondly, it considered that the situations in which a guerrilla fighter was unable to distinguish himself from the civilian population could exist only in occupied territory. Thirdly, it was concerned about the use, in sub-paragraph (b), of the word "deployment", which it must interpret as meaning any movement towards a place from which an attack was to be launched. Lastly, his delegation wished to make it clear that in its view any combatant who failed to meet the requirements set out in paragraph 3 must be considered as having forfeited his combatant status and could be tried and punished accordingly.

75. Mr. HERCZEGH (Hungary) said that, as his delegation considered Articles 1 and 42 to be closely linked, it had felt obliged to vote for both of them. With the provisions of Article 42, international humanitarian law was adapting itself to present-day realities, and he was sure that the adoption of the article by an

overwhelming majority was one of the most important results of the Conference. Born of long and laborious negotiation, the wording of the article struck a delicate balance between different ways of looking at the matter. While it doubtless did not rule out the possibility of differing interpretations, it was nevertheless a satisfactory compromise, ensuring as it did the implementation of the principles of international humanitarian law in all the types of armed conflict mentioned in Article 1. His delegation noted in particular that it extended the protection afforded under the third Geneva Convention of 1949 or equivalent protection in certain cases, to all captured combatants from among peoples fighting against colonial domination and foreign occupation, or against racist régimes, thus considerably broadening the scope of the Convention without thereby affecting its other provisions.

76. Mr. GOZZE-GUČETIĆ (Yugoslavia) expressed pleasure that the Conference should have adopted an article which opened up a new chapter in the history of international humanitarian law. It was not merely that the article widened the area of humanitarian protection, but also that it laid the foundation for future relations between aggressor and victim: the old rules which had expressly tied the status of combatant to formal and rigid legal conditions, making matters easier for an aggressor and occupying Power, by the same token restricted the opportunities for combating aggression; while the article which had just been adopted unequivocally legalized the struggle of oppressed peoples against occupation and aggression of every kind. It granted the status of combatant to members of the civilian population who in exceptional circumstances might take up arms to defend their country.

77. Inasmuch as Article 42 reflected those new humanitarian as well as political realities of the armed conflicts which were shaking the contemporary world, his Government considered that any reservation regarding the article would impair Protocol I in its very essence, and that no State which entered such a reservation should be recognized as Party to the Protocol.

78. Mr. von MARSCHALL (Federal Republic of Germany) said that his delegation had voted for Article 42 at the fifty-fifth meeting of Committee III because from the outset it had been convinced that guerrilla warfare should be firmly placed under the rules of international law; it had never concealed, however, that it had serious misgivings lest some of the terms of the article might prove harmful to the protection of the civilian population if guerrillas were not required to distinguish themselves sufficiently from the civilian population. At the fiftieth meeting of Committee III, on 8 June 1976, his delegation had

made the following statement: "It /the Federal Republic of Germany/ 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". His delegation had accordingly reserved its right to review its position, even in plenary, if its doubts had not in the meantime been dispelled by an agreed understanding.

79. From Committee III's report (CDDH/407/Rev.1) it appeared that the various delegations had largely succeeded in reaching agreement on the interpretation to be given to the provisions of Article 42. Even so, some serious misgivings remained, and as a result a fair number of delegations had felt compelled to abstain in the final voting. His delegation had also abstained, and it wished that abstention to be understood as an appeal for further efforts to reach complete agreement on an interpretation of the article which would be fully in keeping with the basic aim of Protocol I, namely the protection of the civilian population.

80. He would restrict himself to the foregoing remarks, at that point but would submit explanations of vote in a more detailed form to the Secretariat in writing.

81. Mr. WULFF (Sweden) said his delegation had explained to Committee III at the fifty-sixth meeting on 22 April (CDDH/III/SR.56) why it was voting for the article; he wished to add some remarks in plenary.

82. His delegation had voted for Article 42 because its provisions would protect guerrillas and members of resistance movements if they satisfied the conditions stated. Not only could such protection be regarded as an important gain from a humanitarian point of view, but it would also induce guerrillas to comply with the rules of international law. In addition, combatants of an adverse party who became hors de combat would be afforded better protection.

83. Plainly, the provisions of Article 42 could be understood in various ways, and one interpretation might be that the distinction between guerrillas and the civilian population would disappear. His delegation was strongly opposed to that interpretation, which could undermine one of the fundamental principles of international law. Even after Article 42 had been adopted, it was extremely important to maintain the distinction between combatants and civilians, without which the protection afforded to the civilian population would be seriously eroded; that would be an unacceptable development, completely at variance with the intention of the carefully balanced wording of Article 42.

The meeting rose at 1 p.m.

ANNEX

to the summary record of the
fortieth plenary meeting

EXPLANATIONS OF VOTE

BELGIUM

Original: FRENCH

Article 42 of draft Protocol I

The Belgian delegation refers to the explanation of vote which it gave when Article 42 was adopted by Committee III (CDDH/III/SR.56, paras. 66-70).

FRANCE

Original: FRENCH

Article 42 of draft Protocol I

The French delegation voted in favour of Article 42 and refers to the explanation of vote which it gave in Committee III (CDDH/III/SR.56, paras. 18 and 19).

GERMANY, FEDERAL REPUBLIC OF

Original: ENGLISH

Article 42 of draft Protocol I

When Article 42 was adopted at the fifty-sixth meeting of Committee III on 22 April 1977 (CDDH/III/SR.56), the delegation of the Federal Republic of Germany voted in favour of this article because it was convinced from the outset that the practice of guerrilla warfare should be firmly placed under the rules of international law. My delegation never did conceal, however, that it had serious doubts whether some terms of this article might not prove harmful to the protection of the civilian population, if guerrillas were not required to distinguish themselves sufficiently from the civilian population. Already at the fiftieth meeting of Committee III on 8 June 1976, the delegation of the Federal Republic of Germany had made the following statement: "The Federal Republic of Germany 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" (CDDH/III/SR.50, para. 22). The delegation of the Federal Republic of Germany therefore reserved the right to review its position, even in the plenary meeting if its doubts were not dispelled by an agreed understanding. In our view, such an agreed understanding is to be based on the following preconditions:

(1) If paragraph 3 of Article 42, in the drafting of which this delegation took an active part, is to fulfil its important and necessary purpose, it has to be interpreted quite honestly and precisely in the light of the customary law rule of interpretation codified in Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, which prescribes 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".

(2) Keeping strictly to this rule of interpretation, the understanding of the Government of the Federal Republic of Germany concerning several provisions of Article 42 is the following:

(a) As to the introductory sentence of paragraph 3, the report of Committee III on Article 42 already states that this sentence restates the generally recognized rule of distinction. It is, therefore, the understanding of this delegation that the basic rule set forth in Article 42, paragraph 3, first sentence, that combatants are obliged to distinguish themselves from the civilian population means that these combatants have to distinguish themselves in a clearly recognizable manner.

(b) However, paragraph 3, second sentence, takes adequately into account the situations occurring in some modern types of international armed conflict. It is therefore the understanding of this delegation that paragraph 3, second sentence, applies only to exceptional situations such as those occurring in occupied territories.

(c) The term "deployment" which was introduced by this delegation has caused the main difficulties of interpretation as being a specific military term. It is therefore the understanding of this delegation that the phrase in paragraph 3, sub-paragraph (b), "military deployment preceding the launching of an attack" means any movement toward a place from which an attack is to be launched.

(d) As far as paragraph 4 of Article 42 is concerned, this delegation is able to restate its position already declared at the third session of the Conference, namely that neither the internal law nor the basic views of the Federal Republic of Germany with regard to the subject of paragraph 4 create any obstacle to the implementation of this provision in full application of the third Geneva Convention of 1949. In our view, the substance of paragraph 4 means that the third Convention is and will remain the strict standard for the protection referred to in paragraph 4 of Article 42. Nevertheless, combatants who fail to meet the minimum requirements of the second sentence of paragraph 3 forfeit their combatants status and may be tried and punished accordingly.

We have been glad to see that the draft report of Committee III (CDDH/III/408) reflects a high degree of agreement on such a common understanding of the provisions of Article 42.

We also note, however, that some serious doubts still exist and that a good number of delegations, therefore, felt compelled to abstain in the final voting on Article 42. This delegation has also abstained and it wants this abstention to be understood as a signal for further and intensive common efforts to reach an agreement on an interpretation of this article that fully meets the requirements of the basic aim of Protocol I, namely the protection of the civilian population.

HOLY SEE

Original: FRENCH

Article 42 of draft Protocol I

The delegation of the Holy See voted in favour of Article 42 of draft Protocol I because it considers that it is necessary to establish rules protecting all the combatants in armed conflicts.

This is a principle of humanitarian law which is stated unequivocally in Article 42. The concept of modern war is evolving rapidly, and so provisions are needed to protect combatants in the new types of armed conflict.

The delegation of the Holy See has some misgivings, however, about the criteria for the granting of this protection, which are difficult to assess in practice and do not allow of any reliable guarantee of the protection of the civilian population. Yet the protection of the civilian population is one of the main purposes of Protocol I because it is among the civilian population that there are the most victims in modern conflicts.

This is why the delegation of the Holy See hopes that these measures for the protection of the civilian population can be better expressed in the future, without prejudice to the protection afforded to combatants.

IRELAND

Original: ENGLISH

Article 42 of draft Protocol I

The reasons for my delegation's abstention have already been stated in Committee III. The basic reason for our abstention is that we consider that the protection of the civilian population demanded by humanitarian principles is eroded by Article 42 to an unacceptable extent.

SPAIN

Original: SPANISH

Article 42 of draft Protocol I

The Spanish delegation wishes to state for the record that, in its view, the circumstances which led it to abstain in the vote on Article 42 of Protocol I when that article was adopted by Committee III have not changed and do not warrant a change of attitude at present.

Indeed, as was pointed out at the time, the text presented does not guarantee the safety of the civilian population, which is the essential aim of the instruments under consideration. In the view of this delegation, the terms in which the article is drafted could favour the development of the new phenomenon known as urban guerrilla warfare and, therefore, a certain form of terrorism, thus constituting a grave danger to the security of States and a step on the road to international subversion.

SUDAN

Original: ARABIC

Article 42 of draft Protocol I

The text of Article 42 as adopted by the Conference, while falling short of our expectations, nevertheless represents a triumph of the humanitarian principles and laws applicable in armed conflicts. It is a recognition of the right of peoples to fight for their right to self-determination and a recognition of the legal status of combatants, which affords them the protection to which they are entitled in international law.

Those who approved the text, which was adopted almost unanimously, should be congratulated. This article, read in conjunction with Article 1, especially paragraph 4 of that article, and Article 41, provides a brilliant picture: the armed struggles of the national liberation movements against colonial domination, alien occupation and racist régimes have now acquired the quality of international armed conflicts and, by virtue of this, all combatants taking part in such conflicts have all the rights guaranteed by the Geneva Conventions and this Additional Protocol, taking into account the slight easing announced in Article 42 of the conditions which, by their very nature, form an obstacle to the activities of the liberation movements. It would have been desirable to have these conditions eased still further than they are in Article 42.

My delegation considers that these are fundamental articles and that reservations would be out of place, for any reservation renders the entire Protocol meaningless, in contravention of international law as established by the International Court of Justice at The Hague concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion of May 28th, 1951 - I.C.J. Reports 1951, p. 15), and as codified in the Convention on the Law of Treaties (Vienna, 1969).

My country is both Arab and African. Africa, in common with the Arab countries, has suffered and is still suffering the effects of abominable colonialism, blatant foreign occupation, and brutal racist and fascist régimes, which discriminate among human beings and establish distinctions, conferring on some all rights and prerogatives and denying them to others, treating them in inhuman fashion, consigning them to perpetual servitude, and imposing on them the most abject conditions, without any regard for humanitarian or moral considerations. They even rank below domestic animals in the eyes of those who are pleased to call themselves masters.

Articles 1, 41 and 42 have together given teeth and claws to the principles of the United Nations Charter and to the resolutions of the United Nations General Assembly: these will no longer remain a dead letter, to be infringed and violated daily and shamelessly. From now on, they are enshrined in law and will be under the jealous guardianship of those implacable fighters who will henceforth enjoy the recognition and protection of international law and of the international community. Their triumph is assured, both in the long- and in the short-term.

SUMMARY RECORD OF THE FORTY-FIRST PLENARY MEETING

held on Thursday, 26 May 1977, at 3.10 p.m.

President: Mr. Pierre GRABER Federal Councillor,
Head of the Federal
Political Department of
the Swiss Confederation

ADOPTION OF THE ARTICLES OF DRAFT PROTOCOL I (CDDH/401)
(continued)

Article 42 (concluded)

Title

1. Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, informed the Conference that the Drafting Committee had agreed unanimously that the following wording for the title of Article 42 - "Combatants and prisoners of war" - should be submitted to the plenary meeting for approval.

The title "Combatants and prisoners of war" was adopted for Article 42.

Explanations of vote

2. Mr. AKRAM (Afghanistan) said that his delegation had voted in favour of Article 42. In adopting the article, the international community had accorded a new status to those who were fighting for independence and self-determination, a decision which was fully in conformity with the United Nations Charter and the rules of international humanitarian law. Article 42, as now worded, formed a logical whole with other recently adopted articles: for example, Articles 1, 35 and 41 of draft Protocol I.

3. His delegation was glad that the long and difficult negotiations, in which it had taken an active part, had led to a satisfactory result. The newly adopted article was in line with the traditional policy of Afghanistan, which had always supported peoples fighting against colonial domination and foreign occupation.

4. Mr. BLOEMBERGEN (Netherlands) said that his delegation had voted in favour of Article 42 despite a certain lack of clarity in the text. It was glad to see the protection implied in combatant status extended to fighters who had hitherto been unprotected. That broadening of the scope of protection was especially beneficial in situations such as might arise in wars of national liberation. His delegation hoped that the new beneficiaries of combatant status would be prompted to comply with the requirements set forth in Article 42, thereby enhancing the protection of the civilian population against the effects of hostilities. Article 42, thus perceived, should improve the protection both of the legitimate combatant and of the civilian population. In all circumstances, of course, in which the distinction between combatants and the civilian population was weakened, implementation of the article would be jeopardized.
5. The Netherlands delegation was convinced that the fundamental rule of distinction between combatants and the civilian population had not been weakened by Article 42; it stressed, however, that the article should not be construed as entitling combatants to waive that distinction.
6. It understood the phrase "military deployment" in paragraph 3(b) to mean "any tactical movement towards a place from which the attack is to be launched".
7. Mr. ABDUL EL AZIZ (Libyan Arab Jamahiriya) thanked the delegations which had voted in favour of Article 42; his delegation understood, but did not share, the attitude of those which had abstained.
8. His delegation had voted in favour of the article on the basis of two mutually complementary considerations. The first was a general consideration concerning the legitimacy of the struggle of peoples for freedom and self-determination, a principle consecrated by the history of mankind from time immemorial and confirmed by international treaties at all times and in all places. Like all other peace- and justice-loving peoples, his country was proud of the support it had given to liberation and resistance movements wherever they had operated. The Libyan people's own struggle for self-determination and freedom constituted an integral part of that of the whole of mankind. Freedom, however, was incomplete so long as there were still peoples fighting for their independence. The Conference had rightly recognized the legitimacy of such struggles by taking the development of international humanitarian law a step forward and underlining the international community's recognition of liberation and resistance movements and the need to protect their members.

9. Secondly, his delegation found the text of the article fully satisfactory in form and in substance and saw no need to subject it to legal quibblings. The majority vote in favour of Article 42 spoke for itself. The text struck a just balance between the protection of the civilian population and that of members of liberation and resistance movements. The phrase "protection equivalent in all respects to those accorded to prisoners of war by the third Convention and by this Protocol" was of capital importance. His delegation understood that to mean that members of liberation movements enjoyed protection identical in all respects to that accorded to regular combatants.

10. His delegation deplored the reference, open or insinuated, to guerrilla fighters as "terrorists". Anyone who employed that false and arbitrary description failed to understand the sacred character of the freedom of peoples or to realize that the Conference comprised representatives of liberation movements who had the same right to speak as had the representatives of States. Such a speaker seemed deliberately to ignore the provisions of international treaties concerning the rights of peoples to self-determination and failed to understand the historical truth that the barbarous and illegitimate activities of the colonialist Powers had justified their expulsion by armed struggle from the territories they were occupying, however long that struggle might last.

11. In conclusion, he wished to stress that, in the task of reaffirming and developing international humanitarian law, it was essential for delegations to rise above geographical, political and ideological differences and to base their deliberations on existing realities and on universal humanitarian principles.

12. Mr. SERUP (Denmark) said that his delegation had abstained in the vote on Article 42 in Committee III because it had appeared unduly to blur the distinction between civilians and combatants which was of fundamental importance in building the structure of the two Protocols. The Danish delegation had also felt that the text was far from clear and that its practical applicability was open to serious doubt.

13. The Danish delegation was still concerned about the practicability of Article 42, as adopted, but, through intensive study and reflection, it had reached a better understanding of the correct meaning and interpretation of the article. Since Denmark had suffered the hardships of a military occupation, it was understandable that the Danish delegation should focus on that aspect of the article which related to the treatment and status of members of resistance movements who had not been able to fulfil the often difficult conditions of distinguishing themselves from civilians and were then captured by the Occupying Power. On that point,

his delegation felt that, in comparison with the status resulting from an interpretation of Article 4 of the third Geneva Convention of 1949, the provisions of paragraphs 4 and 5 of Article 42 represented substantial progress. For that reason it had been able to cast a positive vote on Article 42 in the plenary meeting.

14. Mrs. SILVERA (Cuba) said that Cuba had voted in favour of Article 42 because it constituted a success for the national liberation movements. Her delegation hoped that the adoption of the article would help to reduce the oppression of peoples who were fighting for national liberation and that Governments and the international community in general would respect the basic principles embodied in the article. The opposition to the article shown by some Governments was hardly surprising, for it was in line with their repressive action against guerrilla fighters.

15. In her delegation's view, the provisions of Article 42 constituted an amplification of the scope of Article 1 by conferring prisoner-of-war status on the members of liberation movements. The problems of interpretation referred to by some speakers should not be used as a pretext for departing from the essential principles of Protocol I.

16. The large number of delegations which had voted in favour of the article had shown their understanding of the need to afford protection to those who really deserved it, namely, both the civilian population and the combatants.

17. Mrs. HERRAN (Colombia) said that her delegation would submit its explanation of vote in writing.

18. Mr. HERNANDEZ (Uruguay) said that the reasons for his delegation's abstention in the vote on Article 42 had been clearly explained by previous speakers, in particular by the representatives of Argentina and Switzerland. During the discussion of the article in Committee III, the Uruguayan delegation had spoken of its concern about the imprecision of certain passages in the text. His delegation's position in that respect had not changed.

19. Mr. AL GHUNAIMI (Egypt) welcomed the adoption of Article 42, which touched on vital international interests. Some of the wording of the article no doubt left something to be desired, but his delegation had voted in favour of the article in a spirit of compromise. It was the general view that a guerrilla fighting for a just cause was a legitimate incognito combatant and, as such, should be given the benefit of the doubt whenever freedom of manoeuvre required disguise at any stage of the combat. His right

to be treated as a lawful combatant, and, if captured, as a prisoner of war was inviolable and should not be derogated from by virtue of the first sentence of paragraph 3. The right to disguise was confined to the combatants of liberation movements; regular combatants were not released by the article from the obligation to wear uniform during military operations - failure to do so would be to commit an act of perfidy.

20. With regard to the claim that Article 42 would jeopardize the safety of the civilian population, it should be remembered that it was the civilian population which suffered most from foreign oppression and that the guerrillas were fighting on its behalf and were consequently concerned for its safety. The article established a fair balance between the humanitarian protection of the civilian population and the military necessities of guerrillas.

21. In his delegation's view, the expression "military deployment" meant the last step when the combatants were taking their firing positions just before the commencement of hostilities; a guerrilla should carry his arms openly only when within range of the natural vision of his adversary. Any other interpretation constituted an attempt to dilute the prerogatives of the champions of liberty and betrayed the very purpose of the article.

22. Mr. ROMAN (Chile) said that, despite the fact that the material and personal coverage of the article coincided with those of Article 4 of the third Geneva Convention of 1949 and Article 1, paragraph 4, and Article 41, paragraph 4, of draft Protocol I, his delegation had abstained in the vote on the article in view of the vagueness of paragraph 4. That paragraph denied the status of prisoner of war, with the protection that that entailed, to combatants who failed to distinguish themselves from the civilian population by carrying arms openly, while at the same time granting them "protections equivalent in all respects to those accorded to prisoners of war". Like certain other delegations, the Chilean delegation interpreted the paragraph as referring solely to the penal and procedural guarantees of a regular jurisdiction in regard to a breach of the Protocol which might introduce a charge of perfidy within the meaning of Article 35, paragraph 1 (c).

23. Mr. MARRIOTT (Canada) said that his delegation regretted that it had had to abstain in the vote on Article 42, particularly in view of the importance of the problem. It was concerned about the perhaps necessary vagueness of the language adopted in some paragraphs, but hoped that time would make the meaning more precise.

24. Concerning the interpretation of the article, it wished to state: first, that the situations described in the second sentence of paragraph 3 could exist only in occupied territory; or in armed conflicts as described in Article 1, paragraph 4, of Protocol I; secondly, that the phrase "military deployment preceding the launching of an attack" in paragraph 3 meant any movement towards a place from which an attack was to be launched; thirdly, that combatants who failed to meet the minimum requirements of the second sentence of paragraph 3 forfeited their combatants status and might be tried and punished accordingly and, lastly, that armed forces personnel attached to resistance movements in occupied territory were entitled to operate under the same rules as the members of resistance movements.

25. Mr. MOKHTAR (United Arab Emirates) said that Article 42 was one of the basic elements of draft Protocol I and of the Conventions. There were obviously certain fighters, such as mercenaries, who were not entitled to prisoner-of-war status; but it was equally clear that protection had to be provided for combatants who were fighting in order to put an end to a state of injustice and the occupation of their territories and to affirm their right to self-determination. To grant them prisoner-of-war status was not to give them preferential treatment, but merely to put them on the same footing as other combatants; to deny them that right would be to deny them all protection. He agreed with the interpretation given by the Egyptian representative of the expression "military deployment".

26. Mr. GRIBANOV (Union of Soviet Socialist Republics) said that Article 42 was of primary importance in the solution of the problems with which the Conference was confronted. Its purpose was to extend the humanitarian protection provided by the third Geneva Convention of 1949 to the largest possible number of those participating in armed conflict. The article protected members of liberation and national independence movements by extending to them full prisoner-of-war status; in other words, Article 42 referred to that type of international armed conflict in which a people was fighting against colonial domination, foreign occupation and racist régimes. The USSR delegation had felt it duty bound to extend international legal and humanitarian protection to such fighters by voting in favour of Article 42. That article dealt specifically with national liberation conflicts in which, as a rule, the poorly armed national liberation fighters were confronting enemies equipped with all modern military resources; it was for that reason that such combatants were particularly in need of protection.

27. By requiring combatants to distinguish themselves from the civilian population during military engagements or when preparing an attack, paragraph 3 of the article provided for the protection of the civilian population. It thereby provided, for the first time, a criterion for distinguishing combatants conducting a national liberation struggle from the civilian population. That had been possible because national liberation fighters had been assigned to a new category of combatants. Thus Article 42 constituted a significant advance in international humanitarian law beyond the stage of the 1949 Geneva Conventions, providing a new level of protection for the civilian population and for all members of national liberation movements.

28. Mr. ARMALI (Observer for the Palestine Liberation Organization), speaking at the invitation of the President, said that national liberation movements, the authentic representatives of peoples subjected to colonial domination, foreign occupation and racist régimes, could not fail to welcome the protection accorded to their combatants by Article 42, which had received the almost unanimous support of delegations, except for those which failed to recognize the legitimate rights of peoples fighting for self-determination. The vote taken that morning represented an important step forward in international legislation, which gave ever fuller recognition to the struggles of national liberation movements and the need to provide adequate protection to guerrilla fighters.

29. His delegation was not fully satisfied with the compromise text achieved as a result of arduous negotiations, but it constituted a basis for the further development and improvement of humanitarian law.

30. His delegation welcomed the fact that Article 42 accorded to guerrillas the same protection as that given to regular combatants, thereby, as it were, putting teeth into the provisions of Article 1, paragraph 4. It was no accident that the same solitary voice which had been raised against Article 1 had been raised once more against Article 42, on the fallacious pretext of protecting the civilian population, while the Government in question refused to apply the provisions of the fourth Geneva Convention of 1949 in the territory it was occupying.

31. The requirements in paragraph 3 (a) and (b) regarding the open carriage of arms could only be interpreted in the most restrictive manner: the phrase "during such time as he is visible to the adversary" must be interpreted as meaning "visible to the naked eye". Any other interpretation would be abusive

and contrary to the spirit of the discussion on the article. Similarly, the phrase "while he is engaged in a military deployment preceding the launching of an attack" could only mean immediately before the attack, often coinciding with the actual beginning of the attack. Any other interpretation would expose the combatant to certain capture before the attack could be launched.

32. Paragraph 4 could only be interpreted in the strictest sense, namely, that the adverse Party was in no case entitled to limit or reduce the protections afforded, applying that provision in cases where it suited him and rejecting it in others.

33. Mr. BRANCO ALEIXO (Portugal) said that, while welcoming the adoption of Article 42, which reflected new realities by granting prisoner-of-war status in the event of capture to combatants not belonging to regular armed forces, his delegation had felt obliged to abstain in the vote because of its serious doubts with regard to the interpretation of the text. Furthermore, it questioned whether the protection of the civilian population was duly safeguarded.

34. Paragraph 3 appeared to embody a general rule and an exception; with regard to the general rule, the concept of "a military operation preparatory to an attack" was unclear and might cover a variety of situations; moreover, the description of the exceptional situations was ambiguous and his delegation doubted whether it was adequate to meet the innumerable practical problems which would arise.

35. There were two further imprecise concepts: "military deployment preceding the launching of an attack" and, in paragraph 5, "by virtue of his prior activities". Such lack of clarity might be harmful for combatants in view of the variety of possible interpretations.

36. His delegation considered that, in order to ensure the protection of the civilian population, paragraph 3 should specify that combatants must clearly and unequivocally distinguish themselves from the civilian population by means of a distinctive sign. It also considered that the exceptional rule in the second sentence of the paragraph did not ensure reasonable protection for the civilian population.

37. Mr. EL HASSEEN EL HASSAN (Sudan) said that his delegation would submit its explanation of vote in writing.

38. Mr. KHALIL (Qatar) said that Article 42 constituted a new and important development of international humanitarian law. His delegation welcomed the fact that the article had been adopted by a large majority, particularly in view of the wording which made it clear that it applied to those fighting against colonial domination, foreign occupation and racist régimes.

39. It was fully in line with the modern trend in international law to endeavour to create the conditions in which justice and freedom could prevail and, therefore, to protect those fighting for justice and freedom, particularly in view of the noble nature of their struggle and the fact that it was carried on with meagre means against an adversary fully equipped with modern weapons.

40. His delegation considered that paragraph 3 provided all that was necessary to give full protection to the civilian population. It was not the liberation movements which constituted a danger to the civilian population, but rather those who sought to impose foreign domination or racist régimes. In that connexion, he supported what had been said by the representatives of Egypt and of the Palestine Liberation Organization. He also supported the drafting change to paragraph 2 suggested by the Syrian representative, which would make the text clearer.

41. Mr. de ICAZA (Mexico) said that the Mexican delegation had voted in favour of Article 42 because it considered that, while combatants should at all times distinguish themselves from the civilian population, that requirement did not seem indispensable in the case of peoples fighting against colonial or foreign domination. In those cases, it was the whole population which was taking part in the struggle and which, in any event, suffered the inhuman consequences of such domination. It was therefore important to grant prisoner-of-war status and the protection of Protocol I to those who were participating directly in a struggle undertaken by the whole population.

42. Mr. ALDRICH (United States of America) said that he had not intended to make an oral explanation of his delegation's vote on Article 42, but that the article had been the subject of so much inflated rhetoric and had been so distorted that he felt compelled to state clearly the understanding of the United States Government.

43. His delegation supported Article 42, since it represented an important advance in the law and should improve the treatment of all members of the armed forces held prisoner by an adversary. It would be possible to comply with the article fully without significantly reducing the protection of civilians and the civilian population. The article conferred no protection on terrorists.

It did not authorize soldiers to conduct military operations while disguised as civilians. However, it did give members of the armed forces who were operating in occupied territory an incentive to distinguish themselves from the civilian population when preparing for and carrying out an attack.

44. The basic rule contained in the first sentence of paragraph 3 meant that throughout their military operations combatants must distinguish themselves in a clearly recognized manner. Representatives who had stated or implied that the only rule on the subject was that set forth in the second sentence of paragraph 3 were wrong.

45. As regards the second sentence of paragraph 3, it was the understanding of his delegation that situations in which combatants could not distinguish themselves throughout their military operations could exist only in the exceptional circumstances of territory occupied by the adversary or in those armed conflicts described in Article 1, paragraph 4, of draft Protocol I. In those situations, a combatant who failed to distinguish himself from the civilian population, though violating the law, retained his combatant status if he lived up to the minimum requirements set forth in that sentence. On the other hand, the sentence was clearly designed to ensure that combatants, while engaged in a military operation preparatory to an attack, 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 in order to aid in the attack would forfeit their status as combatants. That meant that they might be tried and punished for acts which would otherwise be considered lawful acts of combat. That was justified because such combatants necessarily jeopardized the civilian population whom they were attempting to serve.

46. As regards the phrase "military deployment preceding the launching of an attack", in paragraph 3, his delegation understood it to mean any movement towards a place from which an attack was to be launched. In its view, combatants must distinguish themselves from civilians during the phase of the military operation which involved moving to the position from which the attack was to be launched.

47. Mr. ULLRICH (German Democratic Republic) said that his delegation welcomed the adoption of Article 42. The article was a logical and necessary consequence of the recognition as an international conflict of the struggle against colonial domination, aggression and racist régimes by oppressed people exercising the right of self-determination. By the adoption of Article 42, members of national liberation and resistance

movements had been granted prisoner-of-war status in accordance with the third Geneva Convention of 1949, should they fall into the power of an adversary. The field of application of the Convention, however, was not changed thereby. Paragraph 3 of the article ensured that members of national liberation and resistance movements who had been granted combatant status would be distinguished from members of the civilian population. His delegation, therefore could not share the fear expressed by some delegations that the protection of the civilian population would be restricted by paragraph 3. It was, on the contrary, convinced that the protection of the civilian population would be increased, since the article restricted the possibility of measures being taken by the Occupying Power against national liberation or resistance movements.

48. Mr. SOYSAL (Turkey) observed that his delegation had explained its views on Article 42 when it had been adopted in Committee III. At that time his delegation had voted in favour of the article, although it did not fully meet its expectations. The problem was to find ways and means of providing maximum protection for those who took part in hostilities, including members of national liberation movements. Turkey had always supported liberation movements that were duly recognized by regional intergovernmental organizations, universally and widely accepted, and was satisfied that such movements would benefit from the provisions of the article. A combatant was under the strict obligation to meet the minimum requirements laid down in the article when he claimed that he was entitled to prisoner-of-war status. Should he fail to do so, he would forfeit his combatant status and would therefore not benefit from the provisions of the article.

49. Mr. AULAQI (Democratic Yemen) said that his delegation had unfortunately been absent at the time of the vote on Article 42 in Committee III. Had it been present, it would have voted in favour of the article, which was one of the most important dealt with by the Diplomatic Conference. He regretted that a consensus had not been reached, since the article provided protection for members of resistance movements and those fighting for self-determination. For that reason, it could not be subject to reservations.

50. Mr. SAWAI (Japan) said that his delegation had abstained on Article 42. Although the article represented a compromise, it still raised serious difficulties, and his delegation had therefore been unable to give it full support. In particular, paragraphs 3 and 4 were ambiguous and would give rise to differing interpretations.

51. The provisions of paragraph 3 on the ways in which members of irregular forces were required to distinguish themselves from civilians would lead to inadequate protection of the civilian population. Paragraph 4 would cause some confusion in relation to the third Geneva Convention of 1949, since it created a new category of persons who, although not prisoners of war, would nevertheless be granted the same protection as those granted prisoner-of-war status under the third Geneva Convention and draft Protocol I.

52. The merit of the article lay in the fact that it extended humanitarian protection to combatants, especially those of irregular forces. Nevertheless, it was absolutely necessary to maintain a proper balance between the protection of combatants and of civilians, and for that reason the greatest care should be taken in the interpretation and application of the article.

53. His delegation wished to put on record its interpretation of some specific aspects of Article 42. First, the term "situations" used in paragraph 3 should be construed as applying restrictively to exceptional cases. Secondly, the term "military deployment" used in paragraph 3 (b) meant any movement towards a place from which an attack was to be launched. Thirdly, anyone who did not comply with the requirements of the second sentence of paragraph 3 would forfeit the status of combatant.

54. Mr. LONGVA (Norway), stating that his delegation had voted for Article 42 in Committee III, returned to the explanation of vote it had given at that time. In addition, his delegation considered that Article 42 was among those articles of draft Protocol I (Articles 1, 41, 42 bis, and 84) to which, in accordance with the 1969 Vienna Convention on the Law of Treaties, no reservations could be made. As far as the title of the article was concerned, his delegation would have preferred it to emphasize the most important element, namely, improvement in the protection of the civilian population.

55. Mr. AMIR-MOKRI (Iran) said that his delegation had voted in favour of Article 42. It considered, however, that the protection granted under the article to combatants who were not members of the regular armed forces of a State applied only to members of resistance movements fighting in occupied territory against an Occupying Power and to members of national liberation movements fighting against minority racist régimes.

56. Mr. VAN LUU (Socialist Republic of Viet Nam) said that the adoption of Article 42 by a large majority in a plenary meeting of the Conference was a great satisfaction to those who wished to develop international humanitarian law. Article 1, paragraph 4, had changed the legal status of combatants who were fighting for their national and social emancipation. Article 42 put into effect that change of status so far as the protections accorded by the Geneva Conventions and Protocol I to combatants of those fighting movements were concerned, both as regards their method of combat and the treatment accorded them should they be captured by the adverse Party. Under certain conditions they were now allowed to fight without distinguishing themselves from the civilian population. They had the status of prisoners of war except when they did not carry their weapons openly as laid down in paragraph 3 of the article. In that case, although theoretically they no longer enjoyed prisoner-of-war status, they would in fact benefit from all the protections accorded by the third Geneva Convention of 1949 to prisoners of war.

57. The value of Article 42 lay in the fact that it had developed humanitarian law by establishing the new type of wars of the last decade, the wars of peoples fighting for their national and social emancipation.

58. The success of Article 42 was due to a spirit of consensus based on a realistic view of history and the good will to develop humanitarian law.

59. Certain delegations had said that difficulties might arise concerning the interpretation and application of Article 42. But, his delegation was convinced that, given the same goodwill as had been shown in the drafting of the article, any such difficulties could be overcome. His delegation therefore hoped that the article would not give rise to any reservations.

60. The notion of humanity based on justice for national and social liberation movements and the notion of the protection of the civilian population was acquired and formed in the ever-evolving humanitarian conscience only in proportion as the liberation movements of the weak and oppressed peoples expanded.

61. With the new Article 42, which was one of compromise, justice was not yet complete as regards the combatants of those fighting movements. But, as the humanitarian conscience was evolving ceaselessly, new progress would be made at future conferences on international humanitarian law.

62. Mr. JEICHANDE (Mozambique) reminded the Conference that three years previously he had been merely an observer for a country which had not yet achieved independence. At that time his delegation had asked that members of national liberation movements should be covered by draft Protocol I. Many delegations had asserted that Mozambique's fight against colonialism, foreign occupation and racial régimes was an internal one. Humanitarian law, however, was a part of international law. Since 1960 the United Nations had adopted many resolutions on the struggles of national liberation movements, which they referred to as being international. He cited in particular General Assembly resolutions 1514(XV) and 3103 (XXVIII) and Security Council resolution S/388 (1976), which had been unanimously adopted in 1976.

63. The fight of national liberation movements was a human and just fight for peace and brotherhood among nations. It was the duty of all peace-loving persons to ensure that combatants who were members of national liberation movements were granted legal and humanitarian protection if they fell into the power of the adverse Party. The national liberation movements themselves applied the 1949 Geneva Conventions, although they had not signed them. However, members of the movements who had fallen into the power of the adverse Party in Mozambique, Angola and Viet Nam had been killed or had disappeared completely.

64. The abstention of certain delegations in the vote on Article 42 was no surprise to his delegation, since it realized that such delegations wished to create two laws - one for the oppressor and one for the oppressed. Nevertheless, the adoption of Articles 41 and 42 was an important victory for the peoples of Palestine and southern Africa, and thus for mankind as a whole. His delegation took the view that under the Vienna Convention on the Law of Treaties, no reservations could be made to Articles 1, 41 and 42 of draft Protocol I.

65. Mr. MENCER (Czechoslovakia) said that Article 42, which was closely linked to Articles 1 and 41, was the result of lengthy and patient negotiations. If the article had not been adopted, it would have been difficult to speak of any development in international humanitarian law. An important step forward had, however, been taken, to which his delegation attached great importance. National liberation movements and guerrillas would now be protected if they fell into the power of an adverse Party. Although his delegation would have preferred a more precise and stronger text, leaving no room for misinterpretation, it considered that Article 42 was one of the key provisions of draft Protocol I.

66. His delegation drew attention to its comments which appeared in the report of Committee III at the third session of the Conference (CDDH/236/Rev.1). It had voted unreservedly in favour of Article 42.

67. Mr. MOHIUDDIN (Oman) said that he would submit his explanation of vote in writing.

Article 42 bis - Protection of persons who have taken part in hostilities

68. Mr. ENDEZOU MOU (United Republic of Cameroon), said that the first sentence of paragraph 1 was slightly ambiguous. He asked what was meant by the word "presumed". The detaining Power might have evidence that a captured member of a national liberation movement or a guerrilla was not a prisoner of war. He also considered that the words "this adjudication shall occur before the trial for the offence" in the second sentence of paragraph 2 were ambiguous.

69. Mr. ALDRICH (United States of America), Rapporteur of Committee III, explained that it had been the intention of Committee III that the greatest possible benefits should be given to a person taking part in hostilities who fell into the power of the adverse Party. Article 42 bis required the detaining Power to regard such a person as a prisoner of war if he appeared to be entitled to that status or if either he or the Party on which he depended claimed that status on his behalf. That was a rebuttable presumption, but until a tribunal decided that the person concerned was not entitled to be a prisoner of war he would be so treated.

70. Referring to paragraph 2, he pointed out that it contained further protection in addition to those in paragraph 1. A person who was not considered to be a prisoner of war and was to be tried for an offence arising out of hostilities might wish to assert that he was a prisoner of war, and the Protecting Power had the right in that case to attend the proceedings in which the question was adjudicated. It was desirable that the adjudication should occur before the trial for the offence. Committee III had felt, however, that it could not insist on such action and had decided as a compromise to accept the words "whenever possible under the applicable procedure, this adjudication shall occur before the trial."

Article 42 bis was adopted by consensus. *

* Article 45 in the final version of Protocol I.

71. Mr. DI BERNARDO (Italy), observing that Article 42 bis incorporated a text which his delegation had co-sponsored, expressed satisfaction at the adoption of the article by consensus since it was of great importance in the development of humanitarian law.

72. Mr. de BREUCKER (Belgium) welcomed the adoption of Article 42 bis by consensus. It was at the time of a combatant's capture that the question of his status arose and it was the captor who would take the necessary decision. Paragraph 2 of the article would provide considerable protection for the captured person in those circumstances.

73. Paragraph 3 had the effect of making the provisions of Article 5 of the fourth Geneva Convention of 1949 less severe.

74. Mr. ROMAN (Chile), referring to the Spanish text of Article 42 bis, suggested that the verb "reclamar" should be used instead of "reivindicar". He pointed out that the word "claim" appeared in the English version.

75. Mr. de ICAZA (Mexico) explained that the verb "reivindicar" had been selected because the Spanish legal system resembled the French more closely than the English. The word "revendique" appeared in the French version.

Article 42 quater - Mercenaries

Article 42 quater was adopted by consensus. *

Explanations of vote

76. Mr. MBAYA (United Republic of Cameroon), speaking in explanation of vote, suggested that the article would have been improved by the deletion of the following words in paragraph 2 (c): "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". It would be very difficult to prove that a mercenary received exorbitant pay.

77. Mr. CLARK (Nigeria) said that Article 42 quater was a compromise text which had been carefully considered over a period of three years. He appreciated the suggestion made by the representative of the United Republic of Cameroon and regretted that it had been made too late.

* Article 47 in the final version of Protocol I.

78. His delegation, which was fully in favour of the consensus, took the view that Article 42 quater was intended to be a new article on its own. That was how it was referred to in the Working Group's proposal (CDDH/III/363), which had been adopted by consensus in Committee III. He hoped that the Drafting Committee would take the wishes of Committee III fully into account. He thanked all the delegations which had made the consensus possible, and in particular the United States representative, who had conducted the negotiations leading to the adoption of the new article.

79. His delegation had taken the initiative in proposing the new article because it was convinced that the law on armed conflicts should correspond to present needs and aspirations. The Conference could not afford to ignore the several resolutions adopted by the United Nations and certain regional organizations, such as the Organization of African Unity, which over the years had condemned the evils of mercenaries and their activities, particularly in Africa, and which had called for a ban on their recruitment, training, transport and financing. Article 42 quater, therefore, was fully in accordance with the dictates of public conscience, as embodied in the resolutions of the United Nations, including the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)), in which States were specifically requested to refrain from organizing or encouraging the organization of mercenaries.

80. For years, the African continent had been the helpless victim of mercenaries, some of whom had been specially recruited for the purpose of undermining and subverting the independence and stability of African States. But now even the countries where those despicable criminals were normally recruited, trained and financed seemed to be in agreement that it was time to put an end to such activities. The Governments of Africa expected that henceforth all Governments would co-operate in punishing the recruitment and employment of mercenaries.

81. Laws were never made to protect criminals, and his delegation saw nothing in paragraph 2 that could be construed as giving comfort or encouragement to mercenaries at any time. While recognizing the fundamental guarantees provided for in the new Article 65 of draft Protocol I and not denying the common humanity which mercenaries shared with the rest of mankind, he did not think that such considerations could serve as a pretext

for giving mercenaries the rights of combatants or prisoners of war in any situation of armed conflict. By adopting Article 42 quater, the Conference had once and for all denied to all mercenaries any such rights. The new article represented an important new contribution to humanitarian law.

82. Mr. BINDSCHIEDLER (Switzerland), speaking in explanation of vote, said that his delegation was still not satisfied with the definition of mercenaries given in paragraph 2, which might give rise to different interpretations. Moreover, it considered that Article 42 quater was out of place in draft Protocol I, which was of an essentially humanitarian nature. His delegation was of the opinion that the question of prohibiting the employment of mercenaries should have been the subject of a special treaty prohibiting the recruitment and enlistment of mercenaries. Lastly, it regretted that there had been no reference in Article 42 quater to other provisions of the Protocol, in particular Article 65.

83. Mr. KLEIN (Holy See), speaking in explanation of vote, said that his delegation had already had occasion to express its opinion on the very complex phenomenon of mercenaries, which was not just a problem of the twentieth century but had existed since remote ages.

84. The delegation of the Holy See had clearly expressed its disapproval of the system of mercenaries whenever it had been necessary to do so, and particularly with regard to those who recruited, trained and manipulated mercenaries, whatever the label, whatever side they were on.

85. The Swiss delegation had clearly shown the way: prohibition at State level and not at individual level.

86. The delegation of the Holy See reiterated its disapproval and repeated what it had said in Committee. It was hardly admissible that an article relating to humanitarian law should be more the expression of a passion (albeit understandable) than of cold reason and justice, going so far as virtually to exclude from the human community men whose designation was unilateral and therefore, to say the least, questionable.

87. The delegation could not agree that mercenaries should not be expressly granted the minimum protection given to all men, whatever their faults and their moral destitution.

88. Consequently, as it had pointed out in Committee, the delegation of the Holy See would have liked Article 42 quater to refer explicitly to Article 65 on fundamental guarantees.

89. The delegation therefore regrets fully that it had to enter some reservations on Article 42 quater.

90. Mr. DIXIT (India), speaking in explanation of vote, said that his delegation had joined in the consensus, although it was not fully satisfied with all the implications of Article 42 quater. He welcomed the clarification given by the Nigerian representative.

91. Mr. KABARITSI (Uganda), speaking in explanation of vote, said that his delegation had supported Article 42 quater as a compromise, although it would have preferred a stronger text absolutely prohibiting the recruitment and training of mercenaries in all countries.

92. Mr. DI BERNARDO (Italy), speaking in explanation of vote, said that his delegation, while joining in the consensus, felt that paragraph 2 of Article 42 quater was not altogether satisfactory, since it left some margin of discretion as to whether a person was a mercenary or not. His delegation considered that mercenaries, though not entitled to prisoner-of-war status, were covered by Article 65, which contained the fundamental safeguards to be given to all persons not enjoying more favourable treatment, regardless of the gravity of the crimes with which they might be charged.

93. Mr. EL HASSEEN EL HASSAN (Sudan), speaking in explanation of vote, thanked the Nigerian and other delegations for their efforts to place the necessary limitations on the employment of mercenaries.

94. Mrs. SUDIRDJO (Indonesia), speaking in explanation of vote, said that her delegation welcomed the new article and had supported the consensus. The aim of the article was to discourage mercenary activity and prevent irresponsible elements from getting the rights due to a combatant or prisoner of war. Her delegation was obliged, however, to enter a reservation to paragraph 2 (f) in its present form. More time was needed to study the implications of that provision.

95. Mr. JOMARD (Iraq), speaking in explanation of vote, said that his delegation had supported Article 42 quater, which it considered to be a very necessary and specific provision directed against a category of persons who acted contrary to the principles of humanitarian law.

96. Mr. SHERIFIS (Cyprus) said that his delegation, besides joining in the consensus, wished to express its appreciation for the clarification given by the Nigerian representatives and the efforts to achieve a compromise made by the United States representative.

97. Mr. BRANCO ALEIXO (Portugal) said that according to the interpretation given by the Portuguese delegation to Article 65 on fundamental guarantees and Article 42 quater on mercenaries, the latter were in a category covered by the fundamental guarantees set out in Article 65.

98. Mr. MARRIOTT (Canada), speaking in explanation of vote, welcomed the recognition by the Nigerian representative that mercenaries were entitled to the fundamental guarantees provided in Article 65. Although his delegation would have wished to see an explicit reference to Article 65 in Article 42 quater, it considered that the absence of such a reference did not prejudice the application of Article 65 to mercenaries.

99. Mr. BINTU (Zaire), speaking in explanation of vote, pointed out that since his country's independence, the escalation of wars of secession supported by mercenaries had cost the lives of several hundred thousand victims. Some mercenaries were still engaged today in what was called the "Shaba war".

100. His delegation was not satisfied with the text of Article 42 quater for the following reasons. It regretted the lack of any reference to the responsibilities of those States in whose territory mercenaries were recruited. It felt that the international community could have expressed its disapproval more clearly by stronger provisions prohibiting that foul trade and unequivocally condemning States which encouraged it. Moreover, it considered that paragraph 2 (c) was greatly weakened by the inclusion of the second clause reading: "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".

101. With reference to paragraph 2 (d), his delegation understood the words "Party to the conflict" as used in the meaning of Protocol I applying to international conflicts.

102. His Government believed that any person, even if a national of a Party to the conflict, who had served as a mercenary in other parts of the world continued to be a mercenary, he remained so, even if he were led to attack his own country. In all cases, such a person should be considered as a mercenary and should not enjoy privileged status.

103. Lastly, with reference to sub-paragraphs (e) and (f), his delegation understood the term "member of the armed forces" to refer to armed forces placed under the sovereignty of a legitimate and internationally recognized authority. It clearly excluded any kind of adventurer.

104. Mrs. HERRAN (Colombia) said that as her delegation had had occasion to point out during the meetings of Committee III, it was in a spirit of conciliation that it had joined the consensus for the adoption of the article on mercenaries.

105. Her delegation, however, would have liked some specific reference to be included to the fundamental guarantees provided for in Article 65, so as not to lose sight of the humanitarian legislation which the Conference was seeking to achieve.

106. She congratulated the President on behalf of her delegation on the efficient and able manner in which he had guided the discussions, and likewise congratulated the Rapporteur on his invaluable labours in connexion with the Working Group. Her delegation also wished her to thank the delegation of Nigeria for its efforts in introducing the text just adopted.

107. Mr. WANE (Mauritania), Mr. de ICAZA (Mexico), Mr. WULFF (Sweden), Mr. ABDUL EL AZIZ (Libyan Arab Jamahiriya), Mr. JEICHANDE (Mozambique), Mr. GRIBANOV (Union of Soviet Socialist Republics), Mr. BARRO (Senegal), Mr. BLOEMBERGEN (Netherlands), Mr. AKRAM (Afghanistan) and Mrs. SILVERA (Cuba), said that their delegations would submit their explanations of votes in writing.

Article 43 - Basic rule

Article 43 was adopted by consensus. *

108. Mr. DIXIT (India), Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) and Mr. PAOLINI (France) said that they would submit their explanations of votes in writing.

Article 44 - Scope of application

109. The PRESIDENT said that a revised text of Article 44 would be circulated in all languages at a later time.

Article 45 - Definition of civilians and civilian population

Article 45 was adopted by consensus. **

Article 46 - Protection of the civilian population

110. Mr. PAOLINI (France) said that Article 46 concerning the protection of the civilian population had been drafted from a humanitarian point of view with which the French delegation agreed.

* Article 48 in the final version of Protocol I.

** Article 50 in the final version of Protocol I.

111. The French delegation had obviously no fundamental objection to the principle of the prohibition of indiscriminatory attacks in order to protect the civilian population. It wished to point out, however, that the provisions of paragraphs 4, 5 and 7 of Article 46 were of a type which by their very complexity would seriously hamper the conduct of defensive military operations against an invader and prejudice the exercise of the inherent right of legitimate defence recognized in Article 51 of the Charter of the United Nations. As an example, he said that it would be very difficult in many cases to estimate the limits of a "specific military objective" which was mentioned but not defined in paragraph 4 (b), especially in industrialized zones of large cities and in forestry zones which could serve as a cover to the stationing and movement of enemy forces, while being used as a shelter by the civilian population.

112. The French delegation wished to point out that the determining of "clearly separated and distinct military objectives" mentioned in paragraph 5 (a) might prove unrealisable when such objectives were in small villages or in small towns. The generous provisions of paragraph 7 could often prove unapplicable in an armed conflict, because their strict observance would prohibit the placing of military objectives, whatever their nature, in any place where civilians resided or to which they moved, which would in practice prohibit the stationing of combatants in towns or villages in order to organize and to assure defence against the enemy.

113. Those considerations were valid not only for the defence of France and other European countries but also for that of the numerous countries of other continents.

114. For the reasons given as examples and because it considered that provisions concerning indiscriminate attacks could not prohibit a State from defending its territory against an invader, even if such defence might result in losses in its own civilian population, the French delegation considered that Article 46 went beyond the scope of its humanitarian aim and that it was likely seriously to impair the inherent right of legitimate defence.

115. Lastly, the wording of paragraph 8 was contrary to existing international law and would leave a State which saw its civilian population decimated by serious, overt and deliberate breaches of the Conventions and Protocol by the enemy, without any means of reply.

116. The French delegation could therefore not accept Article 46 and would have to oppose its adoption.

117. Mr. SOYSAL (Turkey) said that paragraphs 4 and 5 were open to different interpretations. He therefore proposed that the Conference should vote on Article 46 paragraph by paragraph.

118. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said that his delegation would oppose any motion for a separate vote on any part of that article. He asked that the Turkish proposal should be put to the vote.

The Turkish proposal was rejected by 36 votes to 19, with 34 abstentions.

At the request of the representative of France, the vote on Article 46 was taken by roll-call.

Tunisia, having been drawn by lot by the President, was called upon to vote first.

In favour: Tunisia, Union of Soviet Socialist Republics, Uruguay, Venezuela, Yemen, Democratic Yemen, Yugoslavia, Saudi Arabia, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Canada, Chile, Cyprus, Ivory Coast, Cuba, Denmark, Egypt, United Arab Emirates, Ecuador, Spain, United States of America, Finland, Ghana, Greece, Guatemala, Honduras, Hungary, India, Indonesia, Iraq, Iran, Ireland, Israel, Libyan Arab Jamahiriya, Jamaica, Japan, Jordan, Kuwait, Lebanon, Luxembourg, Mexico, Mongolia, Mozambique, Nicaragua, Nigeria, Norway, New Zealand, Oman, Uganda, Pakistan, Panama, Netherlands, Peru, Philippines, Poland, Portugal, Qatar, Syrian Arab Republic, German Democratic Republic, Democratic People's Republic of Korea, Socialist Republic of Viet Nam, Byelorussian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic, United Republic of Tanzania, Romania, United Kingdom of Great Britain and Northern Ireland, Holy See, Sudan, Sri Lanka, Sweden, Switzerland, Czechoslovakia.

Against: France

Abstaining: Turkey, Zaire, Afghanistan, Algeria, Federal Republic of Germany, United Republic of Cameroon, Colombia, Italy, Kenya, Madagascar, Mali, Morocco, Monaco, Republic of Korea, Senegal, Thailand.

Article 46 was adopted by 77 votes in favour, one against and 16 abstentions. *

* Article 51 in the final version of Protocol I.

Explanations of vote

119. Mr. FREELAND (United Kingdom) said that his delegation had voted in favour of Article 46, the first three paragraphs of which contained a valuable reaffirmation of existing customary rules of international law designed to protect civilians. While it also welcomed the prohibition of indiscriminate attacks in paragraph 4, the language of that paragraph was not entirely clear. His delegation considered that the definition of indiscriminate attacks given in that paragraph was not intended to mean that there were means of combat the use of which would constitute an indiscriminate attack in all circumstances. The paragraph did not in itself prohibit the use of any specific weapon, but it took account of the fact that the lawful use of means of combat depended on the circumstances.

120. The reference in paragraph 5 (b) to what had become known as the "rule of proportionality" was a useful codification of a concept that was rapidly becoming accepted by all States as an important principle of international law relating to armed conflict. In his delegation's view, the reference in that sub-paragraph and in Article 50 to "military advantage anticipated" from an attack was intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

121. Finally, his delegation wished to refer to a point which applied in relation both to Article 46 and to all the other articles in that Section of the Protocol. It welcomed all the provisions which were designed to protect civilians and civilian objects and which accordingly placed restraints on military action. It was clear, however, that military commanders and others responsible for planning, initiating or executing attacks necessarily had to reach decisions on the basis of their assessment of the information from all sources which was available to them at the relevant time.

122. Mr. DI BERNARDO (Italy) said that his delegation had abstained in the vote on Article 46 chiefly because of serious doubts about paragraphs 4 and 7. Its attitude to paragraph 4 related in particular to the vague language of sub-paragraphs (b) and (c), in which the definitions of indiscriminate attacks could give rise to misunderstanding. There was nothing in paragraph 4 to show that certain methods or means of combat were prohibited in all circumstances by the Protocol except where an explicit prohibition was established by international rules in force for the State concerned with regard to certain weapons or methods. It was not intended that the Protocol should infringe upon the competence of other bodies better equipped to deal with

the subject, even from the technical point of view. That interpretation was explicitly confirmed by Article 50, paragraph 2 (a) (ii), which referred to the necessity of taking all feasible precautions (i.e. according to the circumstances) 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.

123. His delegation's attitude to Article 46, paragraph 7 was based on the following considerations. The prohibition on the use of the presence or movements of the civilian population to shield or attempt to shield military objectives from attack presupposed that the State in question had large areas of uninhabited territory at its disposal. That, however, was frequently not the case. There were a large number of States whose territory was densely populated even near its frontiers. The provision could therefore in no case be interpreted as preventing or hindering a State that wished to do so from organizing an effective system of defence. That was a fundamental right which no Government could renounce.

124. The validity of that interpretation was largely confirmed by Article 51, sub-paragraph (b), which stated that the Parties to the conflict should, to the maximum extent feasible, avoid locating military objectives within or near densely populated areas.

125. Mr. NAOROZ (Afghanistan) said that the delegation of the Republic of Afghanistan was in principle in favour of Article 46 of draft Protocol I as presented in document CDDH/401.

126. The delegation fully appreciated the humanitarian conditions which had led to the adoption of that article. The ratio of civilian victims to that of military personnel in armed conflicts had reached an alarming proportion which needed to be checked by all possible means. However, the delegation of Afghanistan felt that nations had the right to self-defence against invasion and the problem of national defence had no less importance especially to the developing countries. His delegation had some doubts whether the provisions of paragraphs 4 and 5 as formulated in the above document were technically possible and might not at times prove conflicting, thus creating difficulties in the field of application. It was because of such considerations and of lack of accuracy that his delegation, while fully agreeable to the substance of Article 46, wished to record its reservations when the consideration of the preservation of civilian lives and objects conflicted with the demands of a nation's legitimate defence.

127. Mr. NAHLIK (Poland) said that codification of the rules of war at the turn of the nineteenth and twentieth centuries appeared to have been based on the notion that war would be restricted to combat between armed forces and that rules would be required for their protection alone.

128. The history of the Second World War, during which civilians had often been exposed to even greater danger than combatants, had shown up that notion as unrealistic. His country had lost about six million of its citizens, most of them civilians, in that conflict. The fourth Geneva Convention of 1949 had therefore been the most important achievement of the 1949 Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War. In the light of certain armed conflicts which had occurred since that time, however, some of the rules of that Convention had proved to be ambiguous or lacking in clarity and it was necessary to supplement them.

129. The field was covered by the whole of Section IV of draft Protocol I, Article 46 of which had a special function since it contained the most important provisions of the Protocol, such as the prohibition of indiscriminate attacks that made no distinction between military personnel and civilians, and of attacks by way of reprisals. The latter often affected the most innocent persons and those who were least able to defend themselves, and gave rise to a mood of desperation which led to counter-reprisals and to chain reactions which became increasingly difficult to stop.

130. His delegation therefore welcomed the clear and categorical prohibition of reprisals in paragraph 6 of Article 46. The whole article, with its general rules, would fill some of the gaps in existing rules of a more specific character. It represented a coherent whole, and his delegation therefore welcomed the rejection of the proposal that separate votes should be taken on its various paragraphs.

131. His statement also applied, to a large extent, to a number of other articles, such as Articles 47, 47 bis and 52.

132. Mr. MARTIN HERRERO (Spain) said that his delegation regretted that it had been necessary to vote on Article 46 as a whole, particularly in view of its complex nature and of the fact that the paragraphs covered such a diversity of ideas.

133. The article, including in particular the provisions of paragraphs 4 and 5 (b), had a number of unsatisfactory features, while the provisions of paragraph 7 would be difficult to put into practice.

134. His delegation nevertheless preferred to see the article adopted as a whole rather than rejected outright.

135. Mr. ULLRICH (German Democratic Republic) said that his delegation had voted in favour of Article 46. From the start of the work on draft Protocol I, his Government had supported the elaboration of clear and comprehensive provisions concerning the protection of the civilian population. In its view, the reaffirmation and progressive development of rules to protect civilians in armed conflict was one of the most important tasks of the Conference.

136. The prohibition of indiscriminate attacks or of attacks which employed methods or means of combat that could not be directed at a specific military objective was of the utmost importance, since it re-established the priority of humanitarian principles over the uncontrolled development and barbarous use of highly sophisticated weapons and means of warfare, which from the outset disregarded the fundamental rights of the human being.

137. His delegation therefore gave particular support to paragraph 4, which contained a clear prohibition on attacks against the civilian population or civilians by way of reprisals. That prohibition, he was convinced, had the same importance, and was of the same absolute nature, as the prohibition of reprisals against prisoners of war, the wounded and the sick, which were already contained in the Geneva Conventions. His delegation would therefore regard any reservation on the prohibition as incompatible with the humanitarian object and purpose of the Protocol.

138. Mr. SOYSAL (Turkey) said that the wording of paragraphs 4 and 5 of Article 46 were open to differing interpretations that could prejudice the application of Protocol I as a whole. His delegation had therefore abstained in the vote on the article. It nevertheless had a positive attitude towards the spirit of the article as a whole and towards its aim of protecting the civilian population.

139. Mr. SHELDON (Byelorussian Soviet Socialist Republic) said that his delegation had voted in favour of Article 46, which was one of the most important articles of Protocol I. It would submit its further comments in writing.

140. Mr. von MARSCHALL (Federal Republic of Germany) said that his delegation would submit its explanation of vote in writing.

141. Mr. BLOEMBERGEN (Netherlands) said that it was his delegation's interpretation of Article 46 that the reference to the military advantage anticipated from an attack (paragraph 5 (b)) was intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular phases of that attack. The same remarks applied to the similar reference in Article 50.

142. Mr. MBAYA (United Republic of Cameroon) said that his delegation supported all provisions for the protection of the civilian population. It would nevertheless be regrettable if any given provision of the Protocol were to prejudice the defence of a State. His delegation had for that reason abstained in the vote on Article 46.

143. Mrs. HERRAN (Colombia) said that her delegation had abstained in the vote on Article 46, despite its support for the provisions of paragraphs 1 to 3 and 6 to 8, for the protection of the civilian population, since the interpretation of paragraphs 4, 5 and 7 might lead to confusion.

144. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said that his delegation would submit its explanation of vote in writing.

145. Mr. MARRIOTT (Canada) said that his delegation's interpretation of the term "indiscriminate attack" was the same as that of the United Kingdom delegation. His delegation would submit a detailed statement in writing.

146. Mrs. CONTRERAS (Guatemala) said that her delegation, too, would submit its explanation of vote in writing.

147. Mr. SHERIFIS (Cyprus) said that his delegation had voted in favour of Article 46, which it considered to be of fundamental significance. It would submit an explanation of vote in writing.

148. Mr. SKALA (Sweden) and Mr. de ICAZA (Mexico) said that their delegations, too, would submit written explanations of vote.

Article 47 - General protection of civilian objects

149. At the request of Mr. PAOLINI (France), the PRESIDENT put Article 47 to the vote.

Article 47 was adopted by 79 votes to none, with 7 abstentions. *

* Article 52 in the final version of Protocol I.

Explanations of vote

150. Mr. PAOLINI (France), referring to the stipulation in the first sentence of paragraph 2 of Article 47 that "attacks shall be strictly limited to military objectives", said that, as his delegation had already indicated in connexion with Article 46, there were many situations in armed conflicts in which it was difficult or even impossible to determine precisely the limits of a military objective, particularly in large towns and in forest areas, in either of which enemy armed forces and groups of civilians might be intermingled. His delegation was therefore unable to accept such a restriction, which, by the strictness of its terms, could seriously prejudice the exercise of the legitimate right of self-defence, and it had therefore been obliged to abstain in the vote.

151. Mr. DI BERNARDO (Italy) said that his delegation had voted in favour of Article 47 but wished to emphasize that its interpretation of the first sentence of paragraph 2 was the same as the interpretation it had adopted for the similar provision in Article 46.

152. Mr. AKKERMAN (Netherlands) said his delegation would submit a written statement on Article 47.

153. Mr. FREELAND (United Kingdom) said that his delegation, which had voted in favour of Article 47, was glad to see the partial definition of "military objective" contained in it, which appeared to provide a needed clarification of the law. It had noted in particular that a specific area of land might be a military objective if, because of its location or for other reasons specified in Article 47, its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offered a definite military advantage. His delegation also welcomed the reaffirmation, in paragraph 2, of the customary law rule that civilian objects must not be the direct object of attack. It did not, however, interpret the paragraph as dealing with the question of incidental damage caused by attacks directed against military objectives. In its view, the purpose of the first sentence of the paragraph was to prohibit only such attacks as might be directed against non-military objectives.

154. Mr. MARRIOTT (Canada), Mr. ALDRICH (United States of America) and Mr. MAHONY (Australia) said that their delegations would submit written statements on Article 47.

155. Mr. ABDINE (Syrian Arab Republic) said that the French text of the second sentence of paragraph 2 of Article 47 was unclear. The Drafting Committee should be requested to bring it into line with the English text.

156. The PRESIDENT pointed out that the article had already been adopted in all languages.

Article 47 bis - Protection of cultural objects

157. The PRESIDENT, drawing attention to the amendment in document CDDH/412/Rev.1, said that the words "où spirituel" should be inserted after the word "culturel" in the last line of the French text.

158. Mr. NEMATALLAH (Saudi Arabia), introducing amendment CDDH/412/Rev.1, said that places of worship were of particular importance, being sacred to all the faithful. While fully appreciating all the various views that had been expressed on the subject in Committee III, the sponsors considered that greater emphasis should be placed on the need for protection of places of worship, since the greater the number of the faithful, the greater would be the desire to fulfil the humanitarian provisions with which the Conference was dealing, and thus to strive for world peace and security. The delegations of the Islamic countries and the delegation of the Holy See had recognized the importance of bringing places of worship under the protection afforded by Article 47 bis.

159. Throughout history, Moslems had traditionally respected the places of worship of other faiths. Islam was based on principles of tolerance and religious freedom, and the Islamic countries therefore desired to give all places of worship the protection to which they were entitled.

160. He expressed his appreciation to the United States delegation for its assistance in drafting the text and particularly commended the representative of the Holy See, whose co-operation had made it possible to secure a full understanding of the humanitarian purpose of the text.

161. The amendment related to all places of worship in any national heritage, and not merely to those of Islam or Christianity.

162. Referring to sub-paragraph (b) of Article 47 bis, he said that it would be more appropriate to refer to historic objects, as was done in sub-paragraph (c), than to historic monuments.

163. Mr. SHERIFIS (Cyprus) said that his delegation fully supported the amendment. Places of worship of all faiths should be respected at all times and should come under the protection of Article 47 bis.

164. Mgr. LUONI (Holy See) said that his delegation had co-sponsored amendment CDDH/412/Rev.1 because it considered that places of worship were not sufficiently protected by the simple reference made in Article 47, paragraph 3. The proposed amendment to Article 47 bis would make it possible to fill that gap.

165. In rightly affirming the protection of historic monuments and works of art which constituted the cultural heritage of peoples, Article 47 bis, together with the proposed amendment, also mentioned places of worship, that was to say the objects which were the outward sign of the spiritual heritage of peoples, which was to a large extent the basis of their cultural identity.

166. It was true that man, a creature of God and created in His own image, was much more precious than building stones whether artistic, historic or sacred, and the world itself was the most beautiful of the temples raised to the glory of its Creator.

167. It was also true that places of worship symbolized and gave expression to basic human values which were not only historic or artistic. They were values which retained their true and living force. They had undeniably and invariably inspired numerous humanitarian relief activities in favour of victims of armed conflict.

168. It was perhaps useful to recall that at the battle of Solferino which marked the historical inception of the Red Cross, a group of monks of the Order of St. Camille, had gone from camp to camp in the heat of battle to find and tend the wounded and give them shelter in churches.

169. Such lofty humanitarian values had been given expression by all generations and in all ages through places of worship, many of which were also historic or artistic monuments, while retaining their religious character.

170. The delegation of the Holy See therefore wished that all those facts be affirmed, at least indirectly in an instrument of humanitarian law and it sincerely hoped that the amendment, of which it was a co-sponsor, would be adopted by the Conference.

171. He was grateful to the representative of Saudi Arabia for having submitted the amendment.

172. Mr. KAKOLECKI (Poland) said that it was difficult to take a decision on the amendment in view of the divergence between the English and French texts.

173. Mr. WANE (Mauritania) said that his delegation fully supported the amendment and the introductory statement made by the Saudi Arabian representative. He regretted that his delegation had not been among the sponsors of the amendment.

174. Mr. DI BERNARDO (Italy) said that his delegation was a sponsor of the amendment which had been so ably introduced by the Saudi Arabian representative. His delegation had consistently supported the cause of protecting the great historical monuments and places of worship which, as the foundations of human culture, should be a source of inspiration to all. He was confident that the Conference would be able to adopt the amendment by consensus.

175. Mr. KUSSBACH (Austria), commending the Saudi Arabian representative on his explanatory statement, said that his delegation fully supported the amendment.

176. Mr. MCGILCHRIST (Jamaica) suggested that the last phrase of sub-paragraph (a) should read "... which constitute both the cultural and the spiritual heritage of peoples".

177. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic), speaking on a point of order, suggested that the amendment should be adopted by consensus without further discussion, since all delegations appeared to be in favour of it.

178. Mr. URQUIOLA (Philippines) suggested that the Conference should adopt the amendment to sub-paragraph (a) of Article 47 bis as in document CDDH/412/Rev.1, and also the oral amendment to sub-paragraph (b) proposed by the Saudi Arabian representative.

179. Mr. ALDRICH (United States of America) said that the amendment to sub-paragraph (b) would be essential if the amendment to sub-paragraph (a) was adopted. The deletion of the word "those" which had appeared in the original text of the amendment seemed to his delegation to make no difference in substance. If it was considered that there was a difference, however, the point should be discussed before the amendment was adopted. According to his understanding, the amendment affected only special categories of monuments, works of art and places of worship.

180. The PRESIDENT suggested that the Conference should adopt the amendment to sub-paragraph (a) by consensus. If that were done, it would be necessary to make the consequential amendment to sub-paragraph (b) proposed by the Saudi Arabian representative.

181. Mr. von MARSCHALL (Federal Republic of Germany) supported by Mrs. LIDDY (Ireland), said that it was not clear what the final text of the amendment was to be. He therefore moved the adjournment of the meeting and proposed that the final text should be submitted in writing at the forty-second meeting.

It was so agreed.

The meeting rose at 7 p.m.

ANNEX

to the summary record of
the forty-first plenary meeting

EXPLANATIONS OF VOTE

AFGHANISTAN

Original: FRENCH

Article 42 quater of draft Protocol I

The delegation of the Republic of Afghanistan was happy to participate in the consensus which emerged in respect of Article 42 quater concerning mercenaries.

Our delegation has always declared itself in favour of the total prohibition of mercenary activities throughout the world.

The delegation of Afghanistan is also glad to see that the article on mercenaries is shown to be justified from a humanitarian standpoint and is given its proper place in an instrument such as the additional Protocol I. Our delegation, moreover, does not see any need for the retention of the clause immediately following the words "private gain" in paragraph 2 (c).

AUSTRALIA

Original: ENGLISH

Articles 42 quater, 44 and 47 of draft Protocol I

Article 42 quater

The Australian delegation joined in the consensus for the adoption of Article 42 quater.

The Australian delegation holds the view that mercenaries, who are in the hands of a Party to an armed conflict to which draft Protocol I applies, are entitled to the benefits of the treatment provided for by Article 65 of that Protocol. We would have preferred to have this put beyond all doubt by the inclusion in Article 42 quater of an explicit statement to that effect, and we regret that this could not be agreed.

We also note that the Rapporteur in the final paragraph on the third page of his report dated 28 April 1977 (CDDH/III/369), recorded that the understanding within the Working Group of Committee III of this Conference was that mercenaries are amongst the classes of persons to whom Article 65 is to apply. The Australian delegation agrees with this view and will interpret Article 42 quater accordingly.

Article 44

The Australian delegation joined in the consensus for the adoption of Article 44. However, if this article had come to a vote the Australian delegation would have abstained from the vote, because of doubts which it entertains concerning the legal effects and implications of paragraph 2 of the article.

The Australian delegation would have preferred that there be no restriction upon attacks by a party within such part of its territory as may be controlled by its adversary.

The views of the Australian delegation are reflected in paragraph 2 of the report of the Rapporteur (document CDDH/III/369, dated 28 April 1977, page 8).

The Australian delegation reserves its position accordingly.

Article 47

The Australian delegation abstained from the vote on Article 47.

The Australian delegation supports proposals for rules to prohibit attacks against civilian objects but it opposes the adoption of a provision which prohibits reprisals against civilian objects in all circumstances.

In the view of the Australian delegation, a reprisal during armed conflict is an act by a government which would normally be a violation of international law, but which becomes permissible when carried out in response to a previous violation of international law by an adversary State. A reprisal is a sanction to deter further violation of the law. It is not an act of vengeance. The availability of this sanction may persuade an adversary not to commit violations of the law in the first place.

Nevertheless, the Australian delegation does believe that it is necessary to re-affirm the prohibition of reprisals against the wounded, sick and shipwrecked, against medical and hospital services and against civilians, and that it is necessary to adopt a rule prohibiting reprisals against civilians. Australia, therefore, supported the adoption of Articles 20 and 46 of this Protocol, both of which contained prohibitions against reprisals.

However, in the view of my delegation the adoption of further prohibitions against reprisals will not assist in the development of international law for humanitarian purposes.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC Original: RUSSIAN

Article 46 of draft Protocol I

The delegation of the Byelorussian Soviet Socialist Republic voted for Article 46 of draft Protocol I, which we are deeply convinced is one of its key articles. The article in question, containing as it does important provisions providing that the civilian population as such, as well as individual civilians, shall not be made the object of attack and shall be protected, confirms and further develops the humanitarian principles which form the basis of the Geneva Conventions on the protection of civilian populations in armed conflicts and the series of other important international instruments adopted since 1949, more particularly the "Basic principles for the protection of civilian populations in armed conflicts", adopted by the United Nations General Assembly in 1970 (General Assembly resolution 2625 (XXV)).

Also very important from the standpoint of increasing the protection afforded to the civilian population is the provision in Article 46 concerning the prohibition of the use of force or threat of the use of force for the purpose of intimidating the civilian population. Intimidating peaceful citizens and spreading terror among the civilian population is well known to be one of the infamous methods widely resorted to by aggressors seeking to attain their criminal ends at whatever price. To us as representatives of the Byelorussian Soviet Socialist Republic, which during the Second World War made terrible sacrifices, losing 2.2 million lives, or one in four of the population, this is particularly familiar. Accordingly we energetically support the development of rules of humanitarian law designed to give the civilian population greater protection and, in particular, those rules contained in Article 46.

We all know that in armed conflict huge losses are caused among the civilian population by attacks of an indiscriminate nature, i.e. attacks which strike at military objectives and civilian objects, and consequently civilians, without distinction. Foremost among these are mass bombings, which cause the loss of countless lives among the civilian population. This too we know well from our experience of the Second World War, when many of our towns, among them Minsk, the capital of the Republic, were reduced to ruins and tens of thousands of peaceful citizens were killed as a result of barbarous bombing by the fascist air forces.

The Byelorussian Soviet Socialist Republic considers that by banning such attacks, Article 46 of draft Protocol I makes a substantial contribution to the development of humanitarian law, and we welcome it.

Our delegation likewise considers that special stress should be laid on the importance of the provisions in Article 46 forbidding reprisals against the civilian population or individual civilians and the use of the civilian population to shield military operations or shield military targets from attack.

We are convinced that these clear and straightforward rules laid down in Article 46 will help to ensure better protection of the civilian population in armed conflicts.

In conclusion, the Byelorussian Soviet Socialist Republic would like once more to emphasize that Article 46, like the whole of the section of Protocol I on the protection of the civilian population, enjoys our full support, because these provisions serve the noble and humane purpose of defending the civilian population against the disasters and horrors of war.

CANADA

Original: ENGLISH

Articles 45, 46, 47 and 50 of draft Protocol I

Articles 45 and 50

It is the view of the Canadian delegation that commanders and others responsible for planning, deciding upon or executing necessary attacks, have to reach decisions on the basis of their assessment of whatever information from all sources may be available to them at the relevant time. This interpretation applies to the whole of this section of the draft Protocol, including Articles 45 and 47.

The references in Articles 46 and 50 to military advantage anticipated from an attack are intended to refer to the advantage anticipated from the attack considered as a whole, and not only from isolated or particular parts of that attack.

Article 46

The Canadian delegation voted in favour of this article, since in its view, many of its provisions are codification of customary international law. However, the Canadian delegation also feels that some other provisions could give rise to interpretations which, in our view, would be contrary to the interest and purpose of this article. For that reason, our delegation deems it appropriate to explain its interpretation.

The definition of indiscriminate attack contained in paragraph 4 of Article 46, is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. It is our view that this definition takes account of the circumstances, as evidenced by the examples listed in paragraph 5 to determine the legitimacy of the use of means of combat.

Article 47

In the view of the Canadian delegation, a specific area of land may also be a military objective if, because of its location or other reasons specified in Article 47, its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

It is also our understanding that the first sentence of paragraph 2 prohibits only attacks that could be directed against non-military objectives. It does not deal with the result of a legitimate attack on military objectives and incidental damage that such attack may cause.

COLOMBIA

Original: SPANISH

Articles 42, 42 quater and 46 of draft Protocol I

Article 42

We are all indebted to Mr. Aldrich, the Rapporteur, for his efforts to draft a text which, although it did not achieve a consensus in the strict sense of the word, that is to say the agreement of all, none the less received the support of the majority.

The Colombian delegation abstained for reasons which are not only supported by the tenor of the lengthy discussions held during previous sessions, but confirmed by the explanations of vote heard today.

Firstly, we do not think it proper in a Conference of this sort, which is not a political but a legal forum for strengthening and broadening the humanitarian content of certain rules for limiting the various types of warfare, to advance solidarity with nations struggling for their independence and for emancipation from colonialism as the basic argument for approving a text. In this respect Colombia has adopted an unchanging and honourable position alongside those who, like itself, are struggling for their own national identity and full independence.

The problem therefore lies in the clarity and precision of the texts, in their very viability and in their humanitarian content, not in political innovation.

Humanitarian law is not being reaffirmed or developed as we would wish if the texts cause confusion or lend themselves to conflicting interpretations.

Allow me to recall that over a century ago, when the First Geneva Convention was being discussed, civilians were not a part of war and were not taken into account in what seemed an exclusively military situation between belligerents. Since then, civilians have become involved in warfare in a way which our predecessors in this work could not have foreseen. Today they run as many risks and dangers as combatants, or even more. The paradox lies in the fact that it is in peacetime rather than in time of war that there is the clearest distinction between civilians and the military; in wartime the two tend to become merged. There are many reasons for this, such as those which brought about the eclipse of classical warfare and the emergence of unconventional patterns, arms, strategies and dimensions which in this field we might term revolutionary. The disruption of the classical pattern is also caused both by the latest technological inventions and by the use of the most primitive methods of combat.

Nowadays, however, there is something else: the very concept of international warfare has taken on a different shape. In a world which is tending towards internationalization - and sometimes supra-nationalization - in all respects, warfare, too, is becoming internationalized. There is sometimes no clear-cut line between an internal and an international conflict or, if there is, it is far vaguer than in past centuries. This is another consequence of the law of interdependence which now governs us.

We say this because we are sure that Article 42 goes beyond all questions of ideology, that is to say, its application goes beyond the ideological viewpoint of a certain conflict known to everyone.

Colonialism as it exists today may change within a few decades and these texts must be of a permanent nature. In this respect it is a well-known fact that colonialism is not a precise static phenomenon but manifests itself in various forms; there are several kinds of colonialism in the world and there are neo-colonialisms.

Having said this, I should like to state the specific reasons for our abstention, which are that Article 42 relates to an addition to Article 4 of the Third Convention i.e., it relates to prisoners of war in international conflicts, and in no way in internal conflicts, and its field of application belongs to Protocol I.

1. It is imprecise, particularly in paragraphs 3, 4 and 5, and this lack of precision may lead to arbitrary interpretations.

2. It does not safeguard the civilian population sufficiently, and in our view the main criterion must be protection of the innocent.

3. Although combatants will be distinguished from the civilian population, as specified in Article 41, armed combatants will not be clearly differentiated, and this entails imminent danger for the civilian population.

4. The original article of the International Committee of the Red Cross stated that armed combatants should be distinguishable in some way (arms carried openly or uniform) and this important detail disappeared from the new text.

Lastly, the Colombian delegation considers that to achieve the aims of this Conference, the phenomena arising from new war situations in the world are such that the obligations of combatants of any kind and for whatever purpose, whether they are defenders of any State or fighting to overthrow it, must form an equation with comparable terms in the observance of a law such as humanitarian law in armed conflicts, which attempts to humanize what is inherently inhuman and to rationalize something - and I refer to violence - which is inherently irrational.

Article 42 quater

As my delegation had occasion to point out during the meetings of Committee III, it was in a spirit of conciliation that we joined the consensus for the adoption of the article on Mercenaries.

My delegation, however, would have liked some specific reference to be included to the fundamental guarantees provided for in Article 65, so as not to lose sight of the humanitarian legislation which this Conference is seeking to achieve.

Allow me, Mr. President, to congratulate you on behalf of my delegation on the efficient and able manner in which you have guided our discussions, and likewise to congratulate our eminent Rapporteur on his invaluable labours in connexion with the Working Group. My delegation also wishes me to thank the delegation of Nigeria for its effort in introducing the text we have just adopted.

Article 46

The delegation of Colombia abstained in the vote on Article 46 although it agrees with the principles in paragraphs 1 to 3, 6 and 8 concerning protection of the civilian population, to which my country attaches special importance.

Nevertheless, we have some reservations with respect to paragraphs 4, 5, 7 and 8, as follows:

With regard to paragraph 4, the reservations of the delegation of Colombia are due to the over-vague wording of sub-paragraphs (b) and (c). The details given for the definition of indiscriminate attacks give rise to differing interpretations which would lead to confusion.

Paragraph 5 provides for the determination of clearly separated and distinct single military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.

This situation may prove to be unrealistic in military terms when such objectives are situated in certain inhabited areas.

My delegation notes that paragraphs 7 and 8 lay down generous provisions which it would not be possible to apply in a real situation in armed conflict, since their strict observation would prevent military objectives, whatever their nature, being situated

in areas where civilians might live or move about. This provision would render it difficult in practice to bring in combatants so that defence against the enemy could be organised and ensured.

These examples are given to explain why my delegation considers that the provisions concerning indiscriminate attacks could prevent a State from defending its own territory against an invader even though that defence entailed the loss of its own civilian population.

We therefore share the opinion expressed by other delegations that Article 46 exceeds the humanitarian purpose which we are defending and that the article presents difficulties of drafting and interpretation.

CUBA

Original: SPANISH

Article 42 of draft Protocol I

The delegation of Cuba voted in favour of this text in the belief that the adoption of the article by the Conference would undoubtedly be a positive achievement for the members of national liberation movements. We hope that this provision will help to persuade certain Governments to ease their repressive measures against those who are fighting for the true freedom of their peoples.

The international community must accept the need to respect the fundamental principles contained in the article which we have adopted today.

We shall not be surprised at the problems raised by other delegations which speak later, as we know that their objection to this article on the pretext that it is vague is in keeping with their repressive action against combatants in guerrilla groups.

The existence of racist, zionist and repressive régimes is a fact of life in our times. Therefore it is legitimate for the voice of rebellion to be raised against these practices.

My delegation considers that this provision constitutes an extension of the scope of Article 1 of Protocol I, conferring prisoner-of-war status on members of liberation movements.

We also consider that the problems of interpretation raised by certain representatives cannot be any excuse for departing from the fundamental principles laid down in the Protocol.

Finally, we are very pleased to see the considerable number of votes in favour of the article, which shows an awareness of the need to give protection to those who truly deserve it, namely, the civilian population and the combatants.

Article 42 quater of draft Protocol I

The Republic of Cuba joined in the consensus, as on previous occasions, both in the Working Group and at plenary meetings of Committee III, in the desire to contribute to the adoption of the compromise text that we have adopted today in the plenary Conference.

This position should not be interpreted as a full acceptance of the provisions contained in this compromise text, since we were in favour of an exact definition and prohibition that would clearly reflect the truth of mercenary activities, the aims of which are to hamper and thwart the struggle of peoples to free themselves. These aims reflect political interests of the imperialist countries and their lackeys, which in their greed to expand and seize more wealth, at the cost of hunger and suffering among the struggling peoples of Africa, Latin America and Asia, have ignored this truth, thus helping to build up the mercenary system.

My delegation considers that those States are equally responsible and deserve the repudiation of the international community as reflected in a rule of international law.

In addition to these considerations there is the growth of certain associations that have sprung up in the imperialist countries, from which they are carrying out their propaganda work and offering every facility for the recruitment of mercenaries. We all know that these activities are being conducted with the consent and support of the authorities of the imperialist countries concerned.

World public opinion, too, is fully informed about the imperialist countries that are devoting themselves to these illicit activities, and of the evidence that exists about the large sums of money they are investing in order to turn the mercenaries into real professionals as their accomplices in crime.

With regard to the method of establishing the mercenary character referred to in paragraph 2 (c), my delegation has serious doubts about its objectivity, since in practice it will not be possible to verify whether or not the material compensation is in excess of that paid to combatants of similar rank and functions.

In our view this sub-paragraph is completely unrealistic, in view of the fact that the payrolls are kept secret by these imperialist countries, and we have doubts about the reliability of the information that might be provided by the recruiting countries or by third countries, as the case may be, since on it would depend the establishment of the mercenary character of these people.

In conclusion, we wish to congratulate the delegation of Nigeria and the other delegations that have contributed their efforts to the approval by consensus of the article on mercenaries now before us. Although imprecise in places, it reflects the need to regulate all matters relating to the activities of mercenaries in an international convention.

DEMOCRATIC YEMEN

Original: ARABIC

Article 42 of draft Protocol I

My country's delegation regrets the fact that it was not present during the discussion and vote on Article 42 and hence was unable to vote in favour of that article at that time in Committee III, having been held up for some time and arriving too late. Had my delegation been present it would have voted in favour of Article 42. In view of the prime importance of the article in the work of the Diplomatic Conference on the Reaffirmation and Development of International Law, my delegation fully supports it and regrets that it was not adopted by consensus.

The article provides a fundamental and important rule of Protocol I, for it extends the humanitarian protection afforded to combatants and prisoners of war to the fighters of national liberation movements struggling against colonialism, racist régimes and foreign occupation for the sake of self-determination, which has become a legal and mandatory rule according to the United Nations Charter and relevant resolutions, as well as the recognized principles of international law.

My delegation expresses its satisfaction at the outcome of the vote, which has confirmed international unanimity and considers that Article 42, as well as Article 1, should not be impeded by any reservations. The reason for this is that without those two articles Protocol I would fail to fulfil its primary aim of developing humanitarian law applicable in armed conflicts.

FRANCE

Original: FRENCH

Articles 43 and 47 of draft Protocol IArticle 43

Article 43, which enunciates the basic rule of Section I of Part IV concerned with the general protection of the civilian population against the effects of hostilities, is the first of a series of articles which, after the manner of those in Part III relating to methods and means of combat, goes outside the specific context of humanitarian law for regulating the laws of war.

Although this article was drafted with a humanitarian purpose in view, it has direct implications as regards a State's organization and conduct of defence against an invader. That is why the French delegation while not having opposed the consensus on the adoption of this article, wishes to make it clear that, if there had been a vote, it would have abstained therefrom.

Article 47

The first sentence of paragraph 2 of Article 47 lays down that "attacks shall be strictly limited to military objectives".

The French delegation, as it has already pointed out in the case of Article 46, draws attention to the fact that in a good many situations of armed conflict it would be very difficult, if not impossible, to determine precisely what constitutes a military objective, especially in large towns or wooded areas, either of which might harbour indiscriminately enemy military forces and groups of civilians more or less closely mixed together. It is therefore unable to accept such a prohibition which, owing to its categorical terms, is likely to be seriously prejudicial to the exercise of the natural right of legitimate defence, and has consequently been obliged to abstain from voting.

GERMAN DEMOCRATIC REPUBLIC

Original: ENGLISH

Article 46 of draft Protocol I

The delegation of the German Democratic Republic voted in favour of Article 46. From the very beginning of our work on Protocol I the German Democratic Republic supported the elaboration of a clear and comprehensive provision concerning the protection of the civilian population. In our view the reaffirmation and progressive development of rules protecting civilians in armed conflict is one of the most important tasks of our Conference - if not the most important one.

Especially the prohibition of indiscriminate attacks or of attacks which employ methods or means of combat which cannot be directed at a specific military objective seems to us to be of utmost importance. It re-establishes the priority of humanitarian principles over the uncontrolled development and barbarous use of highly-sophisticated weapons and is a solid basis for mobilizing public opinion against imperialist methods and means of warfare which from the outset neglect the fundamental rights of the human being.

The delegation of the German Democratic Republic has therefore worked particularly in favour of paragraph 4, which contains a clear prohibition on attacks against the civilian population or civilians by way of reprisals. We are convinced that this prohibition has the same importance and is of the same absolute nature as the prohibition of reprisals against prisoners of war, wounded and sick which are already contained in the Geneva Conventions. Therefore we would regard any reservation concerning this prohibition as incompatible with the humanitarian object and purpose of this Protocol.

GERMANY, FEDERAL REPUBLIC OF

Original: ENGLISH

Articles 46 and 47 of draft Protocol I

Article 46

The Federal Republic of Germany could not cast a positive vote on Article 46 of Protocol I because the wording of this article lends itself to possible misinterpretations. We have not voted against the article, however, but were able to abstain, for it is our understanding that the definition of indiscriminate attacks contained in paragraph 4 of Article 46 is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. Rather,

the definition is intended to take account of the fact that the legality of the use of means of combat depends upon circumstances, as shown by the examples listed in paragraph 5. Consequently the definition does not prohibit as indiscriminate any specific weapon. Moreover, the reference in paragraph 5 (b) to military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack.

It is also the understanding of the Federal Republic of Germany that Article 46, paragraph 6 applies insofar as - according to the preceding paragraphs - the civilian population as well as individual civilians enjoy protection against military operations.

Article 47

The Federal Republic of Germany has been able to vote in favour of Article 47 of Protocol I because it is our understanding that a specific area of land may be a military objective if, because of its location or other reasons specified in Article 47, its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

The first sentence of Article 47, paragraph 2 is a restatement of the basic rule contained in Article 43, namely that the Parties to a conflict shall direct their operations only against military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives.

INDIA

Original: ENGLISH

Article 43 of draft Protocol I

The Indian delegation has joined the consensus with the clear understanding that this article will apply within the capability and practical possibility of each party to the conflict. As the capability of the parties to distinguish will depend upon the means and methods available to each party generally or at a particular moment, this article does not require a party to do something which is not within its means or its capability.

ISRAEL

Original: ENGLISH

Article 42 bis of draft Protocol I

With regard to Article 42 bis of the draft Additional Protocol I, the delegation of Israel wishes to declare that the obligation to determine the status of the person in question by a tribunal arises only in cases where an objective doubt exists, and if it is evident that the person is not entitled to prisoner-of-war status, the presumption is invalidated ab initio.

MADAGASCAR

Original: FRENCH

Article 42 of draft Protocol I

The Democratic Republic of Madagascar is the heir to a past marked by a series of liberation movements, before the term had been coined, in which prisoners of war were simply equated with criminals.

Today, Article 42 has been adopted by our Conference by a very large majority, and my delegation cannot but express its pleasure.

It is pleased not so much because it was the co-sponsor of an amendment the spirit of which is to a large extent reflected in this article, but rather and essentially because the amendment was also sponsored by SWAPO. The article adopted thus took some account of the views of an organization representing a people oppressed because of their colour, their race - a people's organization to which this matter is of direct practical concern.

Article 42, in its present wording, corrects, in regard to the treatment of combatants and prisoners of war, an imbalance due primarily to structural and financial factors, which leads on the field of battle to an unequal balance of forces.

My delegation considers that the adoption of Article 42 renders the scope of humanitarian law more universal by covering peoples who, in conformity with the principles of the United Nations, are engaged, willy-nilly, in a struggle for freedom, a struggle forced on them by the moral, social and economic aggression of the adverse Party, a struggle in line with the one waged in the Second World War by many peoples of the world, together with the then colonial peoples, against a system whose philosophy was partly based on the alleged superiority of a

certain race, and thus on racial discrimination. It would be selfish and criminal for today's world, freed from the menace of Hitler, to shelter behind legalistic considerations, closing its eyes to the legitimate struggle of those seeking to free their countries from apartheid and racism.

Hence, any reservations to Article 1 (4) and Article 42, especially in regard to humanitarian protection of combatants belonging to internationally recognized liberation movements, would be tantamount to encouraging slavery and racism - and would thus run counter to the Constitution of Madagascar and to the principles of the United Nations Charter. As such it would be unacceptable to Madagascar.

Any such reservation would be all the more unacceptable in that it would be contrary to one of the objectives of our Conference, and thus of the present Protocol, namely, the "development of humanitarian law".

My delegation would not wish to conclude without paying tribute to all the goodwill which led to the present compromise formula and thanking those delegations which voted for it. My delegation hopes that those who abstained may reconsider their position later on.

MAURITANIA

Original: FRENCH

Articles 42 and 42 quater of draft Protocol I

Article 42

By voting in favour of Article 42 on combatants and prisoners of war, my delegation has merely given effect to a constant feature of its foreign policy, namely, its support for the just struggle of peoples that are still colonized and oppressed.

My country's support for just causes was reaffirmed four years ago, in this very room, on the occasion of the opening of the Diplomatic Conference by His Excellency Mokhtar Ould Daddah, President of the Islamic Republic of Mauritania. Indeed, our support for the struggle of liberation movements recognized by the regional organizations, as defined in rule 58 of the rules of procedure of this Conference, has never failed. My delegation, therefore, hails the positive vote on Article 42 as a great victory.

This vote is, in point of fact, in line with the appeal made in 1974, in this very forum, by His Excellency the President of the Islamic Republic of Mauritania in his historic speech, from which I quote:

"The time had indeed come when the lives of man in the third world should count for something and when there might be established not perhaps hypothetical equality among men - an equality that is apparently hypothetical even in the face of death - but at least the recognition of certain elementary values and certain elementary rights which fall short of the Universal Declaration of Human Rights.

"I say advisedly values and rights which fall short of the principles of the Universal Declaration of Human Rights, since if these principles were everywhere recognized and everywhere respected, many of the situations which it is your task to consider might not have occurred."

Lastly, it gives my delegation great satisfaction to have taken part in the preparation and adoption of Article 42. Although still incomplete, this article nevertheless affords protection to all members of the armed forces of a Party to a conflict, as defined in Article 41, which for us includes, of course, combatants recognized by the regional organization, in accordance with rule 58 of the rules of procedure, who are fighting against colonial domination and foreign occupation and against racist régimes.

Article 42 quater

Although the delegation of the Islamic Republic of Mauritania joined in the consensus when a vote was taken in the plenary meeting on Article 42 quater entitled "Mercenaries", it wishes to express the greatest reservation with regard to the definition, motivation and scope set forth in the provisions of Article 42 quater, paragraph 2, sub-paragraphs (a), (b) and (c) of Protocol I.

In fact, the mercenary of today is no longer motivated solely by the desire for private gain, but tends more and more to become a tool in the service of certain individuals and of a category of States working for the realization of certain unavowed political and power objectives, in total disregard of all human rights and the sovereignty of States.

No one nowadays has any doubt that the use of mercenaries constitutes a deeply pernicious practice which is against the interests of peace, freedom and the sovereignty of States.

That being so, the delegation of the Islamic Republic of Mauritania considers that the definition and motivations of the mercenary as specified in Article 42 quater, paragraph 2, are incomplete in so far as their range does not cover all categories of mercenaries.

The Mauritanian delegation also thinks that Article 42 quater should have a more realistic scope in view of the true nature of the practice of mercenaries, which is an alarming and repugnant instrument for the violation of the independence and unity of sovereign and peace-loving States.

MEXICO

Original: SPANISH

Articles 42 quater, 46 and 47 of draft Protocol I

Article 42 quater

It is the understanding of the delegation of Mexico that the guarantees contained in Article 65 are implicitly applicable to the persons dealt with in Article 42 quater.

Articles 46 and 47

The Mexican delegation voted for Articles 46 and 47 of Protocol I because they reflect Mexico's clear wish that rules should be laid down for the protection of the civilian population from unnecessary suffering.

During the work of this Conference, in which Mexico has channelled its efforts towards strengthening the rules and regulations designed to protect the civilian population in the event of an armed conflict, we have noted with the utmost regret that the major military Powers have concentrated their activities on the development of rules designed to protect prisoners of war and the wounded and sick in the field, but not to protect the civilian population. Mexico, on the contrary, has maintained that the protection of the civilian population and civilian objects must be universally recognized, even at the cost of restricting the use of means and methods of warfare, the effects of which cannot be confined to specific military targets.

The Mexican delegation believes that Articles 46 and 47 are essential because they represent a development of international humanitarian law. It is therefore of the view that the articles concerned cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis.

MOZAMBIQUE

Original: FRENCH

Article 42 quater of draft Protocol I

The delegation of the People's Republic of Mozambique welcomes the fact that this article on mercenaries has been adopted by consensus.

We joined in the consensus despite the weakness of the text of Article 42 quater, in that no mention is made of the countries and organizations that give cover to the system of mercenaries in the sense of paragraph 2 of Article 42 quater.

Since this article is not strong enough to discourage this activity, we should like to see an international conference convened to study and conclude a convention on the prevention and elimination of the system of mercenaries.

To kill for money a people struggling for its complete independence, a people fighting to put an end to racial, colonial and neo-colonial domination is, indeed, the most odious crime known to mankind.

The trial of mercenaries in Angola in 1976 shed new light on the scope and the criminal nature of the system of mercenaries, hitherto considered a noble profession by those who procure them. We congratulate our brothers in the People's Republic of Angola for having drawn attention to the fact that the person committing the crime is not the only criminal; there are also those who recruit, train and provide facilities for the mercenary system.

Some countries, fierce defenders of humanitarian law, violate their own legislation, which prohibits the recruitment of mercenaries. The mercenaries in Angola are known to have been recruited through public advertisement, even making use of television. There are also, in some countries, private agencies for the recruitment of mercenaries. We keenly regret that, in this article, those States and organizations are not condemned and held responsible for their action.

We are aware, however, that this is a compromise text and we take this opportunity to congratulate our colleague from Nigeria on having submitted a text which has obtained a consensus.

NETHERLANDS

Original: ENGLISH

Articles 42 quater, 46, 47, 47 bis and 50
of draft Protocol I

Article 42 quater

The Netherlands delegation has shared the consensus on Article 42 quater notwithstanding certain misgivings about this article.

Our delegation is convinced of the necessity of action being taken against the persistent activity of mercenaries.

When considering this phenomenon it appears to us imperative to attack the problem at its roots, i.e. the practice of recruitment of mercenaries. Those morally most appalling practices should be impeded by effective legal measures, wherever they occur, and their authors prosecuted.

The present article seeks to tackle the problem not at its roots but at the stage where the mercenary is already in his field of operation, where it will be found extremely difficult to take effective action against him.

My delegation supports these efforts. We are somewhat worried by the fact that in the list of criteria contained in this article, the motivation of a person has been brought into play. We should like to reiterate our position that the application of humanitarian law and the granting of humanitarian treatment should not be made dependent on some one's motivation for taking part in the armed conflict. Moreover the element of motivation will be difficult to establish and could give rise to more than one interpretation.

Furthermore, the Netherlands delegation reiterates the applicability to a mercenary of the fundamental guarantees embodied in Articles 42 bis and 65 of Protocol I, which has been recognized by the Rapporteur of Committee III in his report of the same Committee that was adopted by consensus.

At this moment I would like to express my appreciation for the efforts of Ambassador Clark of Nigeria in finding a compromise solution. We have noted with satisfaction that Ambassador Clark in his declarations explicitly recognized the applicability of all fundamental rights to mercenaries, including those enshrined in Articles 42 bis and 65 of Protocol I. We still regret, however, the absence of a specific reference to the fundamental guarantees mentioned among the provisions of the article itself.

Articles 46 and 50

It is the interpretation of the Netherlands delegation that the references in Articles 46 and 50 to military advantage anticipated from an attack are intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular phases of that attack.

Article 47

With regard to Article 47, the Netherlands delegation interprets this article to mean that a specific area of land may be a military objective if, because of its location or other reasons specified in Article 47, its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Furthermore, it is the view of the Netherlands delegation that the first sentence of Article 47, paragraph 2, prohibits only such attacks as may be directed against non-military objectives and consequently does not deal with the question of collateral damage caused by attacks directed against military objectives.

Article 47 bis

Article 47 bis established a special protection for a limited class of objects which, because of their recognized importance, constitute a part of the cultural heritage of mankind. It is our understanding that the illegal use of these historical objects for military purposes will cause them to lose effective protection as a result of attacks directed against such military uses.

OMAN

Original: ENGLISH

Article 42 of draft Protocol I

The delegation of Oman voted in favour of Article 42 of draft additional Protocol I and welcomes its adoption by the plenary of this Conference by an overwhelming majority. This article as a whole represents a remarkable development in international law, in so far as it confers legitimate rights on guerrilla fighters who are engaged in the liberation of their national homeland from colonial rule and alien occupation or racist régimes. Morally and politically, these liberation-movement fighters well deserve the status conferred on them by this article.

The delegation of Oman has voted in favour on the clear understanding that the personal field of application of this article is in respect of those liberation or resistance movements which have been formally recognized by intergovernmental international organizations.

ROMANIA

Original: FRENCH

Article 46 of draft Protocol I

My delegation voted in favour of Article 46 concerning the protection of the civilian population, and would like to avail itself of this opportunity to express its satisfaction at the inclusion of such an article in Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts.

Romania has always attached special importance to the need to improve the protection of the civilian population through the application of specific rules of international law, since, in my delegation's view, that is one of the fundamental aims of this Diplomatic Conference. We see this Conference as called upon to modify and harmonize the rules of humanitarian law applicable in armed conflicts in line with the far-reaching changes which have occurred in the world, particularly since the Second World War. And, unfortunately, both the Second World War and the armed conflicts which have succeeded it have shown that the civilian population fall victim to the horrors of war to the same extent as the combatants proper.

That is why we consider that humanitarian law must develop in the context of present-day international law, which prohibits the threat or use of force, and likewise prohibits aggression.

On the other hand, since the Charter of the United Nations affirms the right of individual or collective self-defence in the event of armed attack, it is accordingly obvious that, when confronted with an incident of exceptional seriousness such as aggression directed against a foreign territory or its occupation, international law cannot restrict the legitimate right of a victim of aggression to defend himself.

It is in that sense that the delegation of Romania interprets the provisions of Article 46 of Additional Protocol I. For that reason, it would once again stress the need to draw a very clear distinction between the aggressor and the victim of aggression. It is our conviction that it is always necessary to ensure the protection of the victim in the exercise of his right of self-defence on his own territory.

SENEGAL

Original: FRENCH

Article 42 quater of draft Protocol I

The delegation of Senegal welcomes the consensus achieved on Article 42 quater, and takes this opportunity to pay a warm tribute to the delegation of our sister Republic of Nigeria for its well-judged proposal and for the praiseworthy efforts it has made to submit a text acceptable to the Conference as a whole. This Article 42 quater is most timely and constitutes the first link in a long chain that should result in the complete eradication of this scourge of mercenary activity. All Africa welcomes it today.

However, the delegation of Senegal is convinced that there is still a long way to go. We have indeed succeeded in defining the notion of the mercenary, and we have agreed on not granting the status of combatant or prisoner of war to these mercenaries. But Senegal would have preferred a stronger text that would have obliged States to forbid the recruitment, training or assembling of mercenaries in their territory. We should also have liked States to establish a body of legislation and regulations to discourage or prevent this practice of mercenary activity which the international community has so rightly condemned.

In view of these omissions from the present text Senegal continues to attach particular importance to the draft of a regional convention on the question of mercenaries now under consideration by the Organization of African Unity. This draft will, we hope, have the advantage of being more comprehensive and thus fully meet the wishes of the peoples of the African continent, which has suffered most from this scourge and continues to suffer from it.

The delegation of Senegal believes, therefore, that the work done at this Conference is a basis and, at the same time, an encouragement for the African regional convention.

We therefore wish once again to express our sincere appreciation to Nigeria and to appeal to all the delegations present to continue the work begun here and thus ensure that a worldwide convention on mercenary activities will soon emerge.

SWEDEN

Original: ENGLISH

Articles 42 quater and 46 of draft Protocol I

Article 42 quater

We welcome the new article on mercenaries. However, the text may give rise to some doubts as to the protection that should be afforded to mercenaries. Already during the debate in Committee III, Sweden mentioned that the text should be complemented with a sentence stating that mercenaries are entitled to the protection laid down in Article 65 in Protocol I. We want to mention this once again in order to clarify our opinion concerning this important humanitarian aspect.

Article 46

Article 46 might be considered as one of fundamental value for the whole Protocol. This article was elaborated during long negotiations in 1975 and was adopted in the same year by consensus in Committee III.

Article 46 provides new rules of fundamental importance for the protection of the civilian population and civilians against the effects of attacks. Paragraph 4 contains a definition of indiscriminate attacks and paragraph 5 contains a definition of indiscriminate area bombardment. This paragraph also contains provisions concerning incidental losses when point targets are being attacked. These paragraphs introduce new elements in international humanitarian law.

The provision stated in paragraph 6 containing a clear prohibition of reprisals is in our opinion of very great importance from a humanitarian point of view. The rules laid down in Articles 46 to 50 are to be considered as a "package" including important and clearly expressed rules, where humanitarian considerations are balanced in a very good way against military requirements.

Compared with the Hague Regulations we consider the adoption of Article 46 as an important step forward.

SOCIALIST PEOPLE'S LIBYAN
ARAB JAMAHIRIYA

Original: ARABIC

Article 42 quater of draft Protocol I

I am starting this intervention, Mr. Chairman, by extending the congratulations of the Socialist People's Libyan Arab Jamahiriya delegation to the distinguished delegations for having reached a consensus and adopted Article 42 quater concerning mercenaries.

The fact of agreeing on a text which prevents mercenaries from enjoying the status of prisoner of war can be construed as an explicit recognition and a real consciousness of the dangerous violations carried out by mercenaries against human rights and the right of self-determination. The historical experience of several peoples bears witness to the fact that mercenaries violate all international laws concerning human rights. The nearest example that could be given of such a state of things is provided by Africa, which could be considered as the first continent that has suffered, and is still suffering, from the harmful effects of the phenomena of mercenary activity. African peoples in particular, and peace and justice-loving peoples in general, today pay tribute and express their appreciation and gratitude for this momentous historical event and for the noble aim that has been achieved during our Conference. They fully believe that international peace and security can never be achieved in our world unless peace and security prevail in Africa.

The problem of mercenaries has been of considerable concern to the international community for several years now. In his report, the Secretary-General of the United Nations, referring to the third session of this Conference, mentioned the subject of mercenaries. At that time all the delegations representing peace and justice-loving peoples manifested their complete satisfaction and expressed the hope that our Conference would reach agreement on a text that prevents mercenaries from enjoying the status of prisoners of war. This is intended to restrict the activities of mercenaries, and we have succeeded in achieving that result.

My delegation had hoped that this text would include another paragraph that would carry an appeal to those States which permit the activities of certain establishments that help in mobilizing mercenaries, and send them to areas of conflict for the purpose of silencing all voices calling for freedom. Such a paragraph would also include a provision to the effect that those States should, in their internal legislations, prohibit the mobilization of their nationals in the ranks of mercenaries. However, and whatever the extent of this text, my delegation supports it and can only express its thanks and gratitude to the representative of Nigeria who has exerted considerable efforts to prepare this draft, which has been adopted by consensus.

UKRAINIAN SOVIET SOCIALIST
REPUBLIC

Original: RUSSIAN

Articles 43 and 46 of draft Protocol I

Article 43

Our delegation wishes to state that it supported the consensus on Article 43, since the latter affirms and develops a basic principle of international humanitarian law, that of the general protection of the civilian population from the consequences of military operations. This is one of the main principles of present-day international law: military operations are to be conducted only against armed forces and military objectives, not against the peaceful civilian population.

It is generally recognized that States must not destroy unprotected peaceful civilian objects, that is, inhabited localities which do not constitute military objectives.

Article 43, in definite terms and with legal clarity, prohibits attacks on the civilian population and civilian objects, by laying down that 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.

A new element in this article is the obligation imposed on Parties to the conflict to distinguish on all occasions between the civilian population and combatants in order to ensure respect for and protection of the civilian population and civilian objects. Thus, the Parties to the conflict must refrain from attacking the civilian population as such, and also from using the civilian population as a screen for military objectives.

In this way, Article 43 gives wider protection to the civilian population in wartime than do the Geneva Conventions of 1949, and constitutes a major step forward in the development of international humanitarian law.

Article 46

Article 46 of draft Additional Protocol I, together with the other articles in the Section "General Protection against effects of hostilities" sets out in concrete form the principles enshrined in Article 43; the civilian population shall enjoy protection against dangers arising from military operations, while military operations must be conducted solely against armed forces and military objectives, not against the civilian population.

In common with the previous articles of this Section, Article 46 widens the scope of protection for the civilian population and individual civilians, who under no circumstances shall be the object of attack. In particular, paragraph 2 explicitly prohibits acts or threats of violence the primary purpose of which is to spread terror among the civilian population; this is in line with the generally recognized rules of international law, which lay down that Parties to the conflict shall not make the civilian population an object of attack. Paragraph 6 prohibits attacks against the civilian population or civilians by way of reprisals. This is a major improvement on Article 33 of the fourth Geneva Convention of 1949. This prohibition of reprisals covers not merely individual civilians, but also the entire civilian population as defined in Article 45 of Protocol I.

Paragraphs 4 and 5 also widen the scope of, and give concrete form to, another generally recognized principle of humanitarian law, prohibition of indiscriminate attacks, that is, attacks directed against military objectives, civilians or civilian objects without discrimination. Here too, for the first time in international humanitarian law, a reasonably accurate and comprehensive list is given of types of indiscriminate attacks, corresponding on the whole to present-day requirements for improved protection of the civilian population and civilian objects against the effects of hostilities.

Also important is the reaffirmation in paragraph 7 of the principle of prohibition of the use of the civilian population and individual civilians to shield military objectives from attacks or to shield military operations.

The principle prohibiting the use of the civilian population to shield military objectives is set out in Article 28 of the fourth Geneva Convention. But Article 46 develops this principle, extending it to all types of military operations and specifying that this prohibition pertains to the entire civilian population.

Thus, in our delegation's view, the article corresponds to the stated objectives of Protocol I, and its adoption will certainly contribute greatly to the strengthening, in international humanitarian law, of protection for the civilian population against the effects of hostilities.

In view of these considerations, the delegation of the Ukrainian Soviet Socialist Republic voted in favour of Article 46.

UNION OF SOVIET SOCIALIST
REPUBLICS

Original: RUSSIAN

Article 42 quater of draft Protocol I

The Soviet delegation expresses its deep satisfaction on the occasion of the adoption by consensus of the article on mercenaries. This article is one of the more important articles of Protocol I, and is of great significance both politically and in the context of international law. In adopting this article our Conference has taken a big step towards rooting out the shameful phenomenon of foreign

mercenaries, thereby making a significant contribution to the nations' struggle finally to put an end to the colonial system, racism and racial oppression.

Faithful to its consistently-held principles and policy of supporting the legitimate struggle of the peoples for their national liberation, the Soviet Union from its inception and thereafter throughout the next sixty years has supported and will continue to support every effort aimed at helping nations to put a speedier end to colonialism, racism, apartheid and other forms of oppression, and to strengthen their national independence. Our delegation has spoken out and does speak out for that in all international forums, including the present Conference, at which from the very outset it has actively supported the idea of including in Protocol I a separate article on mercenaries.

The article adopted on this subject makes a substantial contribution to international humanitarian law. The principle it incorporates, that a mercenary does not have the right to be a combatant or a prisoner of war, is entirely in accordance with the spirit and meaning of a series of important resolutions of the United Nations General Assembly on this subject - resolutions reflecting the opinion of the wider international community, by which the use of mercenaries has long been severely condemned. In its resolutions, the General Assembly stated unequivocally that the use of mercenaries against national liberation and independence movements is considered to be a criminal act, and that the mercenaries themselves should be treated as criminals outside the law. It should also be noted that the definition of aggression adopted by the United Nations General Assembly in 1974 (General Assembly resolution 3314 (XXIX), Annex), included the use of mercenaries among the means of aggression, and condemned it.

The article adopted on mercenaries is the result of prolonged work by Committee III, and it represents a compromise. It would of course have been more nearly perfect if it had included such elements as the establishment of the liability of States which permit or encourage the recruitment, training or use of mercenaries. We understand, however, that the article as worded represents the best compromise that could be achieved at the present time, and we accordingly endorsed it.

Despite certain imperfections, however, the article as adopted, containing as it does a definition of mercenaries, and rules depriving them of the status of combatants or prisoners of war, will sound a serious warning to all those who, for narrow, selfish reasons of personal advantage, might wish to enter upon the criminal path of becoming mercenaries, and who are prepared, for money or other personal advantages, to kill no matter who, no matter where and no matter how many. We hope that this article, as also the whole Protocol, will provide an incentive to Governments to adopt domestic legislation prohibiting the criminal as well as anti-humanitarian institution of the use of mercenaries.

UNITED STATES OF AMERICA

Original: ENGLISH

Article 47 of draft Protocol I

Article 47 is a significant and important development in the humanitarian law applicable in armed conflict. The distinction between civilian objects and military objectives will be made easier to identify and recognize. In that regard it is the understanding of the United States that a specific area of land may be a military objective if, because of its location or other reasons specified in Article 47, its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

The first sentence of Article 47 paragraph 2 prohibits only such attacks as may be directed against non-military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives.

SUMMARY RECORD OF THE FORTY-SECOND PLENARY MEETING

held on Friday, 27 May 1977, at 11.10 a.m.

President: Mr. Pierre GRABER Federal Councillor,
Head of the Federal
Political Department of
the Swiss Confederation

ADOPTION OF THE ARTICLES OF DRAFT PROTOCOL I (CDDH/401) (continued)

Part IV, Section I

1. Mr. BLOEMBERGEN (Netherlands) said that the Netherlands delegation wished to emphasize that when any of the articles contained in Section I of Part IV of Protocol I were interpreted it should be borne in mind that commanders and others responsible for planning, deciding upon or executing attacks necessarily had to reach decisions on the basis of their assessment of the information from all sources which was available to them at the relevant time. That would be appropriate for the entire Section including Articles 45 and 47.

Article 47 bis - Protection of cultural objects (concluded)

Sub-paragraph (a) (CDDH/412/Rev.3)

2. The PRESIDENT invited the Conference to continue its consideration of sub-paragraph (a) of Article 47 bis. The Conference now had before it new versions in French and in English which took account of the comments made at the forty-first meeting (CDDH/412/Rev.2 and CDDH/412/Rev.3). If there was no objection, he would take it that sub-paragraph (a) of Article 47 bis, as amended, was adopted by consensus.

Sub-paragraph (a) of Article 47 bis was adopted by consensus.

Sub-paragraph (b)

3. The PRESIDENT explained that in the new version of sub-paragraph (b) the words "historic monuments" had been replaced by the word "objects".

4. Mr. ABDINE (Syrian Arab Republic) did not consider that amendment appropriate. In law, the term "objects" referred to both movable and immovable objects; but the former were already provided for under the article on pillage. In Article 47 bis, which was solely concerned with immovable objects, it would be better to say "historic monuments".

5. Mr. EUSTATHIADES (Greece) suggested that the words "and places" be inserted after the word "objects" so as to make it quite clear that sub-paragraph (b) referred also to places of worship.
6. Mr. de BREUCKER (Belgium) thought that the word "objects" was perfectly suitable. For the sake of greater clarity, it might be further defined as follows: "objects referred to in sub-paragraph (a)".
7. Mr. ALDRICH (United States of America) pointed out that as used in the articles of the Protocol, the term "objects" included places. In paragraph 3 of Article 47 on the general protection of civilian objects, it was in fact stated that "... an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, it shall be presumed ...".
8. Mr. SHELDON (Byelorussian Soviet Socialist Republic) pointed out a discrepancy between the Russian version and the others: the term "objects" was rendered as "kulturnyé tsennosti" (cultural assets).
9. Mr. ABDINE (Syrian Arab Republic) said that he would join in the consensus but that he still regarded the use of the word "objects" in sub-paragraph (b) as not very judicious. It might very well include history books condemning another country during a conflict. He would prefer the term "historic monuments".
10. Mr. WILHELM (Legal Adviser), referring to the comment made by the representative of the Byelorussian Soviet Socialist Republic, confirmed that the Russian version of sub-paragraph (b) did not correspond to the other versions and said that it could easily be brought into line with them by the Drafting Committee.
11. The PRESIDENT said that, if there were no objection, he would consider that sub-paragraph (b) was adopted by consensus.

Sub-paragraph (b) of Article 47 bis was adopted by consensus.

Article 47 bis as a whole, as amended, was adopted by consensus.*

Explanations of vote

12. Mr. de BREUCKER (Belgium) was of the opinion that Article 47 bis, like some others, reflected the adaptation of the laws of war to mankind, in accordance with civilization's ever-increasing scope and with universal demands. It was certainly

* Article 53 entitled "Protection of Cultural Objects and of Places of Worship" in the final version of Protocol I.

in that sense that the words "spiritual and cultural heritage" used in the article should be understood. Each of those two adjectives must be given their full value. The first required armed forces to show special respect for the places of worship that bore such striking witness to the faiths that inspired them, places of worship so intimately associated with those faiths that, more than all the other religious buildings already protected under Article 47, they seemed to be their true embodiment on earth. The second, joined to the word "heritage", referred to the previous legacy on which mankind had, over the centuries, left the seal of its labours, its struggles, its artistic feelings. How could the monuments of cities such as Damascus, Avignon, Florence or Bruges, to mention only a few, be anything other than a heritage common to all mankind to be protected from war! Throughout the discussions, his delegation had made no secret of its fears that the article might derogate from the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague in 1954. But in the end the text, as it now stood, did not justify those fears. It was nevertheless true that that Convention must remain the basic instrument on the subject and ought to be put into practice everywhere. His delegation understood that a resolution was to be submitted to that effect and would join in sponsoring it.

13. Mr. FREELAND (United Kingdom) said that his delegation would make its comments in writing.

14. Mr. EUSTATHIADES (Greece) drew attention to the steps taken by his country's delegation for the protection of places of worship, works of art, historic monuments and the whole of mankind's common heritage both at the second Peace Conference at The Hague in 1907 and at the 1954 Conference, particularly with regard to the question of reprisals, which had been successfully solved by the present article. His delegation had also been the initiator of that clause at the first session of the Diplomatic Conference. It was glad, therefore, that a consensus had been achieved on Article 47 bis.

15. Mr. MARRIOTT (Canada) and Mr. ALDRICH (United States of America) said that their delegations would submit their comments in writing.

16. Mr. BLOEMBERGEN (Netherlands) stressed that Article 47 bis provided special protection for a limited category of objects which by virtue of their generally recognized importance constituted part of the cultural or spiritual heritage of mankind.

17. As he understood it, the illegitimate use of those historical objects for military purposes would deprive them of the protection afforded by Article 47 bis.

18. Mr. IPSEN (Federal Republic of Germany), Mr. NAHLIK (Poland) and Mr. DI BERNARDO (Italy) said that their delegations would submit comments in writing.

Article 44 - Scope of application (concluded)

19. The PRESIDENT reminded participants that at the forty-first meeting the Conference had been unable to take a decision on Article 44 because the final text had not yet been circulated. That text was now before the plenary.

Article 44 was adopted by consensus.*

Article 48 - Protection of objects indispensable to the survival of the civilian population

Article 48 was adopted by consensus.**

Article 48 bis - Protection of the natural environment

20. Mr. DI BERNARDO (Italy) said that his delegation would be glad to join in a consensus on the adoption of Article 48 bis. The article marked a big step forward in the protection of the natural environment in the event of international armed conflict.

21. In view of the specific aims and the scope of application of Additional Protocol I, he thought that the adjectives "widespread", "long-term" and "severe" qualifying "damage" should be interpreted in accordance with the general feeling during the discussion on the article in Committee III and with the conclusions of that discussion as recorded in the Committee's report at the third session of the Conference (CDDH/204/Rev.1). He wished to emphasize that the interpretation of those adjectives should in no circumstances be based on other legal instruments dealing with questions relating to the protection of the environment but having different aims and a different scope of application.

22. Mr. DIXIT (India) and Mr. AJAYI (Nigeria) drew attention to an error in the English text of the article: in the first line, the word "case" should read "care".

23. Mr. EL HASSEEN EL HASSAN (Sudan) pointed out minor errors in the Arabic text.

* Article 49 entitled "Definition of attacks and scope of application in the final version of Protocol I.

** Article 54 in the final version of Protocol I.

24. Mr. SHELDON (Byelorussian Soviet Socialist Republic) said that his delegation would transmit its comments to the Secretariat in writing.

25. Mr. GONZALEZ-RUBIO (Mexico) said that the participation of his delegation in the consensus on Article 48 bis should not be interpreted as modifying in any way whatsoever the position of his Government regarding the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, in which the words "widespread, long-lasting and severe effects" were used but with a different meaning.

26. Mr. CHAUNY (Peru) said that, while not opposed to the adoption of Article 48 bis by consensus, he must reiterate the statement made by his delegation during the consideration of paragraph 3 of Article 33, namely, that its assent in no way modified Peru's position with regard to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

27. Mr. CASTELLANOS (Venezuela) asked to have it stated in the summary record that his delegation's position on Article 48 bis coincided in every respect with that of the delegations of Mexico and Peru.

28. Mr. CERDA (Argentina), Mr. PAOLINI (France), Mr. HERCZEGH (Hungary) and Mrs. HERRAN (Colombia) said that they would transmit their comments to the Secretariat in writing.

Article 48 bis was adopted by consensus. *

Article 49 - Protection of works and installations containing dangerous forces

29. Mr. EL HASSEEN EL HASSAN (Sudan) drew attention to several typing errors in the Arabic text of Article 49.

30. The PRESIDENT said that he had taken note of the errors but would ask delegations in future to bring drafting corrections to the notice of the Secretariat in order to avoid loss of time in plenary meetings.

Article 49 was adopted by consensus. **

Explanations of vote

31. Mr. AL GHUNAIMI (Egypt) said that his delegation had not hesitated to support Articles 46 to 49, which were, to his mind, an advance in the reaffirmation and development of international humanitarian law. While fully aware that by prohibiting reprisals, those articles were a departure from the customary

* Article 55 in the final version of Protocol I.

** Article 56 in the final version of Protocol I.

rules of international law, his delegation's acceptance was based on the philosophy of Islam and the ethics of Arab chivalry. Egypt was proud to have been the first country, fifteen centuries before, to have spared the civilian population and civilian objects and respected cultural property. Only once in history had a victorious army been ordered, as a result of a court decision, to evacuate a conquered town owing to minor breaches of the rules of war.

32. The articles adopted by the Conference left very few major objectives against which reprisals could be taken, apart from military forces. Particular consideration should be given to the lot of the victims of illegal reprisals taken by an adversary who disregarded his obligations. Grave breaches constituted war crimes. A war criminal was unquestionably an enemy of mankind and should be penalized. His delegation recognized the interdependence of the clauses on reprisals and, in the event of violation by an adversary, would reconsider its position on them.

33. Mr. BRING (Sweden) said that the adoption of Article 49 completed a set of prohibitions on reprisals. A legal situation now existed whereby reprisals against the civilian population and civilian objects were condemned as well as the breaches that might have given grounds for them. The adoption of those provisions was clearly in keeping with the trend of international humanitarian law, which was to restrict the application of the traditional customary principle on the permissibility of reprisals.

34. Prior to the Second World War prisoners of war alone had been explicitly protected against reprisals. The Conventions signed in Geneva in 1949 extended such protection to other categories of persons, and in 1954 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict had prohibited reprisals against cultural property. In 1977, the present Conference, in adopting Articles 46 to 49 established the legal situation to which he had referred earlier.

35. In the Working Group his delegation had opposed the proposed article regulating the permissibility of reprisals. Several delegations had sought to explain such opposition by the emotional revulsion generated by the very word "reprisals". His delegation had pointed out that its stand was based not on an emotional reflex but on the knowledge that in practice counter-measures never led to observance of the law. It had attempted to show that the threat of reciprocal treatment would always be real to those who violated the rules of humanitarian law - irrespective of any legal rules - but that a formal legalization of reprisals would be an invitation to misuse and abuse. Sweden

had attempted to weigh up the pros and cons of the idea of reprisals and had found that the balance was against it. It was therefore with a sense of satisfaction that his delegation noted that the results achieved by the Conference aimed at a further limitation of the institute of reprisals in customary law.

36. Mr. VANDERPUYE (Ghana) said that he would submit his comments to the Secretariat in writing.

37. Mr. BINDSCHEDLER (Switzerland) said that his delegation had done all it could for Article 49. Paragraph 2 (b) would be difficult to apply in practice since it was impossible to check the source of supply in an integrated grid.

Article 50 - Precautions in attack

38. Mr. PAOLINI (France) said that his delegation fully endorsed the over-all humanitarian aim of Article 50, which sought to reduce the effects of military operations on the civilian population as far as practicable. However, paragraph 2 of Article 50, like the provisions of Article 46 on indiscriminate attacks, was open to restrictive interpretations likely to hinder the exercise of the natural right of self-defence. His delegation was therefore unable to join a consensus on the article.

39. Replying to the PRESIDENT, he asked that Article 50 should be put to a vote.

Article 50 was adopted by 90 votes to none, with 4 abstentions.*

40. The PRESIDENT said that the representative of France need not have requested a vote but, in accordance with the rules of procedure, could merely have made a statement that had a vote been taken he would have abstained. He could then have given the reasons for his abstention. The result would have been the same but the Conference would have saved time.

Explanations of vote

41. Mr. SOYSAL (Turkey) said that as far as his delegation was concerned, the word "feasible" in Article 50 and other articles should be interpreted as related to what was practicable, taking into account all the circumstances at the time and those relevant to the success of military operations.

42. Mr. DI BERNARDO (Italy) and Mrs. CONTRERAS (Guatemala) said that they would submit their explanations of votes to the Secretariat in writing.

* Article 57 in the final version of Protocol I.

43. Mr. BINDSCHIEDLER (Switzerland) said that he was critical of paragraphs 2 and 3 of Article 50 because they lacked clarity, particularly the words "Those who plan or decide upon an attack..." in paragraph 2 (a). That ambiguous wording might well place a burden or responsibility on junior military personnel which ought normally to be borne by those of higher rank. The obligations set out in Article 50 could concern the high commands only - the higher grades of the military hierarchy, and it was thus that Switzerland would interpret that provision.

44. Mr. KUSSBACH (Austria) said that his delegation fully supported the idea behind Article 50, namely, to give more effective protection to the civilian population and civilian objects against indiscriminate attack.

45. He nevertheless had some difficulty with paragraphs 2 and 3 of the article, because their wording was not as clear as it should be if they were to be applied in practice.

46. His delegation considered that the precautions envisaged could only be taken at a higher level of military command, in other words by the high command. Junior military personnel could not be expected to take all the precautions prescribed, particularly that of ensuring respect for the principle of proportionality during an attack. The position was even more complicated for those who were defending their own territory against an invading force. As a general rule it was the invading force which imposed its methods of warfare upon the defending force. That further complicated the task of junior military personnel, who had to take those requirements into account in all circumstances.

47. In view of the practical difficulties he had mentioned, his delegation had been unable to vote in favour of Article 50 and had abstained.

48. Mr. EL HASSEEN EL HASSAN (Sudan) said that he would submit his explanation of vote to the Secretariat in writing.

49. Mr. RABARY-NDRANO (Madagascar) said that he had voted in favour of Article 50 in spite of some misgivings about its wording. The article reflected a laudable desire to narrow the gap between the ideal and the possible, and to deal from a humanitarian standpoint with two opposite positions, namely, the aggressor's and the victim's.

50. He would nevertheless refer to Article 33 of draft Protocol I, which stated that "the right of the Parties to the conflict to choose methods or means of warfare is not unlimited", and to United Nations General Assembly resolution 3314 (XXIX) on "Definition of Aggression", particularly Article 5, which said that "aggression gives rise to international responsibility". Under humanitarian law the responsibility of the aggressor was clearly much greater than that of the victim. Accordingly, Article 50, paragraph 2 (a) (iii) should not be interpreted as infringing the sovereignty of a country seeking to liberate its territory. No one could be expected to do the impossible.

51. Mr. ALDRICH (United States of America), Mr. IPSEN (Federal Republic of Germany) and Mr. DIXIT (India) said that they would submit their explanations of vote to the Secretariat in writing.

52. Mr. AMIR-MOKRI (Iran) said that he endorsed the principle of Article 50 but had reservations about paragraph 2 (a), since it introduced an element of uncertainty and subjective judgement. Moreover, there appeared to be a contradiction between the words "do everything feasible" in paragraph 2 (a) (i) and the terms of paragraph 5.

53. Mr. MARRIOTT (Canada) said that he would submit his explanation of vote to the Secretariat in writing.

Article 51 - Precautions against the effects of attacks

54. Mr. PAOLINI (France) said that Article 51, relating to precautions against the effects of attacks, had a humanitarian purpose - namely, protection of the civilian population - to which the French delegation subscribed, particularly so far as sub-paragraphs (a) and (c) were concerned. On the other hand, he wished to express his keen sense of anxiety about the provisions contained in sub-paragraph (b), since provisions of that kind could not, in practice, be applied in all regions of the world having a high population density. He wished to point out that the expression "to the maximum extent feasible" used in such provisions, if they were to be applied in the concrete case of France, could not really become operative, given the distribution and density of the population, unless it were accepted that French territory would not be defended.

55. That amounted to saying either that it was impossible to apply the provisions of sub-paragraph (b) or that such provisions, if they were actually applied, would prevent France from exercising its right of self-defence, which was unacceptable.

56. In the circumstances, his delegation would be unable to vote in favour of those provisions. It could not, therefore, participate in the consensus, and called for a vote to be taken.

At the request of the French delegation, a vote was taken by show of hands on the adoption of Article 51.

Article 51 was adopted by 80 votes to none, with 8 abstentions.*

Explanations of vote

57. Mr. BINDSCHELDER (Switzerland) said that his delegation would have preferred to see the article deleted, and he endorsed the comments made by the representative of France. It seemed to him that the terms of sub-paragraph (a), and especially those of sub-paragraph (b) might prove prejudicial to a country's national defence. In interpreting the article, particular emphasis should be placed on the introductory phrase "to the maximum extent feasible".

58. Mr. FREELAND (United Kingdom) expressed keen satisfaction at the adoption of the article, which was designed to lend added strength to the protection already extended to civilian persons and objects of a civilian character by preceding articles. Nevertheless, in an armed conflict such protection could never be absolute; and that was reflected in the article through the expression "to the maximum extent feasible".

59. According to the interpretation placed upon it by his delegation, the word "feasible", wherever it was employed in the Protocol, related to what was workable or practicable, taking into account all the circumstances at a given moment, and especially those which had a bearing on the success of military operations.

60. Mr. KUSSBACH (Austria) said that his delegation had abstained in the vote for the same reasons as those stated by the representative of Switzerland.

61. Mr. BLOEMBERGEN (Netherlands) said it was the Netherlands delegation's view that the word "feasible" when used in Protocol I, for example in Articles 50 and 51, should in any particular case be interpreted as referring to that which was practicable or practically possible, taking into account all circumstances at the time.

62. Mr. DI BERNARDO (Italy), Mr. RABARY-NDRANO (Madagascar), Mr. REED (United States of America), Mr. KO (Republic of Korea), Mr. von MARSCHALL (Federal Republic of Germany), Mr. MARRIOTT (Canada) and Mr. ENDEZOU MOU (United Republic of Cameroon) said they would convey their explanations of vote in writing to the Secretariat.

* Article 58 in the final version of Protocol I.

Article 52 - Non-defended localities

Article 52 was adopted by consensus.*

Article 53 - Demilitarized zones

Article 53 was adopted by consensus.**

Article 54 - Definitions and scope

63. Mr. PAOLINI (France) pointed out that in sub-paragraph 1 (f) of the French text the word "soins" should be replaced by the word "secours".

Article 54 was adopted by consensus.***

64. Mr. HESS (Israel) and Mr. HARSANA (Indonesia) said they would convey their written explanations of vote to the Secretariat.

Article 55 - General protection (CDDH/417)

65. The PRESIDENT pointed out that in paragraph 1 of the French text the word "des" before "dispositions" should be replaced by the word "aux". In the last sentence of paragraph 3 of the French text, the comma before the word "sauf" should be placed after that word. If the amendment were adopted, the end of paragraph 3 would read as follows: "... de leur destination sauf, ..., par la Partie à laquelle ils appartiennent".

The amendment in document CDDH/417 was adopted by consensus.

Article 55, as amended, was adopted by consensus.****

Explanations of vote

66. Mr. ENDEZOUYOU (United Republic of Cameroon) explained that his delegation had participated in the consensus, because the amendment altered the substance of the article. In fact, the amended text accepted or recognized the possibility of diverting objects used for civil defence purposes from their proper use in cases other than that of imperative military necessity. His delegation was a priori favourably disposed on essentially humanitarian grounds, towards diversion or possible destruction in certain circumstances. The postulation of military necessity as the sole grounds on which an exception could be made would encourage the spirit of militarism. The right to divert or destroy should, however, have been restricted by certain conditions. Presumably, however, humanitarian aims would be taken into consideration.

* Article 59 in the final version of Protocol I.

** Article 60 in the final version of Protocol I.

*** Article 61 in the final version of Protocol I.

**** Article 62 in the final version of Protocol I.

67. Mr. MARRIOTT (Canada) said he considered that the second sentence of paragraph 1 did not restrict the right of Governments to use personnel belonging to civilian civil defence organizations as they saw fit.

68. Mr. BLOEMBERGEN (Netherlands) said he would convey his comments in writing to the Secretariat.

69. Mr. KHAIRAT (Egypt) said he considered that the obligation stated in paragraph 1 concerned the adverse Party and not the Government which the personnel in question came under.

Article 56 - Civil defence in occupied territories

Article 56 was adopted by consensus. *

70. Mr. GOZZE-GUČETIĆ (Yugoslavia) and Mr. HARSANA (Indonesia) said they would convey their comments in writing to the Secretariat.

71. The PRESIDENT, replying to Mr. KHALIL (Qatar), said that the Arabic text would be put into final shape by the Secretariat.

Article 57 - Civilian civil defence organizations of neutral or other States not Parties to the conflict and international co-ordinating organizations

Article 57 was adopted by consensus. **

Article 58 - Cessation of protection

72. The PRESIDENT, replying to Mr. RABARY-NDRANO (Madagascar), confirmed that the word "ne" in the fifth line of paragraph 1 of the French text was, in fact, superfluous.

Article 58 was adopted by consensus. ***

73. Mr. HESS (Israel), Mr. HARSANA (Indonesia) and Mr. MAHONY (Australia) said they would convey their comments in writing to the Secretariat.

Article 59 - Identification

74. The PRESIDENT drew attention to the following corrections in the French text: the fourth line of paragraph 2 should read "personnel, les bâtiments et le matériel ...", and in the fourth line of paragraph 3, the words "international de la protection civile" should be inserted after the words "signe distinctif".

* Article 63 in the final version of Protocol I.

** Article 64 in the final version of Protocol I.

*** Article 65 in the final version of Protocol I.

75. Mr. PAOLINI (France) pointed out that the last line of paragraph 9 (in the French text) should read: "protection civile est également régie par l'article 18".

76. Mrs. HERRAN (Colombia) said that in the last line of paragraph 1 of the Spanish text the word "poder" should be deleted.

77. Mr. PAOLINI (France), replying to Mr. ENDEZOUYOU (United Republic of Cameroon), confirmed that in the first line of paragraph 1 (in the French text) the expression "s'efforcer d'assurer" was faulty and should be replaced by "s'efforcer de faire en sorte que".

78. Mr. de ICAZA (Mexico) said that that amendment to the French text necessarily involved a correction in the Spanish text.

79. The PRESIDENT suggested that the consideration of Article 59 be adjourned until conformity in all languages had been reached.

It was so agreed.

The meeting rose at 1 p.m.

ANNEX

to the summary record of the
forty-second plenary meeting

EXPLANATIONS OF VOTE

AFGHANISTAN

Original: ENGLISH

Article 50 of draft Protocol I

The delegation of the Republic of Afghanistan, while joining in the consensus for the adoption of Article 50 in general, wishes to point out that it foresees the difficulties which will face military commanders responsible for defensive operations. It would have preferred for sub-paragraph 2 (a) a better text which would provide more specific guidance to commanders in the field while engaged in military operations, especially the junior ones who are less able to change their course of action when a specific combat operation is in progress.

ARGENTINA

Original: SPANISH

Article 48 bis of draft Protocol I

If Article 48 bis had been put to the vote the delegation of Argentina would have abstained.

Moreover, as the delegation of Argentina understands it, the provision now adopted has no connexion with the work of the Conference of the Committee on Disarmament, which culminated in the draft Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, with regard to which the Government of Argentina has duly stated its position.

AUSTRALIA

Original: ENGLISH

Article 47 bis of draft Protocol I

The Australian delegation joined in the consensus for the adoption of Article 47 bis. However, if this article had come to a vote, the Australian delegation would have abstained because the article contains a prohibition against reprisals.

The Australian delegation supports proposals for rules to prohibit acts of hostility directed against historic monuments or works of art which constitute the cultural or spiritual heritage of peoples. It also agrees with the prohibition against using these historic monuments in support of the military effort. However, the provision in Article 47 bis relating to reprisals creates difficulties for the Australian delegation. The attitude of the Australian delegation with respect to the prohibition of reprisals is set out in the explanatory statement made by the delegation in regard to Article 47. We adhere to that statement and repeat that in our view the adoption of further prohibitions against reprisals will not assist in the development of international law for humanitarian purposes.

Article 48 of draft Protocol I

The Australian delegation joined in the consensus for the adoption of Article 48. However, if this article had come to a vote, the Australian delegation would have abstained, because the article contains a prohibition against reprisals, and for other reasons.

The Australian delegation supports, in principle, proposals for rules to prohibit attacking, destroying, removing or rendering useless those objects which are indispensable to the survival of the civilian population. However, the provision in Article 48 relating to reprisals creates difficulties for the Australian delegation. The attitude of the Australian delegation with respect to the prohibition of reprisals is set out in the explanatory statement made by the delegation in regard to Article 47. We adhere to that statement and repeat that in our view the adoption of further prohibitions against reprisals will not assist in the development of international law for humanitarian purposes.

The Australian delegation wishes to place on record its view that Article 48 does not prevent military operations intended to control and regulate the production and distribution of foodstuffs to the civilian population, and that it does not affect existing legal rules concerning the right of military forces to requisition foodstuffs. Moreover, in the view of my delegation, nothing in Article 48 directly or indirectly affects existing legal rules concerning naval blockade.

My delegation wishes to make two specific points:

1. It is opposed to the inclusion of the words "under its own" control in paragraph 2 of Article 48. My delegation regards those words as placing an unacceptable limitation upon the right of a State to defend its own sovereign territory. Paragraph 2 of the report of the Working Group by the Rapporteur of Committee III - document CDDH/III/369 and Corr.1 of 28 April 1977, page 8 - reflects the views of the Australian delegation. My delegation reserves its position in regard to the article because those words are retained.

2. My delegation wishes to say that the phrase "imperative military necessity" is imprecise as to its meaning and tends to provide a subjective text. My delegation will give this phrase a broad interpretation rather than a narrow one.

Article 48 bis of draft Protocol I

The Australian delegation joined in the consensus for the adoption of Article 48 bis. However, notwithstanding its having played a leading part in the negotiation of the terms of this article, if the article had come to a vote the Australian delegation would have abstained, because the article contains a prohibition against reprisals.

The Australian delegation supports proposals for rules to prohibit the use of methods or means of warfare which are intended or may be expected to cause damage to the natural environment and thereby to prejudice the health or survival of the population. However, the provision in Article 48 bis relating to reprisals creates difficulties for the Australian delegation.

The attitude of the Australian delegation with respect to the prohibition of reprisals is set out in the explanatory statement made by the delegation in regard to Article 47. We adhere to that statement and repeat that in our view the adoption of further prohibitions against reprisals will not assist in the development of international law for humanitarian purposes.

The Australian delegation welcomes the adoption of paragraph 1 of Article 48 bis. It records its thanks to the representatives who co-operated and gave their support in the drafting and adoption of this paragraph.

Article 49 of draft Protocol I

The Australian delegation joined in the consensus for the adoption of Article 49. However, if this article had come to a vote the Australian delegation would have abstained, because the article contains a prohibition against reprisals.

The Australian delegation supports proposals for rules to prohibit attacks directed against works and installations containing dangerous forces, namely dams, dikes and nuclear electrical generating stations or military objectives in their vicinity, if such attacks may cause the release of dangerous forces and consequent severe losses among the civilian population. However, the provision in Article 49 relating to reprisals creates difficulties for the Australian delegation. The attitude of the Australian delegation with respect to the prohibition of reprisals is set out in the explanatory statement made by the delegation in regard to Article 47. We adhere to that statement and repeat that in our view the adoption of further prohibitions against reprisals will not assist in the development of international law for humanitarian purposes.

Article 58 of draft Protocol I

The Australian delegation has supported the consensus on the adoption of Article 58 and places on record its serious concern about the effectiveness of this article as a result of the provisions of paragraph 3.

In the view of the Australian delegation, the essential characteristic of civil defence is that its tasks are performed by civilians for the protection of the civilian population of which they form part. Civil defence personnel are civilians and for this reason should not be attacked. The Australian delegation considers that the highest possible degree of protection should be given to those civilians who undertake, for the benefit of their fellow citizens, work which is often very dangerous. To this end, the Australian takes the view that the best guarantee of protection is for civil defence units to be comprised of unarmed civilians.

We fear that in the heat of combat, the bearing of light individual weapons by civil defence personnel, as provided for in paragraph 3 of this article, could too often lead to their being mistaken for members of the armed forces. If civil defence personnel are unarmed we consider the possibility of unlawful attack on them would be greatly lessened.

In the explanatory notes adopted by Committee II relating to Article 58 it is stated that if armed civil defence personnel are unlawfully attacked by individual members of the adverse Party's forces they may use their weapons in self-defence, after having made a reasonable effort to identify themselves as civil defence personnel. We fear that this possibility only increases the dangers to which civil defence personnel are exposed.

The Australian delegation sympathizes with the reasons which have prompted many delegations to support this article but it remains our view that paragraph 3 of the article is likely to lessen the protection given to civil defence personnel and increase the dangers to them.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC Original: RUSSIAN

Article 48 bis of draft Protocol I

The delegation of the Byelorussian Soviet Socialist Republic took great satisfaction in joining in the consensus on Article 48 bis on the protection of the natural environment, being convinced that this article is of great importance in Protocol I, as it provides for a prohibition of the use of methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment and thereby to prejudice the health or survival of the population.

Paragraph 2 of this article is of particular importance, providing as it does for the prohibition of attacks on the natural environment by way of reprisals.

The significance and topicality of the article just adopted are underlined by the fact that just recently, here in Geneva, the Palais des Nations was the scene of the official signing of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. The Byelorussian Soviet Socialist Republic is one of the signatories of that Convention.

Quantities of material have already been published in different countries showing that action to influence the environment for military purposes is a serious threat to life on earth. This is why the prohibition of military or any other hostile use of environmental modification techniques was a matter of urgency. The initiative in this question was taken by the Soviet Union, which made a proposal on the subject in 1974 at the United Nations General Assembly's twenty-ninth session. The Convention signed in Geneva on 18 May 1977 was the first of a collective effort. It represents a compromise, which takes account of the positions of a large number of States, thus demonstrating once again that where the general will and desire exist, it is possible to make real progress in solving even the most difficult problems of the day. The signing of this Convention marks an important step forward in efforts to strengthen the peace and security of nations and protect man's environment.

The foregoing considerations clearly bring out once again the great importance of Article 48 bis of Protocol I just adopted.

CANADA

Original: ENGLISH

Article 47 bis of draft Protocol I

In the view of the Canadian delegation, this article was not intended to replace the existing customary law prohibitions reflected in Article 27 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, protecting a variety of cultural and religious objects. Rather the article establishes a special protection for a limited class of objects which because of their recognized importance constitute a part of the cultural heritage of mankind. We were happy to note that the article was made "without prejudice" to the provisions of The Hague Conventions for the Protection of Cultural Property thereby implicitly recognizing the exceptions provided for in that Convention.

Article 51 of draft Protocol I

It is the understanding of the Canadian delegation that the word "feasible", when used in this Protocol, for example, in Articles 50 and 51, refers to that which is practicable or practically possible, taking into account all circumstances existing at the relevant time, including those circumstances relevant to the success of military operations.

CYPRUS

Original: ENGLISH

Article 56 of draft Protocol I

The delegation of Cyprus expresses particular satisfaction at the unanimous adoption of this article, in the original form of which Cyprus was a co-sponsor. In a spirit of accommodation of the views of others, we accepted the compromise text we have just adopted. Our position thereon was amply elaborated upon in plenary Committee II and therefore I need not repeat our views here today.

I wish, however, to reiterate for the record our position as expressed when Committee II was considering this article and which we most definitely maintain.

EGYPT

Original: ARABIC

Article 55 of draft Protocol I

The Egyptian delegation wishes to offer an explanation of vote on Article 55, paragraph 1, which states that civil defence personnel shall be entitled to perform their tasks except in case of imperative military necessity. The Egyptian delegation considers that this obligation rests upon the adverse Party and not upon the Government of the country.

FRANCE

Original: FRENCH

Article 48 bis of draft Protocol I

Article 48 bis concerning the protection of the natural environment lays down rules for the conduct of war. As such, it has direct implications for the organization and management of a country's military defence against invasion.

The French delegation, aware that the article was drafted with a humanitarian aim which it shares, did not oppose the consensus on the adoption of the article, but wishes it to be known that had there been a vote, it would have abstained.

GERMANY, FEDERAL REPUBLIC OF Original: ENGLISH

Article 47 bis of draft Protocol I

It is the understanding of the Federal Republic of Germany that Article 47 bis establishes a special protection for a limited class of objects which, in the particular circumstances, constitute a part of the cultural or spiritual heritage of mankind. Such objects remain protected whether or not they have been restored. The illegal use of these objects for military purposes, however, will cause them to lose the protection provided for in Article 47 bis as a result of attacks which are to be directed against such military uses. In such a case the protected object becomes a military objective.

It is further the understanding of the Federal Republic of Germany that Article 47 bis was not intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land protecting a variety of cultural and religious objects.

The understanding of the Federal Republic of Germany concerning Article 47 bis is limited to this Protocol and does not affect any obligations under The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, of 14 May 1954.

Article 50 of draft Protocol I

The Federal Republic of Germany has voted in favour of Article 50 of Protocol I on the understanding that commanders and others responsible for planning, deciding upon or executing an attack necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.

Furthermore, it is our understanding that the reference to military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack.

Finally, we interpret the word "feasible" as meaning what is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations.

As to the legal quality of Article 50, on which one delegation has commented, the Federal Republic of Germany holds the view that this article is a rule applicable in international armed conflicts and, therefore, is in no way connected with the question of aggression, the prohibition of which is a problem of the law of prevention of war.

Article 51 of draft Protocol I

The Federal Republic of Germany has voted in favour of Article 51 of Protocol I because it is our understanding that the word "feasible" refers to that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations.

GHANA

Original: ENGLISH

Article 49 of draft Protocol I

My delegation is happy to see paragraph 1 of Article 49 spelling out prohibition of wanton attacks on works and installations containing dangerous forces. I need not recall that Ghana has one such works - the Akosombo Dam. It impounds

an artificial lake which is the largest in the world. To make it a target of attack is to commit genocide of untold proportions.

My delegation hopes that this article will be one of the most important provisions of the Protocol, any reservation to which would show lack of good faith on the part of the Party who makes such a reservation.

HOLY SEE

Original: FRENCH

Article 47 bis of draft Protocol I

The Holy See is gratified at the adoption by consensus of an article which affirms that acts of hostility against the cultural or spiritual heritage of the peoples are prohibited.

In the opinion of the delegation of the Holy See, the addition of the words "spiritual" and "places of worship" to the original text represents an undeniable step forward in a humanitarian sense:

in that it shows a better understanding of what is most mysterious and most precious in man's heritage;

and in that it extends better protection to the material embodiments of that heritage.

If all one sees in the stained glass at Chartres, in the frescoes at Assisi, in the pure lines of the mosques at Fez, are artistic creations, no matter how admirable - one is missing the essential.

Truly to comprehend these objects of sacred art, to grasp their uniqueness, one has to discover and comprehend their spirit, the spiritual motives which inspired the artist's hand It is this deep spiritual meaning which is implicit in Article 47 bis.

Moreover, Article 47 bis prohibits attacks on places of worship not because of their artistic qualities, but because of their spiritual significance.

This represents an important extension of the protection afforded to objects of a special nature.

HUNGARY

Original: FRENCH

Article 48 bis of draft Protocol I

The Hungarian delegation is gratified that Article 48 bis was adopted by consensus, as Hungary was one of the initiators. The importance of protecting the natural environment is widely recognized, not only in peacetime, but also in times of armed conflict, and this protection is dealt with in several international instruments. Inasmuch as the balance of the natural environment is one of the essential requirements for the survival and the health of the population, there was a need for such a provision in Additional Protocol I. The Hungarian delegation would have preferred an even stronger and more specific regulation, but is none the less satisfied with the results obtained, as in its mind Article 48 bis plainly prohibits all forms of ecological warfare. In conclusion, it would like to thank most sincerely all those delegations which helped to prepare the adopted text.

INDIA

Original: ENGLISH

Article 50 of draft Protocol I

The Indian delegation voted in favour of this article on the clear understanding that it will apply in accordance with the limits of capability, practical possibility and feasibility of each Party to the conflict. As the capability of Parties to a conflict to make distinction will depend upon the means and methods available to each Party generally or in particular situations, this article does not require a Party to undertake to do something which is not within its means or methods or its capability. In its practical application, a Party would be required to do whatever is practical and possible.

INDONESIA

Original: ENGLISH

Article 54 of draft Protocol I

In the framework of developing humanitarian law in armed conflicts we have to be aware that there are wide differences in the organizations of civil defence from one country to another, and the tasks given to them. Each country has the right to decide on those tasks according to its national situation. In fact, in many countries civil defence organizations perform a number of auxiliary tasks which are not specified in this article.

Based on this fact, it is not possible to lay down any rigid rules - flexibility must be maintained. Accordingly, it is the opinion of my delegation that civil defence organizations shall continue to enjoy the general protection of this part of the Protocol if they perform tasks additional to those outlined in paragraph 1 of Article 54 as long as those tasks remain within the principles of humanity and are not unlawful. My delegation would have abstained if this article had been put to a vote.

Article 56 of draft Protocol I

My delegation has joined in the consensus on Article 56 with the understanding that occupied territories remain a zone of military operations for the duration of the armed conflict. We welcome the provisions laid down in this article which bind the Occupying Power to certain restrictions regarding the treatment of the civilian population. We have an observation to make on one paragraph only, namely paragraph 3, which in our opinion is superfluous and does not add anything useful to this article.

Article 57 of draft Protocol I

My delegation has no difficulties in regard to the performance of civil defence tasks by civil defence organizations of neutral States. But, as far as civil defence organizations of States not Parties to the conflict are concerned, my delegation does entertain certain doubts because of the fact that the States under consideration may be friendly to one Party only while adverse to the other. Abuses would be very likely to occur. Also, as regards the question of international co-ordination and the relevant international organizations mentioned in paragraph 2, my delegation finds that it is not always possible to ascertain the impartiality of the organizations concerned. In conclusion, my delegation would like to state that if this article had been put to the vote, it would have abstained.

Article 58 of draft Protocol I

The views expressed by my delegation during the adoption of Article 54 also apply to Article 58. Different countries have their civil defence organized in a way suited to meet their needs. Accordingly, it is very likely that very often civil defence organizations perform tasks outside those specified in Article 54. Provided that those tasks are not harmful to the adverse Party, it is the considered view of my delegation

that the personnel of such civil defence organizations should not automatically be considered as having committed an unlawful act and should continue to enjoy the general protection provided for by the Protocol. Also, the fact that military units are assigned to a civil defence organization should not be regarded as harmful to the adverse Party, and therefore the protection should not cease. Since we still entertain doubts in regard to this article as it is formulated at present, we would have abstained if it had been put to the vote.

ISRAEL

Original: ENGLISH

Article 54 of draft Protocol I

Israel wishes to draw attention to the report of Working Group A of Committee II (CDDH/II/439/Rev.1), as approved by Committee II, which states on page 6:

"A civil defence organization may perform additional tasks not included in paragraph 1, without losing the general protection afforded by this chapter, provided that those tasks do not constitute acts harmful to the enemy under Article 58. Those performing these additional tasks are, however, not protected by this chapter while they are performing them."

Israel was a party to the consensus on this understanding of the article.

Article 58 of draft Protocol I

Israel understands that the list set out in Article 58, paragraphs 2, 3 and 4, is not exhaustive, and that there are other acts which are not considered as "acts harmful to the enemy" beyond the illustrative list set out in the article.

It was on this understanding of the article that Israel was a party to the consensus.

ITALY

Original: FRENCH

Article 47 bis of draft Protocol I

The Italian delegation has the honour of being one of the sponsors of the amendment proposed by a number of countries to Article 47 bis, and it therefore welcomes the adoption of that amendment and of the article, as thus amended, as a whole.

My delegation wishes to emphasize, throughout the various sessions of the Conference, the very keen interest it takes in the problem of the protection of cultural objects and of places of worship.

The article we have adopted is a most useful addition to the system of guarantees introduced by The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict, and it embodies principles that are of fundamental importance to my country.

The desire to ensure for nations the preservation and enjoyment of the historic monuments, works of art and places of worship which constitute their common cultural or spiritual heritage is in line with the universally shared aim of safeguarding for human beings, in situations of armed conflict, not only their own physical safety, but also respect for and preservation of those expressions and evidences of civilization which are the foundation of all intellectual and moral progress.

Article 50 of draft Protocol I

The Italian delegation voted for Article 50 because it appreciated the importance, from the standpoint of humanitarian law, of a provision that imposes the obligation of taking serious precautions in attack in order to spare civilians and civilian objects to the greatest possible extent.

Despite praiseworthy intentions, Article 50, being a compromise text, is deficient in clarity because of its generally vague wording.

As to the evaluation of the military advantage expected from an attack, referred to in sub-paragraph 2 (a) (iii), the Italian delegation wishes to point out that that expected advantage should be seen in relation to the attack as a whole, and not in relation to each action regarded separately.

In several places Article 50 speaks of taking all "feasible" precautions. This term is basic to the whole structure of Article 50. It indicates that the obligations it imposes are conditional on the actual circumstances really allowing the proposed precautions to be taken, on the basis of the available information and the imperative needs of national defence.

I would like to emphasize that all the foregoing comments relate to all the articles in the section of the Protocol concerned, in particular Article 46 as regards the military advantage expected and Articles 46 and 51 as regards the meaning of the word "feasible".

Article 51 of draft Protocol I

The Italian delegation voted for Article 51 because it has the merit of indicating the precautions that each Party to the conflict should take against the effects of attacks in order to reduce the dangers for the civilian population and civilian objects.

The words "to the maximum extent feasible" at the beginning of the article in question, however, clearly show the real aim of this rule: this is not a question of absolute obligations, but, on the contrary, of precepts that should be followed if, and to the extent that, the particular circumstances permit. This is particularly true of sub-paragraph (b) "Avoid locating military objectives within or near densely populated areas". Thus, it is clear that a State with a densely populated territory could not allow that provision to hamper the organization of its defence. The right of self-defence against, and of resistance to, any aggression has overriding force. It is thus unthinkable that the intention of Article 51 should be to place that right in jeopardy.

MADAGASCAR

Original: FRENCH

Article 50 of draft Protocol I

My delegation voted for Article 50 for the following reasons. It recommends precautions in attack in general, thus conforming to the humanitarian aims of our Conference. Although its somewhat guarded and hesitant language may be considered a defect, the wording testifies, in our view, to the praiseworthy aim not only of trying to combine what is ideal with what is possible, but also of dealing in one article, from the same humanitarian standpoint, with two opposite situations in an attack, that of the aggressor and that of the victim of aggression.

My delegation also appreciates, for the same humanitarian reasons, the illustration, in paragraph 2 (a) (ii) of the article, the rules laid down in Article 33, paragraphs 1 and 2, regarding the choice of weapons, and in particular the restriction or prohibition of the use of weapons that have indiscriminate effects.

That is the general view of my delegation on Article 50.

A more detailed analysis leads my delegation to refer to Articles 1, 2 and 3 of the Definition of Aggression contained in the Annex to United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974. At the same time, my delegation would invoke in particular Article 5, paragraph 2 of that same document in stating that aggression is a "crime against international peace", which "gives rise to international responsibility" is also to be condemned under the United Nations Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), Annex).

For my delegation it follows that the maximum requirements under this Protocol in general, and under this article in particular, are impossible on the aggressor, internationally responsible for the existence of the armed conflict. And it is in this sense that my delegation supports the present article.

The provisions of this article, and in particular paragraph 2 (a) (iii), cannot in any case be a legal bar to the exercise of its sovereignty by a State, or of the will of its people to free its territory from an aggressor.

The unhappy chance of becoming the victim of an aggression bestows the right of self-defence, and it must be conceded that in that particular situation no one can be required to do the impossible.

NETHERLANDS

Original: ENGLISH

Article 55 of draft Protocol I

The delegation of the Netherlands wishes to state its position with regard to amendment CDDH/417. The acceptance by consensus of this amendment has not been opposed by the delegation of the Netherlands. This delegation, however, has strong objections to this amendment.

It is the view of the delegation of the Netherlands that this amendment does not improve the proposed text of paragraph 3 of Article 55. On the contrary, in comparison with the proposed text, the result of amendment CDDH/417 is that the obligations on behalf of the civilian population with regard to the availability of shelters and the civil defence equipment and matériel have been weakened.

The Netherlands delegation regrets therefore that after all the lengthy discussions in Committee II, and after consensus had been reached on the substance of the proposed Article 55, an amendment containing a substantial change in the accepted text should have been submitted.

POLAND

Original: FRENCH

Article 47 bis of draft Protocol I

The delegation of the Republic of Poland wishes to emphasize the importance it attaches to the protection, in case of armed conflict, of cultural objects which constitute the common heritage of all humanity.

The delegation therefore fully supports Article 47 bis of draft Protocol I which places the latter in relationship with The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954. The Polish delegation would like that Convention to have wider scope and would take part in any initiative for that purpose.

QATAR

Original: ARABIC

Articles 46 to 49 of draft Protocol I

The delegation of the State of Qatar considers that the provisions of Articles 46, 47, 47 bis, 48, 48 bis and 49 relating to the prohibition of reprisals constitute a whole, and that, in accordance with the general rules of public international law, a breach of any of these articles by one Party exempts the other Parties ipso facto from any obligation towards the said Party under these articles. In this connexion, the delegation of the State of Qatar endorses the statement made by the representative of Egypt following the adoption of Article 42.

REPUBLIC OF KOREA

Original: ENGLISH

Article 51 of draft Protocol I

The delegation of the Republic of Korea accepts in principle Article 51.

With regard to the interpretation of the provision, with particular reference to sub-paragraph (b), it is the understanding of my delegation that this provision does not constitute

a restriction on a State's military installations on its own territory. We consider that military facilities necessary for a country's national defence should be decided on the basis of the actual needs and other considerations of that particular country. An attempt to regulate a country's requirements and the fulfilment of those requirements in this connexion would not conform to actualities.

ROMANIA

Original: FRENCH

Article 49 of draft Protocol I

The Romanian delegation joined in the consensus on Article 49 in consideration of the fact that the problem dealt with in that article is of particular importance for the protection of the civilian population during armed conflicts.

We took part with great interest in the discussions in Committee III and that Committee's Working Group, holding and defending the view that a regulation of that kind was a positive development of humanitarian law applicable in periods of armed conflict.

We welcome the fact that Article 49 affords ample protection for works and installations containing dangerous forces, including nuclear power stations, and prohibits attacks against these objectives even if they are military objectives. We also welcome the fact that this article provides for the absolute prohibition of reprisals against works and installations containing dangerous forces.

Article 50 of draft Protocol I

Article 50, which we have just voted on, is an important element in the general framework for the protection of the civilian population and civilian objects. We are in full agreement with the spirit of the regulation laid down in this article, but nevertheless have certain reservations regarding the precautionary measures in attack.

In our opinion, in an armed conflict in which the aggressor attempts to seize the territory of its victim, the victim of the aggression is entitled to a preferential régime both as regards its means of defence and as regards the protection of its civilian population and objects.

Although Article 50 provides for many precautionary measures, it also permits attacks causing loss of human life among the civilian population. Paragraph 2 (a) (iii) of this article includes the "principle of proportionality", according to which, during an attack, incidental loss of human life and damage to civilian objects are allowed on the sole condition that they must not be excessive in relation to the concrete and direct military advantage anticipated. The provision in question thereby weakens the provisions of other articles and other paragraphs of Article 50 concerning the protection of the civilian population against the effects of hostilities.

Article 56 of draft Protocol I

The Romanian delegation, in joining the consensus in support of Article 56 on civil defence in occupied territories, wishes to emphasize once again that in its view any approach to the problems of humanitarian law applicable in armed conflicts should start from the need to abolish at once both war and the sources of conflicts. This is because in existing conditions armed conflicts not only affect the regions where they break out, but also endanger the peace of mankind as a whole.

In view of these general considerations, it is natural that the Romanian delegation should regard the problem of civil defence in occupied territories as particularly important and deserving of attention, believing that the most serious breach of the rules of humanitarian law is aggression followed by the occupation of a foreign territory. In this situation it is clear that the provisions of Article 56 must not in any way restrict the right of the victim to defend himself in his own territory. At the same time, there must be a clear distinction between combatants and the civilian population, since the civilian population and the civilian civil defence organizations should enjoy general and effective protection against the dangers arising out of military operations, everywhere and in all circumstances.

In our view, the sole aim of the provisions of Article 56 is to give rights to the civilian population and the civilian civil defence organizations and to impose the maximum restraint on the activities of the Occupying Power.

SWEDEN

Original: ENGLISH

Article 50 of draft Protocol I

The provisions stated in Article 50 were elaborated after long debate in Committee III in 1975 (second session of the Diplomatic Conference) and were adopted by consensus in the

Committee. Considerable efforts have been made in order to clarify the responsibility on different command levels. Certain provisions are stated for those responsible for planning and deciding attacks. Special provisions are included for those who have to carry out attacks. In all these new rules a well-founded balance is expressed between the military requirements and the desire to afford improved protection for civilians.

We deem this article to be of very great importance in the new rules of international law.

UNION OF SOVIET
SOCIALIST REPUBLICS

Original: RUSSIAN

Articles of draft Protocol I relating to civil defence

Articles 54 to 59

It is to this Conference that the honour has fallen of being the first international body to draw up and adopt principles of international law governing civil defence activities in time of armed conflict.

Civil defence covers many aspects of the life of the civilian population in the most complicated situations, both in wartime and in natural disasters, when the fate of a considerable proportion of a country's population may be decided.

Under the conditions prevailing today, further development of humanitarian law is therefore impossible without legal recognition and appropriate regulation of civil defence activities for the relief of the suffering population.

In the course of two sessions, Committee II and its working groups, headed by their Chairman, and all the representatives, have done a great deal of work on the section in question, in an effort to arrive at compromise solutions and more precise formulations of each article. At meetings of Committee II the positions of the various delegations were further defined and duly taken into account, and all the articles were adopted by consensus.

The most complicated and at the same time important task was to draw up the provisions on the protection of military civil defence personnel. We fully understand the positions of those delegations that put forward different points of view on this problem.

We are in favour of a realistic approach to the matter, guided by the fact that national civil defence organizations already exist. Our aim is to give reasonable protection to personnel who are really engaged solely in carrying out humanitarian tasks, in saving the civilian population. Whether such personnel are military or civilian is purely a matter of form.

All of us know very well what modern warfare can be like. After mass destruction, ruin and contamination, great efforts are necessary in order to bring relief to the suffering population.

Civil defence personnel therefore need to be well trained, disciplined and ready to make sacrifices in order to save people. All this makes it necessary sometimes to call upon the aid of military units. Even in peacetime, military personnel are employed in some countries to deal with the consequences of natural disasters. In wartime their aid can be vitally necessary.

That is why military personnel engaged in saving the civilian population must be protected.

Medical personnel are closer to the field of battle than civil defence personnel, but they are nevertheless protected when performing humanitarian duties. Some of the members of military civil defence units are also medical personnel.

But how are medical personnel to carry out their task if people have first to be rescued from piles of rubble and in addition the seriously wounded have to be taken to hospital? Special units with the requisite equipment and transport are needed for this purpose.

UNITED KINGDOM OF GREAT BRITAIN Original: ENGLISH
AND NORTHERN IRELAND

Article 47 bis of draft Protocol I

My delegation has joined in the consensus on this article as amended by document CDDH/412/Rev.1. We note particularly the use of the expression "spiritual heritage", which qualifies the reference to places of worship and makes it obvious that the protection given by this article extends only to those places of worship which do constitute such spiritual heritage.

Many holy places are thus covered, but it is clear to my delegation that the article is not intended to apply to all places of worship without exception.

Secondly, my delegation does not understand this article as being intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land, which protect a variety of cultural and religious objects. Rather, this article establishes a special protection for a limited class of objects which, because of their recognized importance, constitute a part of the heritage of mankind. It is the understanding of my delegation that if these objects are unlawfully used for military purposes, they will thereby lose effective protection as a result of attacks directed against such unlawful military uses.

UNITED REPUBLIC OF CAMEROON Original: FRENCH

Article 51 of draft Protocol I

The Cameroonian delegation voted for Article 51, primarily for humanitarian reasons. But it stresses that this article, while capable of being broadly interpreted, lays down in sub-paragraph (b) an obligation that might undermine the right, and thence the freedom, of a State Party to the Geneva Conventions of 1949 and its Additional Protocols to organize its national defence system in the best possible way and in the manner it considers most effective.

Nevertheless, in the opinion of the Cameroonian delegation, the above obligation is attenuated by the introductory clause, which makes it less imperative both on the Parties to the conflict and on the Parties to the Geneva Conventions.

The Cameroonian delegation therefore considers that the obligations under this article are not absolute, since they are to be fulfilled only "to the maximum extent feasible", for no one is obliged to do the impossible. It is in the light of this interpretation, therefore, that the Cameroonian delegation reaffirms that these obligations can in no way restrict the right of a Party to the conflict to organize its national defence in what it considers to be the most adequate manner.

UNITED REPUBLIC OF TANZANIA

Original: ENGLISH

Article 42 of draft Protocol I

The Tanzanian delegation is very happy with the outcome of the decision on Article 42 of Protocol I. The overwhelming majority of the votes in favour of the article shows without doubt the humane conscience of world opinion towards those who up to now have languished under the yoke of imperialism and colonialism and also towards those who are subjected to racism in their own country. In particular, I have in mind the countries in southern Africa, to wit, Zimbabwe, Namibia and South Africa.

Liberation wars have been won. In this regard, Mozambique, Angola, Guinea-Bissau are now free and sovereign countries. In these wars in which the peoples were fighting for independence, freedom and self-determination, the most outrageous crimes against humanity were perpetrated against the nationals of these countries. And in those countries that are not yet independent, heinous crimes against them are committed every passing day.

It is with the utmost relief that the delegation of Tanzania views the adoption of this article.

In conclusion, the Tanzanian delegation wishes to stress that owing to the importance of this article, it should not be open to reservation. In this way humanitarian law will definitely be developed.

UNITED STATES OF AMERICA

Original: ENGLISH

Article 47 bis of draft Protocol I

We are pleased to see that the nations represented at this Conference so overwhelmingly endorse and support a special recognition for objects of cultural or spiritual heritage of mankind. It is the understanding of the United States that this article was not intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land protecting a variety of cultural and religious objects. Rather the article establishes a special protection for a limited class of objects which because of their recognized importance constitute a part of the special heritage of mankind. Other monuments, works of art or places of worship which are not so recognized, none the less

represent objects normally dedicated for civilian purposes and are therefore presumptively protected as civilian objects in accordance with the provisions of Article 47.

We note that the use of these objects in support of the military effort is a violation of this article. Should they be used in support of the military effort it is our clear understanding that these objects will lose the special protection of this article.

Articles 50 and 51 of draft Protocol I

It is the view of the United States that Article 50 represents a major step in the reaffirmation and development of humanitarian law applicable in armed conflict. Not only does it codify for the first time the rule of proportionality but it also gives to military commanders uniformly recognized guidance on this responsibility to civilians and the civilian population in carrying out attacks against military objectives.

Commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time. This of course is appropriate for the entire section, including Articles 45 and 47.

The reference in Articles 46 and 50 to military advantage anticipated from an attack are intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack.

It is the understanding of the United States Government that the word "feasible" when used in draft Protocol I, for example in Articles 50 and 51, refers to that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations.

YUGOSLAVIA

Original: FRENCH

Article 56 of draft Protocol I

The Yugoslav Government attaches the utmost importance to the civil defence of the civilian population in international armed conflicts. In our view, civil defence is one of the major instruments for achieving this goal.

Article 56 governs the status of civil defence in occupied territory. The Yugoslav delegation wishes to state once again, in this context, that according to the experience of modern warfare the aggressor and occupier often try to take undue advantage of civil defence by seeking to use it for their own benefit. The provisions of Article 56, paragraph 2, protects civil defence from such abuses. In our opinion these provisions guarantee civil defence organizations the right to decide whether or not in the specific case of occupation, continuation of their activities is in the interest of the civilian population. In other words, it is for the civil defence organizations to decide whether they are to continue their activities on territory temporarily occupied by the adversary in order to ensure that civil defence is not used for the enemy's benefit.

We are convinced that this interpretation reflects the contemporary development of international humanitarian law applicable in armed conflicts, which provides the population of temporarily-occupied territories with additional means of defending themselves against the invader.

SUMMARY RECORD OF THE FORTY-THIRD PLENARY MEETING

held on Friday, 27 May 1977, at 3.15 p.m.

President: Mr. Pierre GRABER Federal Councillor,
Head of the Federal
Political Department of
the Swiss Confederation

ADOPTION OF THE ARTICLES OF DRAFT PROTOCOL I (CDDH/401)
(continued)

Article 59 - Identification (concluded)

1. The PRESIDENT said that the discrepancies between the different language versions of Article 59 to which attention had been drawn at the forty-second plenary meeting (CDDH/SR.42) would be corrected by the Drafting Committee and the Secretariat.

Article 59 was adopted by consensus. *

Article 59 bis - Members of the armed forces and military units assigned to civil defence organizations

2. Mr. HESS (Israel), Mr. GRIESSLER (Austria), Mr. HARSANA (Indonesia), Mr. MAHONY (Australia) and Mr. NAOROZ (Afghanistan) said that they would submit written statements on Article 59 bis to the Secretariat.

3. Mr. SKARSTEDT (Sweden) said that his delegation would submit a written statement on Article 59 bis and the question of armed civil defence personnel.

4. Mr. GOZZE-GUČETIĆ (Yugoslavia) said that he would submit a written statement on his delegation's interpretation of the second sentence of paragraph 2.

5. Mr. MULLER (Switzerland) said that his delegation would submit a written statement on its interpretation of paragraph 2.

6. Mr. KORNEEV (Union of Soviet Socialist Republics) said that his delegation would submit a written statement on Article 59 bis. He observed that the Russian language version of the articles relating to civil defence contained a number of typographical errors to which his delegation had already drawn the Secretariat's attention.

* Article 66 in the final version of Protocol I.

7. The PRESIDENT said that the Russian text of Articles 54 to 59 would be reviewed and corrected by the Secretariat.

Article 59 bis was adopted by consensus.*

Explanations of vote

8. Mr. RUIZ-PEREZ (Mexico) said that Article 59 bis was long and complicated. Furthermore, although it clearly established the right of military units assigned to civil defence services to respect and protection in all cases, the conditions it laid down in that regard were too severe.

9. He referred in particular to paragraph 1 (b), which stipulated that members of the armed forces and military units assigned to civil defence organizations should be respected and protected if they did not perform any other military duties during the conflict. Civil defence was defined in Article 54 as the performance of the humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or natural disasters. Military units were frequently called upon to assist the civilian population when disasters such as floods, earthquakes, fires or droughts occurred, and his delegation would have liked members of the armed forces to be protected when they performed such tasks without being obliged to retain their civil defence status for the entire duration of the conflict.

10. His delegation had joined the consensus reached in Committee II in order not to hinder the Committee's work, but it wished to place on record its opposition to paragraph 1 (b). Deletion of that sub-paragraph would not have encouraged abuses or perfidious acts, which were adequately provided against under paragraph 1 (a), (c), (e) and (f).

11. His delegation had joined in adopting the article by consensus for the reasons that had prompted it to follow the same course in Committee II.

Article 60 - Field of application

12. Mr. AL ASBALI (Libyan Arab Jamahiriya) observed that the Arabic text made no mention of the fourth Geneva Convention of 1949.

13. The PRESIDENT said that the necessary correction would be made.

* Article 67 in the final version of Protocol I.

Article 60 was adopted by consensus.*

Article 61 - Basic needs in occupied territories

14. The PRESIDENT said that the Drafting Committee had agreed to replace the phrase "sans aucune discrimination" in the French text of paragraph 1 by the phrase "sans aucune distinction défavorable".

15. Mr. DIXIT (India) asked what was the meaning of the word "objects" in the last line of paragraph 1.

16. Mr. KLEIN (Holy See) said that the meaning of the term "objects necessary for religious worship" was self-evident.

Article 61, as amended, was adopted by consensus.**

Article 62 - Relief actions

17. The PRESIDENT said that the phrase "sans aucune discrimination" in the first sentence of paragraph 1 should be replaced by the phrase "sans aucune distinction défavorable".

18. Mrs. HERRAN (Colombia) drew attention to a grammatical error in the tenth line of the Spanish text of paragraph 1.

19. Mr. URQUIOLA (Philippines) said that the word "mention" in the third line of the English text of paragraph 1 should be replaced by "mentioned".

20. Mr. AL-FALLOUJI (Iraq), speaking as Chairman of the Drafting Committee, said that corrections would have to be made to the Arabic text of paragraph 3 (c).

21. The PRESIDENT said that due account would be taken of those comments.

Article 62, as amended, was adopted by consensus.***

Article 62 bis - Personnel participating in relief actions

Article 62 bis was adopted by consensus.****

* Article 68 in the final version of Protocol I.
** Article 69 in the final version of Protocol I.
*** Article 70 in the final version of Protocol I.
**** Article 71 in the final version of Protocol I.

Article 63 - Field of application

22. Mr. ABDINE (Syrian Arab Republic) said that the Arabic version of several of the articles gave rise to serious difficulties. For instance, the title of Article 63 had been omitted from the Arabic text. That and many similar questions would need to be taken up by the Drafting Committee.

23. The PRESIDENT said that the matter raised by the previous speaker would be dealt with by the Arab group of delegations together with the Drafting Committee and the Secretariat.

Article 63 was adopted by consensus. *

Article 64 - Refugees and stateless persons

24. Mr. ABDINE (Syrian Arab Republic) said that his delegation had two comments to make with respect to Article 64.

25. First, the phrase "before the beginning of hostilities" was ambiguous and made it impossible clearly to identify the refugees and stateless persons to be protected. The example of the Second World War illustrated how complex the question could be, inasmuch as a war could be made up of a series of hostilities occurring over a period of several years. Application of the provisions of Article 64 would inevitably limit in time the protection of the persons concerned and would deny that protection to those who became refugees or stateless persons as a result of the hostilities.

26. Secondly, it was regrettable that the protection granted by the article had not been extended to persons who were forced to flee their homes because of hostilities and whose situation should receive priority treatment according to the objectives of draft Protocol I. The proposal which his delegation had submitted to the third session of the Diplomatic Conference with a view to making good that omission had been evaded at the current session on the pretext that "in the time available, it proved impossible to reach agreement on a text" (CDDH/III/408, para. 13), and it had also been stated that the refugees in question were already covered by the provisions of Articles 44 and 70 of the fourth Geneva Convention of 1949 in particular. In the view of his delegation, those provisions were too general to provide the persons concerned with proper protection, nor did they provide any protection for refugees in terms of their country of origin.

27. His delegation noted with moderate satisfaction the suggestion by Committee III "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" (CDDH/III/408, para. 13). It considered that suggestion to

* Article 72 in the final version of Protocol I.

constitute encouragement and authorization by the Conference to pursue the efforts in favour of refugees and to prepare the relevant conventions in collaboration with the United Nations High Commissioner for Refugees.

28. Mr. PATRNOGIC (Observer for the Office of the United Nations High Commissioner for Refugees) thanked the Conference for the understanding which it had shown in adopting by consensus important provisions for the protection of refugees and stateless persons. Article 64 specifically recognized that refugees and stateless persons were protected persons within the meaning of the fourth Convention of 1949 and of Protocol I. The persons concerned were those who, before the beginning of hostilities, were considered as refugees or stateless persons under the international instruments accepted by the Parties to the conflict - primarily the 1951 Convention relating to the Status of Refugees, the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted in 1969, and the Statute of the Office of the United Nations High Commissioner for Refugees (see United Nations General Assembly resolution 428 (V)) - as well as the national legislation of the State of refuge or of residence. The article supplemented and strengthened Article 44 of the fourth Geneva Convention. The provisions adopted would help to provide fuller protection, at the international level, for refugees who might find themselves in difficulties during armed conflicts; the article thus completed the protection of refugees in all circumstances and at all times.

29. The representatives of the Office of the United Nations High Commissioner for Refugees and of the ICRC, as well as interested governmental delegations, had endeavoured to find a satisfactory solution to the problem of extending certain forms of protection to persons obliged to leave their homes because of hostilities, but unfortunately there had not been enough time to reach general agreement. Some delegations had pointed out that Article 65 of draft Protocol I already covered such persons and that consequently, unless they were nationals of one of the Parties, they were also protected in regard to that Party by Part III of the fourth Geneva Convention of 1949. The Office of the United Nations High Commissioner for Refugees was ready to co-operate with interested Governments in any effort connected with the law of refugees.

30. The Diplomatic Conference had confirmed the fact that law was also a social phenomenon; it was the expression of rules accepted by society at a given moment. Everything which had been said at the four sessions concerning the Geneva and The Hague Conventions showed that, despite the wisdom with which those texts had been prepared, they were now out of date. Since their adoption there had been - in society in general, in United Nations law, and in humanitarian law - an extraordinary development of political and legal phenomena which it had not been possible to understand or conceive in 1949. The fundamental role of humanitarian law was to cover, as far as possible, all situations. In that respect the Conference had accomplished its task.

Article 64 was adopted by consensus.*

Article 64 bis - Reunion of dispersed families

Article 64 bis was adopted by consensus.**

Article 65 - Fundamental guarantees

31. Mr. MBAYA (United Republic of Cameroon), referring to paragraph 4 (e), observed that certain legal systems provided for accused persons to be sentenced in absentia. He would therefore welcome some clarification of the meaning of the phrase "in his presence".

32. Mr. ALDRICH (United States of America), speaking as Rapporteur of Committee III, said that no objection had been raised to the wording of paragraph 4 (e) during the Committee's discussions. The right of a person to be present at his own trial in order to be able fully to defend himself had been considered by the Committee to be an important right. Only jurisdiction which denied an accused person that right would be contrary to paragraph 4 (e).

33. Mr. PAOLINI (France) said that the French text of paragraph 4 (e) would be improved if the phrase "en sa présence" was replaced by the words "étant présente".

34. Mr. MBAYA (United Republic of Cameroon) said that the suggestion by the French representative did not solve the problem. The question was whether or not paragraph 4 (e) excluded the possibility of trying an accused person in absentia.

35. Mr. AL-FALLOUJI (Iraq) agreed with the explanation given by the Rapporteur of Committee III and supported the suggestion by the French representative. The provision in question, which concerned only the right of an accused person to be present at his trial, would not exclude the possibility of trial in absentia if the accused person had, for example, escaped or absconded.

36. Mr. de BREUCKER (Belgium) said that the provision in paragraph 4 (e) was based on Article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights (resolution 2200 (XXI) of the United Nations General Assembly). In his view, the text before the Conference, which had been approved by Committee III, was perfectly adequate and could be adopted as it stood.

* Article 73 in the final version of Protocol I.

** Article 74 in the final version of Protocol I.

37. Mr. MARTIN HERRERO (Spain) said that his delegation had participated in the preparation of Article 65 and had submitted an amendment which had been partially incorporated in paragraph 4 (h). Owing perhaps to an excessive desire for perfection, however, the Spanish text of some of the paragraphs left much to be desired. For instance, there was room for improvement in the wording of paragraphs 2 (a) and 3.

38. Mr. ROMAN (Chile) pointed out that the Drafting Committee's Spanish version of the article in question differed from the text adopted by Committee III, which in paragraph 2 (a) (iii) had spoken of "castigos corporales" not "penas corporales", a phrase unfamiliar to many States. The Spanish text should be aligned with the French and English texts.

39. Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, said that the paragraph had been studied by Mr. Sanchez del Rio (Spain), who had now left, having rendered great service to the Conference. He would ask the Spanish representative to work with the Drafting Committee on the necessary changes to the Spanish text.

40. Mr. MARTIN HERRERO (Spain) accepted that invitation.

41. Mrs. MANTZOULINOS (Greece) said that her delegation welcomed the consensus on Article 65, which was designed to fill the gaps in the Geneva Conventions. Her delegation attached particular importance to the wording of the last sentence of paragraph 1, which provided that "Each Party shall respect the person, honour, convictions and religious practices of all such persons". It had wisely been decided to delete all examples of persons covered by the article.

42. Her delegation considered that persons who became refugees or stateless persons after the start of hostilities and were therefore not covered by Article 64 were, pending adequate settlement of their case by the Office of the High Commissioner for Refugees, protected by Article 65. The same was true of mercenaries, who according to Article 42 quater were denied the right to combatant or prisoner-of-war status. As human beings, mercenaries could not be denied minimum humanitarian protection if they fell into the power of a Party to the conflict. Her delegation, with others, considered that persons in that category were also covered by Article 65.

43. Mr. MBAYA (United Republic of Cameroon) asked whether the words "No one shall be prosecuted or punished by the same Party for an offence of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure", in paragraph 4 (h), meant that a person so acquitted could be tried by another Party for the same offence.

44. Mr. ALDRICH (United States of America), Rapporteur of Committee III, explained that the Committee had not considered it possible to preclude trial and punishment by a different Party. One of the Committee's concerns had been the possibility that a person who had committed a serious offence could be tried and acquitted of that offence by the Party of which he was a national, which might not be a fair trial.

Article 65 was adopted by consensus.*

Explanations of vote

45. Mr. GRIBANOV (Union of Soviet Socialist Republics) and Mr. de BREUCKER (Belgium) said that they would submit written statements on Article 65.

46. Mr. ABDUL EL AZIZ (Libyan Arab Jamahiriya) reserved his delegation's right to submit at an appropriate time its observations concerning Article 65.

47. Mr. MORENO (Italy) said that his delegation was glad that Article 65, one of the most important in the Protocols, had been adopted by consensus. The wording, however, could have been better.

48. His delegation attached great importance to the article, which was designed to fill the inevitable gaps in the 1949 Conventions and to set definitive limits to the discretion that could be exercised by Parties to a conflict.

49. The article reaffirmed certain basic rules of general international law, but the list could not be considered exhaustive. There could be no derogation from the provisions of the article, which applied to every person who did not benefit from more favourable treatment under the Conventions or the Protocol.

* Article 75 in the final version of Protocol I.

50. Mr. EIDE (Norway) said that his delegation had joined in the consensus on Article 65, which was of vital importance to the system of protection of the Protocol. His delegation had made a statement on the article at the time of its adoption in Committee, and would merely add that it understood that paragraph 4 (h) did not refer to judgements passed by foreign courts or tribunals.

51. Mr. AKRAM (Afghanistan) said that his delegation would submit a written statement on Article 65, which was one of the most important in draft Protocol I.

52. Mr. PAOLINI (France) said that his delegation, too, would submit a written statement.

53. Mr. IPSEN (Federal Republic of Germany) said that his delegation would submit a statement of interpretation on paragraph 4 (e) of Article 65, concerning the problem raised by the Cameroon representative.

Article 67 - Protection of women

54. Mr. MBAYA (United Republic of Cameroon) suggested that it would be more logical to reverse the order of the two sentences in paragraph 3.

55. Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, endorsed that view.

Article 67, as amended, was adopted by consensus.*

Article 68 - Protection of children

Article 68 was adopted by consensus.**

Article 69 - Evacuation of children

56. Mr. AL GHUNAIMI (Egypt) recalled that the article as originally adopted by Committee III had included the words "if any" in paragraph 3 (f) after "The mother's full name and her maiden name". Many States made no distinction between a woman's name before or after marriage. He wondered why the words had been omitted, especially since paragraph 3 (q) read "the child's religion, if any".

* Article 76 in the final version of Protocol I.

** Article 77 in the final version of Protocol I.

57. Mr. ALDRICH (United States of America), Rapporteur of Committee III, explained that the words "if any" had been removed at his suggestion, for he had thought them unnecessary and no one had disagreed with him. If the mother had no maiden name it would naturally not be included and no one would consider her in violation of the Protocol.

58. Mr. NEMATALLAH (Saudi Arabia) supported the Egyptian representative's view.

59. Mr. ABDINE (Syrian Arab Republic) suggested that the words "and her maiden name" should be deleted.

60. Mr. ALDRICH (United States of America), Rapporteur of Committee III, said that that would not be satisfactory. In any case the paragraph provided that the card should bear "whenever possible" the information in question.

61. Mr. AL GHUNAIMI (Egypt) said that in that case he would like the words "if any" in paragraph 3 (q) to be deleted.

62. The PRESIDENT pointed out that comparison between the two items was hardly valid, since a child always had a mother whereas it might not have a religion.

63. Mr. MOKHTAR (United Arab Emirates) proposed that the words "if any" should be added at the end of paragraph 3 (f).

It was so agreed.

64. Mr. MBAYA (United Republic of Cameroon) asked what was the meaning of the word "primarily" in the third sentence of paragraph 1.

65. Mr. ALDRICH (United States of America), Rapporteur of Committee III, explained that the word "primarily" had been included at the request of the Nigerian representative, who had argued that the original text did not adequately reflect the customs of certain countries with an extended-family system.

66. Mr. AMIR-MOKRI (Iran), referring to paragraph 3 (g) and (j), asked whether "family" meant parents and whether it was intended to include the address of the next-of-kin.

67. Mr. ALDRICH (United States of America), Rapporteur of Committee III, said that the Committee had tried to draw up a useful but not too detailed list. "Family" meant either parents or whatever members of a family might remain. The address of the next-of-kin might be included if available, though it did not appear on the list.

68. Mrs. HERRAN (Colombia) suggested that the word "any" in paragraph 3 (k) might be deleted, since it was confusing, at least in the Spanish text.
69. Mr. CHELBI (Tunisia) suggested that the word "usually" should be used instead of "primarily" in paragraph 1.
70. Mr. MBAYA (United Republic of Cameroon) thought it would be best to delete the word "primarily".
71. Mr. ALDRICH (United States of America), Chairman of Committee III, said that that change would be undesirable, since there were many people who might be responsible for the care of a child, including teachers, but it was not their names that were needed. The name of the person most responsible was the one required.
72. With respect to the suggestion by the Colombian representative, he thought that any linguistic problems might be cleared up by amending paragraph 3 (k) to read "the identification number for the child, if any".
73. Mr. MBAYA (United Republic of Cameroon) pointed out that a teacher would never have legal custody of a child. He would not press his amendment, however, if other delegations did not endorse it.
74. Mr. BINDSCHIEDLER (Switzerland) supported the Cameroonian proposal for the deletion of "primarily".
75. Mr. URQUIOLA (Philippines) opposed the deletion, for the reasons given by the United States representative.
76. Mr. ALDRICH (United States of America), Rapporteur of Committee III, pointed out that the text, in English at least, did not refer to legal guardianship and had been carefully drafted to avoid being limited to those who were guardians by virtue of law, in order to take account of the customs of various countries. In English the deletion of the word "primarily" would change the provision fundamentally, making it possible for anyone with responsibility for a child, however temporary, to give permission for it to be evacuated.
77. Mr. RABARY-NDRANO (Madagascar) suggested that the wording might be "... persons who in that case by law or custom are primarily responsible ...".

78. Mr. PAOLINI (France) suggested that, as the difficulty was one not only of form but also of meaning, the word "normalement" might be used instead of "principalement" in the French version.

79. Mr. AJAYI (Nigeria) said that the provision had been intended to cover situations provided for in customary law. As a number of persons might be responsible for children to varying degrees, it was essential to indicate the person who was considered to have greatest responsibility for the child. That could only be done by retaining the word "primarily".

80. Mr. MBAYA (United Republic of Cameroon) withdrew his proposal but said that he was not convinced by the argument put forward by the representative of Nigeria.

Article 69, as amended, was adopted by consensus.*

81. Mrs. UNDERHILL (Observer for the International Union for Child Welfare), speaking at the invitation of the President, thanked all those who had helped the IUCW to arrive at the present version of Articles 67, 68 and 69 of draft Protocol I and Article 32 of draft Protocol II. The IUCW had been particularly concerned with the protection of children in armed conflicts. Experiences in the field had shown that a number of situations had arisen which were not provided for in the draft Protocols and could not have been foreseen. The IUCW had felt, therefore, that it would be helpful to include a number of modifications. As an observer from a non-governmental organization, she had not been able to propose amendments and had therefore relied on delegations to do so on her behalf. She was most grateful for the kindness shown by a number of representatives in that respect, and wished to mention in particular the representatives of the following States: Algeria, Egypt, Greece, Holy See, Nigeria, Pakistan, Socialist Republic of Viet Nam, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America and Yugoslavia. She also thanked all members of the ICRC for the valuable assistance they had given the IUCW even long before the Diplomatic Conference was convened, and for enabling the IUCW Working Group on the development of humanitarian law to prepare and circulate two memoranda which she hoped had proved useful.

82. She expressed her organization's deep appreciation to the Swiss Government, which had rendered great service to the world by providing a forum at which international relationships had been established and international understanding increased.

* Article 78 in the final version of Protocol I.

New article to be added after Article 69 - Measures of protection for journalists

83. Mr. PAOLINI (France) said that the new article for insertion after Article 69 was concerned with the protection of journalists engaged in dangerous professional missions in areas of armed conflict.

84. The French delegation had proposed a resolution, which the United Nations General Assembly had adopted in 1970, concerning the preparation of a special convention on the protection of journalists on dangerous missions. As the question clearly came within the competence of the present Conference, his delegation, together with others, had proposed the new article now under discussion.

85. His delegation welcomed the fact that the provisions of humanitarian law were, for the first time in history, to be extended to journalists engaged in dangerous professional missions in areas of armed conflict.

86. In reply to a comment by Mr. MATHANJUKI (Kenya) on paragraph 2 of the article, Mr. ALDRICH (United States of America) explained that that paragraph should be construed as maintaining "the right of war correspondents ... to the status" conferred by the Conventions cited, especially Article 4 of the third Geneva Convention of 1949.

87. Mr. KUSSBACH (Austria) said that his delegation would submit a written statement on the new article on journalists.

88. Mr. ABDINE (Syrian Arab Republic), referring to the Annex to the article, which provided a model identity card for journalists on dangerous professional missions, asked why the text of the identity card had been printed in four languages - English, French, Spanish and Russian - but not in Arabic.

89. Mr. GREEN (Canada) said that the card, which would be approximately of the size shown in the Annex, had been designed to fit into a battledress pocket. If all languages had been included, the print would have been so small as to be undecipherable. He pointed out that paragraph 3 of the article stated that the card would be similar, not necessarily identical, to the model in the Annex.

90. Mr. ABDINE (Syrian Arab Republic) said that other identity cards existed which included Arabic. He proposed that the text of the identity card for journalists on dangerous missions should also appear in Arabic.

91. Mr. PAOLINI (France), Miss EMARA (Egypt), Mr. URQUIOLA (Philippines) and Mr. AKRAM (Afghanistan) supported the Syrian proposal

92. The PRESIDENT said that the text of the card in its final form would include Arabic.

93. Mr. OSORIO (Colombia) said that, in the Spanish text, the heading on page 2 of the Annex should read "Tarjeta de identidad para periodista en misión peligrosa".

The new article on journalists, to be added after Article 69, was adopted by consensus.*

Article 70 - Measures for execution

Article 70 was adopted by consensus.**

Article 70 bis - Activities of the Red Cross and other humanitarian organizations

Article 70 bis was adopted by consensus.***

94. Mr. TETERIN (Union of Soviet Socialist Republics) said that, in his delegation's view, the adoption of Article 70 bis by consensus was of great importance for the Red Cross as a whole and signified a new stage in its development. The Soviet Red Cross, which had 94 million members, had throughout its history followed the high ideals and humanitarian principles of the International Committee of the Red Cross. It had provided and would continue to provide assistance to all peoples fighting for national independence and to the victims of all armed conflicts. In the Second World War it had saved the lives of many millions, had taken measures to avoid epidemics over vast areas, had organized the protection of the civilian population and had rendered great services to Soviet society as a whole. The memory of the Second World War, in which the USSR had lost over 20 million people, was still fresh and the Soviet Red Cross would continue its task, which it regarded as part of a general effort to avoid wars and suffering.

Article 71 - Legal advisers in armed forces

Article 71 was adopted by consensus.****

* Article 79 in the final version of Protocol I.

** Article 80 in the final version of Protocol I.

*** Article 81 in the final version of Protocol I.

**** Article 82 in the final version of Protocol I.

Article 72 - Dissemination

95. The PRESIDENT drew attention to amendment CDDH/419 concerning Article 72, which had been submitted by the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics.

96. Mr. TETERIN (Union of Soviet Socialist Republics) said that amendment CDDH/419 had been submitted because the sponsors considered that paragraph 3 of Article 72 was superfluous. If the High Contracting Parties accepted the obligations laid down in the Protocol, they must also be prepared to take responsibility for implementing them. He therefore requested that Article 72 should be put to the vote.

97. Mr. PARTSCH (Federal Republic of Germany) said that, although his delegation found the amendment interesting, it felt that the effectiveness of the obligation to implement the provisions was weakened by the proposal. Reporting systems had already proved effective in the implementation of other international instruments. States had been known to take spectacular measures in order to be able to report on their progress.

98. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) pointed out that the question under consideration was the submission of reports concerning not the implementation of the Protocol but solely the dissemination of the text of the Protocol, which was not the same thing. The dissemination of documents and the technological methods employed by States was a matter which came within the sovereignty of each State. There were different methods of dissemination and he would have agreed with the representative of the Federal Republic of Germany if the question had been one of implementing the provisions of the Protocol and not of the dissemination of the document.

99. He was not in favour of any obligation being imposed on States regarding the purely technical matter of how they were to disseminate information, especially since the article was concerned with the duty of sovereign States to submit those reports not only to the depositary State but also to the International Committee of the Red Cross, i.e. to a non-governmental organization - a procedure which would be unique in international law.

100. Mr. CLARK (Nigeria) and Mr. AMIR-MOKRI (Iran) supported amendment CDDH/419.

101. Mr. VAN LUU (Socialist Republic of Viet Nam) endorsed the views expressed by the representative of the Ukrainian Soviet Socialist Republic concerning the sovereignty of States.

102. Mr. REED (United States of America) suggested that a vote should be taken on amendment CDDH/419.

103. The PRESIDENT put to the vote amendment CDDH/419 proposing the deletion of paragraph 3 of Article 72. He pointed out that under the rules of procedure a two-thirds majority was required.

There were 45 votes in favour, 27 against, and 14 abstentions.

Not having received the necessary two-thirds majority, the proposal to delete paragraph 3 was rejected.

104. Mr. AMIR-MOKRI (Iran) said that his delegation had voted in favour of the amendment. It considered that some States lacked the material resources to enable them to meet the obligations laid down in paragraph 3 of Article 72. The article should therefore be drafted in such a way as to leave the question of reporting optional.

105. Mr. GREEN (Canada) said that his delegation had been anxious to include the word "encourage" in paragraph 1, because it reflected the federal situation in Canada, where education was a matter of Provinces and not of the whole country as a High Contracting Party.

106. With reference to the obligation in paragraph 3, he assumed that, since it was only possible to give encouragement, it would be adequate to report to the ICRC on measures taken to request provincial authorities to promote such studies through lectures, demonstrations, etc., but not necessarily through structured classes in schools.

107. Mr. EL HASSEEN EL HASSAN (Sudan) said that his delegation had voted in favour of the amendment for the same reasons as those given by the representative of Iran.

108. Mr. CLARK (Nigeria) requested a separate vote on paragraph 3.

109. Mr. PARTSCH (Federal Republic of Germany) moved that the Conference should vote on the article as a whole.

110. The PRESIDENT said that, as an objection had been raised, the Conference should proceed to vote on the Nigerian proposal, by simple majority.

The Nigerian proposal that a separate vote should be taken on paragraph 3 of Article 72 was adopted by 48 votes to 26, with 15 abstentions.

111. The PRESIDENT suggested that the Conference should vote first on paragraphs 1 and 2.

112. Mr. CHAVEZ-GODOY (Peru) said that it was his understanding that the Conference had decided to vote on paragraph 3 first. The vote on paragraphs 1 and 2 might be influenced by the retention or rejection of paragraph 3.

113. Mr. BINDSCHIEDLER (Switzerland) said that a separate vote on paragraph 3 would deal with the same subject matter as the vote on the amendment which had just been rejected. He inquired whether it was legally in order for the Conference to vote twice on the same subject matter and requested the opinion of the legal advisers.

114. Mr. MBAYA (United Republic of Cameroon) said that the text of paragraph 3 was not an amendment and the fact that the vote on the paragraph and the vote on the rejected Soviet Union amendment might produce the same result was not important. There was nothing in the rules of procedure to suggest that a separate vote on paragraph 3 was inadmissible.

115. Mr. HUSSAIN (Pakistan) pointed out that the Conference had already decided that a separate vote should be taken on paragraph 3, and that decision must be respected.

116. Mr. ABDINE (Syrian Arab Republic) supported the representative of Pakistan. The first vote had been on the acceptance or rejection of an amendment. The Conference now had to vote on whether it should retain paragraph 3. It would be illogical to claim that paragraph 3 had been adopted because the amendment to delete it had not obtained the necessary two-thirds majority.

117. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) agreed with the representatives of the United Republic of Cameroon, Pakistan and the Syrian Arab Republic. According to the logic of the Swiss representative's observation, amendments to delete every paragraph could be submitted and, if they were rejected, the Protocol might be adopted by a minority. That did not make sense in law. The procedure already decided upon should be followed.

118. Mr. de ICAZA (Mexico) urged the Swiss representative to withdraw his request, since it could jeopardize the position regarding paragraphs 1 and 2.

119. The PRESIDENT observed that, in the light of what had just happened and having regard to the two-thirds majority rule, it would seem that a delegation wishing to delete a paragraph would be better advised to ask for a vote on the paragraph in question rather than to submit an amendment proposing its deletion. He suggested that, as the motion for a separate vote had been carried, paragraph 3 should be put to the vote.

120. Mr. PAOLINI (France) said that all the comments made seemed relevant, except for the fact that, by rejecting the amendment to delete paragraph 3, the Conference had in fact retained that paragraph by a two-thirds majority. The Conference had then decided to take another vote on paragraph 3, in which a two-thirds majority was required.

121. The PRESIDENT said that, whatever line of argument was followed, a separate vote on paragraph 3 would have to be taken. He therefore invited the Conference to vote on that paragraph.

There were 45 votes in favour, 30 against, and 14 abstentions.

Not having received the necessary two-thirds majority, paragraph 3 was rejected.

122. The PRESIDENT invited the Conference to vote on paragraphs 1 and 2.

Paragraphs 1 and 2 were adopted by consensus.

Article 72, as amended, was adopted by consensus.*

Article 73 - Rules of application

Article 73 was adopted by consensus.**

The meeting rose at 6.20 p.m.

* Article 83 in the final version of Protocol I.

** Article 84 in the final version of Protocol I.

ANNEX

to the summary record of the
forty-third plenary meeting

EXPLANATIONS OF VOTE

AFGHANISTAN

Original: FRENCH

Article 65 of draft Protocol I

The delegation of Afghanistan joined the consensus for the adoption of Article 65 of draft Protocol I.

Our delegation participated with great interest in the negotiations leading up to the elaboration of this article. The discussions did not proceed very easily and it took over two weeks to reach a compromise text. The present wording of the article is, in substance, compatible with the laws applying in Afghanistan.

As the principles of Islam lie at the root of our laws concerning penal proceedings, respect for the dignity of the person is at all times recommended therein.

We are glad to see that acts of violence and outrages upon personal dignity are prohibited under Article 65.

The Conference, by adopting this article, which is one of the most important in draft Protocol I, has made a very effective contribution to the development of international humanitarian law.

However, our delegation, while paying a tribute to all those who took a very active part in the elaboration of this compromise text, finds Article 65 a little too long. There are many details in the wording which are liable to be construed differently, and which may hence cause some divergence in the points of view of those called upon to apply the text.

AUSTRALIA

Original: ENGLISH

Article 59 bis of draft Protocol I

The Australian delegation has supported the consensus on this article, though if the article had come to a vote, my delegation would have abstained. For reasons similar to those we have already mentioned in relation to Article 58, Australia has serious doubts about the effectiveness of Article 59 bis.

The essential characteristic of civil defence is that its tasks are performed by civilians for the protection of the civilian population of which they are part. Australian civil defence personnel are civilians and the Australian delegation believes that it is proper to provide the highest possible degree of protection for people who undertake these tasks for the benefit of their fellow civilians.

The Australian delegation has always maintained the view that civil defence protection should only be available, and civil defence marking only permitted for unarmed civil defence units. This view has not changed. We shall, of course, conform to the humanitarian purposes of Article 59 bis but we wish to place on record our view that there may be occasions in which strict compliance with the terms of this article will prove to be difficult and may even prove to be impracticable.

Article 70 bis of draft Protocol I

The Australian delegation strongly supports Article 70 bis which sets out very clearly the responsibilities which signatory States are prepared to accept and have undertaken in relation to the three different but closely related Red Cross organizations, namely the International Committee of the Red Cross, the national Red Cross, Red Crescent and Red Lion and Sun Societies, and the League of Red Cross (Red Crescent and Red Lion and Sun) Societies during periods of armed conflict.

Protocol I provides that one or more of these organizations have an important role in the implementation of the humanitarian provisions of the Protocol.

Article 6 of draft Protocol I provides for co-operation between signatory States and their Red Cross, Red Crescent, Red Lion and Sun Societies in the training of personnel to assist in the implementation of the Protocol, as well as for the International Committee of the Red Cross to hold in readiness lists of qualified personnel who have been trained to assist in facilitating its application.

Articles 9 (Field of application) and 23 (Hospital ships and coastal rescue craft) of the draft Protocol, concerned with the care of the sick and wounded, make specific reference to the role of "an international impartial humanitarian organization". The Australian delegation regards the Red Cross organizations as fully answering this description. Other articles such as 62 (Relief actions) and 62 bis (Personnel participating in relief actions) are concerned with the civilian population and will

depend heavily for their effectiveness on the assistance which can be provided by the Red Cross, either through the International Committee of the Red Cross, the League of Red Cross, Red Crescent, and Red Lion and Sun Societies, or the national Red Cross Societies of the States concerned in the conflict.

This underlines the very important position which the Red Cross movement has won for itself, both in the development of international humanitarian law through its initiatives in proposing new Conventions and Protocols designed to improve the care of the victims of armed conflicts and in related matters, and in the implementation of the law through its work for the reunion of families and the care of prisoners of war.

This special position is already acknowledged in the Geneva Conventions, where particular responsibilities and corresponding rights are specified for the International Committee of the Red Cross and for the national Red Cross organizations. It should be emphasized also that these latter bodies require the official support of their Governments before being officially recognized and admitted to membership of the International Red Cross.

The national Red Cross Societies have a very special relationship with their Governments - and it is this relationship which is affirmed in Article 70 bis. It is at the same time the guarantee that the tasks they undertake will be performed in accordance with clearly defined and well-publicized principles which ensure the impartial humanitarian treatment for all victims of armed conflicts.

In conclusion, the Australian delegation wishes to place on record its deep appreciation of the role of the International Committee of the Red Cross in the development of the draft on which the new Protocol is based. We hope that as the International Committee of the Red Cross, through its continuing care, concern and sympathy for the welfare of the victims of armed conflicts, becomes aware of new needs and new development, it will bring them before Governments and the international community.

AUSTRIA

Original: FRENCH

Articles 59 bis, 65 and new article to be added after Article 69

Article 59 bis

The Austrian delegation has noted with great satisfaction that the articles of draft Protocol I concerning civil defence have been adopted by consensus, as will be the case with Article 59 bis. Nevertheless, the Austrian delegation had hoped

that only civilian civil defence organizations would be entitled to the protection provided for in Article 55. The question raised by Article 59 bis should be considered in close conjunction with Article 58, and in particular the bearing of weapons by civil defence personnel. In the opinion of the Austrian delegation, the justification for the bearing of weapons by civil defence personnel, and especially by military civil defence units, for use against rioters or for the requirements of the maintenance of order, for example, is of less importance than the need to ensure the best possible protection for civil defence units in combat zones. This protection should be the primary objective of Chapter VI, all other considerations being regarded as secondary. The dangers and difficulties of identifying military units and armed forces assigned to civil defence tasks are shown in the last sentence of paragraph 3 of Article 58. In joining in the consensus, the Austrian delegation is acting on the assumption that all the Parties to the present Protocol will show moderation in the application of Article 59 bis and of paragraph 3 of Article 58.

Article 65

The Austrian delegation welcomes the adoption of Article 65, which it regards as one of the basic articles of Protocol I. The provisions of this article guarantee to all those who do not enjoy a broader protection under the other articles the absolute minimum of rights that a human being should have in all circumstances in relation to whatever Party, including the Party of which such persons are nationals. Thus Article 65, as adopted, constitutes a body of rules of human rights which, while belonging within the context of the Universal Declaration of Human Rights (United Nations General Assembly resolution 217 A(III)) and the International Covenant on Civil and Political Rights (General Assembly resolution A/2200 A(XI)), establishes special rules applicable in cases of international armed conflict. That does not in any way mean, however, that the provisions of Article 65 could limit or undermine other more favourable provisions granting broader protection to the persons concerned under the aforementioned instruments or under other applicable rules of international law. The Austrian delegation wishes to emphasize this very important principle which, moreover, is explicitly recognized in paragraph 8 of the article.

New article to be added after Article 69

The Austrian delegation welcomes the adoption of the new article because it takes full account of the Austrian Government's grave concern about the particularly serious situation of journalists on a dangerous mission.

The Austrian Government was one of the supporters of a draft international convention on the protection of journalists, submitted in 1970 to the United Nations General Assembly for adoption. When the Diplomatic Conference on Humanitarian Law began its work the General Assembly deemed it more appropriate for the question of the protection of journalists to be dealt with in the context of humanitarian law, and accordingly invited our Conference to consider that problem also. Responding to the request of the United Nations, this Conference devoted itself to that task, and has now succeeded in adopting the article on measures of protection for journalists.

The Austrian delegation wishes to emphasize the importance of this article and congratulates the Conference on the results of its work on this subject.

BELGIUM

Original: FRENCH

Article 65 of draft Protocol I

The Belgian delegation welcomes the adoption of Article 65, which it helped to draft. In the absence of more generous provisions for the benefit of certain categories of protected persons, this article forms a set of provisions applicable in all circumstances, as stated in the first paragraph. It can also be applied against a Party, as clearly shown by the provision in paragraph 4 (h) which establishes the rule "non bis in idem" with respect to "the same Party", even where the Party is that of which the person is a national. The text adopted thus forms a set of rules on human rights which fits into the context of the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights and will, in turn, have an effect on the application of the Covenant, particularly its Article 4, paragraph 1.

CYPRUS

Original: ENGLISH

Article 65 of draft Protocol I

The delegation of Cyprus attaches the utmost significance to Article 65, in the drafting of which it played an active role. While rejoicing at its adoption by consensus here today, we would like to place on record the following: in the course of the fifty-eighth meeting of Committee III we explained (paragraph 5 of summary record CDDH/III/SR.58) the reasons why we had not pressed for the addition, in paragraph 2 of Article 65,

of a specific sub-paragraph prohibiting any and all acts of intimidation and harassment by agents of an Occupying Power, aiming at the displacement of individuals or groups of the civilian population from the occupied area. We explained then and we wish to reiterate before the plenary and for the record, that we did not insist on that amendment only because we were satisfied with the authoritative interpretation contained in the report of the Rapporteur in document CDDH/III/369 (p.7) that paragraph 2 was "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". We were glad that no dissenting opinion was voiced and that this interpretation was consequently accepted by the Committee without objection.

We note that no objection to this interpretation has been voiced in plenary either, which we take to mean that all delegations adhere to it.

EGYPT

Original: FRENCH

Article 59 bis of draft Protocol I

The Egyptian delegation does not oppose the consensus on Article 59 bis, concerning the participation of members of the armed forces and military units in civil defence activities.

The Egyptian delegation would like, however, to place on record the fact that it would have preferred such personnel and units not to participate in civil defence, because, in its view, participation by such personnel, carrying light weapons, is likely to endanger the protection of civilian civil defence personnel and of the civilian population.

The Egyptian delegation is also rather doubtful whether this article is consistent with Article 41, paragraph 2, under the terms of which members of the armed forces, other than medical personnel and chaplains, are combatants.

FRANCE

Original: FRENCH

Article 65 of draft Protocol I

So far as this article is concerned, the delegation of France would like to stress the importance attached by the French Government to the prohibition of any taking of hostages which is included therein.

This provision only serves to reaffirm a rule which represents a minimum of humanity and must be complied with at all times, in all places and in all circumstances, whatever the status and motives of those engaging in acts of violence.

The 1949 Geneva Conventions already prohibit such practices absolutely. The French Government can only protest against its being tolerated that, in a topical case which affects it directly, an insurrectionist movement that considers itself to be engaged in a conflict with States, should take hostages from among the civilian population. Furthermore, the French Government wishes to express its indignation that this movement should be able to apply the term "mercenaries" to French nationals, civilians, who were engaged only in duties of a civilian nature on the territory of a foreign State and who were abducted by that movement.

Although it accepts the definition of mercenaries given in draft Protocol I, the French Government cannot accept that the term should be applied to persons who in no way answer to that definition.

Some of the provisions included in Article 65 on fundamental guarantees call for the following comments by the French delegation:

1. Paragraph 4 (e)

In certain cases, French criminal procedure permits the trial of a person who has not been present in court. Such cases include procedure by default (par défaut) for less serious offences, and procedure in absentia (par contumace) for crimes.

It should be emphasized that remedies are always available when such decisions are taken, (since the accused may appeal or surrender himself to the law) and the case can then be tried again in the presence of the person convicted.

In any event, no rule of French law permits a person to be tried in his absence when he expresses a wish to be tried in his presence (with provision for both sides to be heard).

2. Paragraph 4 (g)

The French code of criminal procedure affords a person charged with an offence - whether it be a simple misdemeanour, a less serious offence or a crime - the opportunity of having witnesses questioned or summoned to appear before the court. This applies both to witnesses for the prosecution and to witnesses for the defence.

3. Paragraph 4 (h)

The rule of "non bis in idem" is enshrined in French legislation; it is applied, and is hence in conformity with paragraph 4 (h).

It should be pointed out that because of the uniform nature of the legal rules in force in France, the proceedings instituted or the sentences passed for one and the same offence is invariably subject to the same rules as those to which a court of first instance may have been subject.

GERMAN DEMOCRATIC REPUBLIC Original: ENGLISH

Article 65 of draft Protocol I

The German Democratic Republic delegation welcomes the fact that some of the fundamental guarantees of the Covenant on Civil and Political Rights have been incorporated in this Protocol. In enumerating these fundamental guarantees, the Protocol underlines the inhuman and criminal nature of aggressive wars which - as we learned in the past - are directed towards or connected with the annihilation of fundamental freedoms and human rights and quite often even question not only the political independence but the very existence of a whole people.

We therefore hold the opinion that it is of special importance when, in connexion with the enumeration of fundamental guarantees, Article 65 not only reaffirms the penal responsibility for war crimes and crimes against humanity but requests that 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. Thus, paragraph 7 of Article 65 reaffirms the principle embodied in Article 6 of the Statute of the International Military Tribunal of Nürnberg established for the prosecution and punishment of the major war criminals of the Second World War.

GERMANY, FEDERAL REPUBLIC OF Original: ENGLISH

Articles 59 bis and 65 of draft Protocol IArticle 59 bis

The Federal Republic of Germany welcomes the adoption of a special chapter for the protection of civil defence functions and for the personnel assigned and devoted to it. Articles 54 to 59 of Protocol I contain a significant contribution to the

development of humanitarian protection for the activities of organizations of a non-military character mentioned in Article 63, paragraph 2 of the fourth Geneva Convention of 1949.

But the Federal Republic of Germany has serious doubts whether the provisions of Article 59 bis fit well into the general scheme of protection of civil defence as provided for in Articles 54 to 59. It stated its position during the debates of Committee II. Without changing its general attitude with respect to the question of military units of civil defence, it has joined the consensus on Article 59 bis on the basis of the understandings explained in its statement given at the ninety-seventh meeting of Committee II on 13 May 1977 (CDDH/II/SR.97, paras. 68 and 69).

Article 65

The understanding of the Federal Republic of Germany as to Article 65, para. 4 (e) is the following: If there are penal proceedings before two or more instances, in which the last instance has as its only purpose to review the applicable law and not to review the fact-finding of the previous instance, then it is for this court of review to decide whether an accused has to appear in person at the hearing before the court of review or not. In such a case, the court of review cannot, of course, impose a higher penalty; so that all rights of the accused as provided for in Article 65, paragraph 4 (e) are and remain granted.

As to Article 65, para. 7 (a), it is the understanding of the Federal Republic of Germany that the phrase "prosecution and trial in accordance with the applicable rules of international law" means that the national law applicable in such cases must strictly conform to the corresponding rules of international law.

GHANA

Original: ENGLISH

Article 59 bis of draft Protocol I

My delegation gave its full support to the adoption of Article 59 bis, putting humanitarian considerations above all others. However, we wish to submit that the stipulations mentioned in paragraphs (a) and (b), which require that military personnel assigned to civil defence units will only be protected if their assignments are, among other things, (i) of a permanent nature, and (ii) that they do not perform any other military duties during the conflict, may create problems for developing countries, including mine.

We are aware that, in many countries civil defence duties are performed exclusively by civilians and we do not doubt that this, to a large extent, is the ideal. However, most developing countries have written into their national laws provisions for the employment of military personnel for the performance of civil defence duties, and this may involve whole units or parts thereof. The reason is, basically, non-availability of sufficient numbers of trained civilians for such assignments. Depending upon the particular circumstances of the situation and the type of armed conflict, these duties may be temporary or permanent. In the event of protracted hostilities it may not be feasible for parties to immobilize their trained soldiers during the whole of the conflict by virtue of their attachment to civil defence organizations. It should be possible to withdraw them to engage in the conflict on the battlefield and, during the latter period, when they assume combatant status, the protection may cease; but in conflicts such as envisaged in non-international situations and wars of liberation, it should be possible for them to engage in battle as required. We appreciate the difficulties of assuming these statuses as and when necessary, thereby rendering recognition at material times dependent upon the individual involved in the conflict. We hope that this consideration will generate more discussion in future reviews. Meanwhile, we urge that so long as this category of person is performing civil defence duties and adheres to the provisions of paragraphs (c), (d), (e) and (f) of the article, he should be respected and protected.

HOLY SEE

Original: FRENCH

Article 62 of draft Protocol I

The delegation of the Holy See welcomes the spirit reflected in the drafting and adoption by consensus of this article, which seeks to ensure the provision of supplies for a hungry population.

We regret only that the sponsors of the text did not see fit to stress the importance of speed in requests and negotiations preceding the initiation of relief actions.

HUNGARY

Original: FRENCH

Article 48 bis of draft Protocol I

The Hungarian delegation, as one of the original sponsors, welcomes the adoption of Article 48 bis by consensus. The importance of protecting the natural environment is generally recognized, not only in time of peace but also in periods of armed conflict. This protection is the subject of a number of international instruments. A balanced natural environment being one of the conditions essential to the survival and health of the population, a provision to this effect in Additional Protocol I was required. The Hungarian delegation would have preferred a stricter and more detailed rule but is nevertheless glad of the results achieved, since Article 48 bis, as interpreted by Hungary, clearly prohibits all forms of ecological

warfare. Lastly, the delegation expresses its sincere thanks to all the representatives who helped to draft the text now adopted.

INDONESIA

Original: ENGLISH

Articles 59 bis and 72 of draft Protocol I

Article 59 bis

For many countries there is a need to assign military units to their civil defence organizations when international armed conflicts occur. But such an assignment will always be subject to the rapid changes of situation during that conflict. It is the view of my delegation that it is not realistic to state that the assignment of military units to a civil defence organization will have to last for the entire duration of the armed conflict. With this in mind we have joined the consensus, but if this article had been put to the vote, my delegation would have abstained.

Article 72

My delegation abstained in the vote on amendment CDDH/419 and abstained too on paragraph 3 of Article 72, because as a developing country we do not as yet have the means, the personnel or the matériel to comply with the reporting mentioned in paragraph 3.

However, reports have already been submitted periodically by the Indonesian national Red Cross to the International Committee of the Red Cross.

ISRAEL

Original: ENGLISH

Articles 59 bis and 70 bis of draft Protocol I

Article 59 bis

We wish to refer to our statement made as an explanation of vote on Article 54. Since Article 54 is referred to in Article 59 bis, we would like to declare that Israel was a party to the consensus on Article 59 bis with the understanding that Article 54 is to be interpreted in accordance with the passage of the report of the Working Group quoted in our statement on Article 54.

Article 70 bis

With regard to Article 70 bis of draft Additional Protocol I, the delegation of Israel wishes to declare:

The National Relief Society of Israel is the Red Shield of David Society, founded in 1930 during the Mandate Administration in Palestine. The Red Shield of David Law, enacted by the Israel Parliament in 1950, established the Society as the sole national Society whose functions include the functions assigned to national societies by the Conventions and the Protocol.

The Red Shield of David Society is a non-political, non-profit-making benevolent society which offers first aid and relief services to all in Israel as well as emergency disaster aid to Red Cross-affiliated societies overseas. It responds regularly to appeals addressed to it by the ICRC and the League of Red Cross Societies. Since, for reasons deeply rooted in religious, historical and national feeling, it does not use the Red Cross symbol or existing alternatives, the Society has not yet been officially recognized by the ICRC or the League of Red Cross Societies. We hope that the situation will be rectified and that the Red Shield of David will be granted recognition equivalent to that accorded to the other symbols. Until that time, the Red Shield of David Society will continue to fulfil the functions and obligations of the equivalent national societies.

JAPAN

Original: ENGLISH

Article 65 of draft Protocol I

With regard to paragraph 7 of Article 65, adopted at the forty-third plenary meeting of the Conference, the delegation of Japan wishes to note that the provisions laid down in the paragraph in no way obligate any State to act in a way that might constitute a derogation from the general principle nulla poena sine lege and due process of law. Therefore, if and when any person accused of the crimes referred to in paragraph 7 were to be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law, the legal proceedings concerned would be subject to the relevant criminal law provisions with the guarantee of due process.

NETHERLANDS

Original: ENGLISH

Article 65 of draft Protocol I

To the arguments that have so rightly been invoked in the statement of the Belgian delegation, the Netherlands delegation would like to add that the applicability of Article 65 to a Party's own nationals would moreover follow from the reference to crimes against humanity in paragraph 7 of the present article, since such crimes can only be interpreted as having been committed by and against nationals of the prosecuting Party.

ROMANIA

Original: FRENCH

Article 65 of draft Protocol I

In accordance with present-day international law, the occupation of a foreign territory by armed force constitutes an act of particular gravity. Consequently, such situations should have a wholly provisional character and should not give special rights to the Occupying Power.

In the view of the Romanian delegation, Article 65, which relates to the fundamental guarantees that should be given to civilian persons temporarily in the power of a Party to the conflict, bears specially on the protection the Occupying Power is obliged to give to civilian persons in the territories it has occupied, since the aim of this article is to limit the rights of the occupants in territories that are not theirs. We are, therefore, in full agreement with the regulations contained in this article.

The important point, which is covered by Article 65, is that the Occupying Power should treat the civilian population with the utmost consideration, respecting the life, health, liberty, honour, customs and all other fundamental values of the human person.

In that connexion, we wish likewise to stress the very special importance we attach to the protection of those categories of persons at the greatest disadvantage in periods of armed conflict, namely, women and children.

SUDAN

Original: ARABIC

Articles 47 bis and 72 of draft Protocol I

Article 47 bis

My country's delegation is very glad that this Conference has adopted by consensus Article 47 bis after approving an amendment to the effect that places of worship should be added to historical sites and works of art to constitute the cultural or spiritual heritage of peoples.

My country views the Muslim religion as a beacon that guides us to its teachings and tolerant tenets. The Muslim religion is the religion of tolerance and freedom, it imposes on all Muslims belief in all messengers, prophets and divinely-inspired holy books. Those who do not believe in Abraham,

Isaac, Jacob, Solomon, David, Moses and Jesus, peace be upon them, who preceded our noble Prophet Mohammed, Allah's blessings and peace be upon him, are not considered Moslems.

My country's constitution stipulates obedience to the teachings of Islam, stipulates as well that the Christian religion is the religion of a large section of our countrymen and that the noble beliefs of others should be respected. Hence our places of worship, whether mosques for Moslems, churches for Christians of all sects, or synagogues for Jews, are all sacred to us and their respect an imperative for all; for each one's holy rites are observed in complete freedom within these holy places.

Therefore, I express once more my delegation's satisfaction at the Conference's adoption of the amendment, as well as of the article as a whole, after its amendment, by consensus.

Article 72

My country's delegation voted against maintaining paragraph 3 of Article 72 for several reasons:

- (1) It constitutes some sort of unacceptable control over States.
- (2) Several States lack the necessary material, human or technical resources for publishing and following up the despatch of the required reports at the appointed times.
- (3) Any country that does not wish to take measures to fulfil its obligations involving the publication of the Conventions and Protocol, or which is, for some reason or other, unable to do so, will not find in the text of this paragraph any incentive for undertaking such a task.
- (4) Several States have failed to promulgate any laws designed to impose penalties for grave breaches of the Conventions despite the fact that they are High Contracting Parties. Even those States that have promulgated such laws have in their legislations provisions contrary to those of the Conventions and no authority can or could ever request these States to amend their laws in order to be fully consistent with the provisions of the Conventions, inasmuch as this involves a question of sovereignty in respect of these States. What can be achieved in this respect does not go beyond criticism expressed by jurists of international law in their studies and works.

- (5) How would it be possible to reply to the following question asked by the distinguished representative of Nigeria: "What could we do to the States who fail to abide by their obligations involving the publication of the Conventions and Protocols, whether intentionally or through the mere fact of being unable to do so?"
- (6) It should be easy to follow up such activities through the national Committees of the Red Cross or through the delivery of questionnaires to all the States which are parties to the Conventions and Protocols, as happened previously.

Hence my country's delegation voted against maintaining paragraph 3 and is glad that the Conference has deleted it, since it failed to gain a two-thirds - indeed a simple - majority.

SWEDEN

Original: ENGLISH

Article 59 bis of draft Protocol I.

The question of whether civil defence personnel should be entitled to carry small arms or not is of vital importance. The Swedish delegation has stated many times during the Conference that civil defence personnel, whether civilian or military, should not be armed. Only if this is so can civil defence protection be reasonably effective and gain all possible credibility. In the light of these views, we have with some hesitation but in a spirit of compromise joined in the consensus on paragraph 3 of Article 58 and Article 59 bis. We feel particular concern about the fact that civil defence personnel will have the right to carry light individual weapons even in areas where land fighting is taking place or is likely to take place. In this respect we share the views of principle underlying that opinion put on record by the United Kingdom representative at the ninety-sixth meeting of Committee II (CDDH/II/SR.96).

We are aware of the fact that the provisions in paragraph 3 of Article 58 represent a serious attempt to provide the best possible protection for civil defence personnel by distinguishing them from combatants. We seriously hope that the application of these provisions will be as reasonable as possible so as not to injure the whole system of special protection for civil defence.

As to the protection of members of the armed forces and military units assigned to civil defence organizations, we should like to place on record our view that Article 59 bis assumes a restrictive application and a great degree of trust between the Parties to the conflict.

Finally, it has to be strongly emphasized that every situation which does involve an abuse of the provisions in Articles 53 and 59 bis might entail serious difficulties in maintaining the respect and protection of the civilian civil defence personnel in the performance of their tasks.

SWITZERLAND

Original: FRENCH

Article 59 bis of draft Protocol I

The Swiss delegation would have preferred Article 59 bis to include a provision to the effect that the personnel of military units assigned to civil defence should not be regarded as members of the armed forces within the meaning of Article 41, paragraph 2, of draft Protocol I. This would have made it possible to treat them on the same footing as permanent medical military personnel, i.e. not regard them as prisoners of war. Indeed, civil defence activities deserve to be given the same if not better protection than medical assistance, for it is more humane to prevent wounds or even deaths among the civilian population than to look after the wounded and sick. In all circumstances, prevention is better than cure. However, despite the extremely complicated solution chosen in paragraph 2 for the personnel of military units, assigned to civil defence, we have joined in the consensus in a spirit of compromise.

According to paragraph 2 of Article 59 bis, such personnel will be made prisoners of war. In practice, this means that they would have to be transferred to a prisoner-of-war camp and that an enquiry would have to be held to ascertain who was prepared to volunteer to resume civil defence tasks. Lastly, it would be necessary to send such volunteers back to places where they could continue their civil defence activities.

In a desire to simplify the matter, the Swiss delegation understands the provision in paragraph 2 to mean that the adverse Party may authorize volunteers from among the personnel described in paragraph 2 to continue their civil defence activities without interruption.

UNION OF SOVIET
SOCIALIST REPUBLICS

Original: RUSSIAN

Article 59 bis of draft Protocol I

The Conference has acted quite logically in giving protection to all military civil defence personnel. In our view, Article 59 bis makes the whole chapter on civil defence complete. It is a compromise text that has been carefully drafted and balanced.

At the same time, the USSR delegation considers that in conditions of actual warfare, it will be difficult to comply with the provisions of paragraph 1 (b) of the article, particularly when conflicts last a considerable time and affect large areas and when the number of military personnel engaged in civil defence work is relatively large.

All in all, we feel that the articles drafted cover the tasks of civil defence quite fully and offer a good formulation of the general principles governing the protection of civil defence organizations and personnel during conflicts in different situations.

We thus see the section on civil defence as a single whole, a well-drafted and balanced compromise. It does not run counter to the interests of the different countries and can serve as a good legal basis for civil defence activities.

The legal rules thus drafted, which are based on humanitarian principles concerning the protection of the civilian population, are as a whole realistic. We hope that they will remain viable for a long period of time.

Article 65 of draft Protocol I

The USSR delegation considers that Article 65 represents a certain step forward in the development of international humanitarian law since it broadens the categories of persons to whom international protection is to be extended, even if to a limited extent.

Important among the provisions of Article 65 are those concerning the humane treatment of women and children, and also those prohibiting certain activities, whether committed by civilian or by military agents.

As the Soviet delegation understands Article 65, its effects do not extend to war criminals and spies. National legislation should apply to this category of persons, and they should not enjoy international protection.

We should like to recall in this connexion the reservation which the USSR made to Article 85 of the 1949 Geneva Convention on the treatment of prisoners of war.

The reservation says, in particular, that persons "who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nürnberg Trial, for war crimes and crimes against humanity ... must be subject to the conditions obtaining in the country in question for those who undergo their punishment".

The position thus taken by the USSR remains unchanged.

UNITED KINGDOM OF GREAT BRITAIN Original: ENGLISH
AND NORTHERN IRELAND

Article 59 bis of draft Protocol I

My delegation made its views known on this article in Committee II and they are recorded in summary record CDDH/II/SR.97, para. 66. We wish to reaffirm those views today.

YUGOSLAVIA

Original: FRENCH

Article 59 bis of draft Protocol I

During the discussion in Committee II on the contents of Article 59 bis, paragraph 2, the Yugoslav delegation suggested the deletion of the second sentence of that paragraph. However, when the article, as it stands now, was adopted by consensus, the Yugoslav delegation accepted the majority view.

Nevertheless, I take this opportunity to point out that we interpret this second sentence in paragraph 2 in the context of the other provisions of the same article, and of Protocol I in general, that is: that civil defence personnel should never be placed at the service of the Occupying Power, and that they are accordingly, in any case, protected against the danger of being used contrary to the interests of the civilian population.

SUMMARY RECORD OF THE FORTY-FOURTH PLENARY MEETING

held on Monday, 30 May 1977, at 10.10 a.m.

President: Mr. Pierre GRABER Federal Councillor,
Head of the Federal
Political Department of
the Swiss Confederation

In the absence of the President, Mr. J. de Breucker (Belgium),
Vice-President, took the Chair.

ADOPTION OF THE ARTICLES OF DRAFT PROTOCOL I (CDDH/401)
(continued)

Article 74 - Repression of breaches of this Protocol (CDDH/418)

1. The PRESIDENT drew attention to a proposal by the Philippines to add a new sub-paragraph (g) to paragraph 3 of Article 74 (CDDH/418).

2. Mr. GLORIA (Philippines), introducing the proposal, said that its purpose was to reaffirm and restore faith in the principles of humanitarian law and to give new force to The Hague Declaration of 1899 concerning the Prohibition of Using Projectiles the Sole Object of which is the Diffusion of Asphyxiating or Deleterious Gases and the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare by providing some recourse in the event of their violation. Most of the countries represented at the Conference had ratified the Declaration and Protocol. Furthermore, the Conference had recently adopted Article 33 of draft Protocol I, laying down basic rules on the methods and means of warfare, which in paragraph 2 prohibited the use of weapons, projectiles and materials and methods of a nature to cause superfluous injury or unnecessary suffering. It was thus difficult to understand the attitude of those delegations which at earlier stages had resolutely opposed the Philippine proposal.

3. The Conference's main objective had always been to ensure that, if war could not be avoided, the suffering it caused should be reduced to the minimum. All intolerable forms of cruelty had frequently been denounced. The Ad Hoc Committee on

* Incorporating document CDDH/SR.44/Add.1

Conventional Weapons, however, had not adopted any of the many proposals aimed at prohibiting or restricting certain weapons, and the only provisions approved on the matter were those in Article 33. The Philippine proposal was therefore designed to fill that gap. Paragraph 3 of Article 74, made various acts against the civilian population grave breaches of Protocol I, while paragraph 4 did the same for such acts as attacks on historic monuments. Surely, by the same token, some protection was needed for the fighting soldier too?

4. He appealed to all who opposed the proposal to adopt a realistic and objective attitude and to be guided by the dictates of justice and conscience. Even if the delegations concerned were to concede that the use of the weapons prohibited under The Hague Declaration of 1899 and the Geneva Protocol of 1925 constituted a grave breach, their countries would still have at their disposal stockpiles of more sophisticated and lethal weapons, which were not prohibited or restricted under any international agreement.

5. If the Conference sincerely wished to reaffirm and develop humanitarian law, political considerations should be set aside in favour of an impartial rule, for true humanitarianism did not countenance double standards.

6. Mr. de ICAZA (Mexico) said that in Committee I his delegation had supported the ICRC draft on prohibition of the use of certain weapons. It had also agreed, for the sake of arriving at a consensus, that no reference should be made to a prohibition on methods or means of warfare, one of the reasons being that such methods or means had not been specified. The Philippine amendment (CDDH/418) now filled that lacuna, however, and his delegation would therefore support it.

7. Mr. ALDRICH (United States of America) regretted that the Philippine delegation had seen fit to reintroduce an amendment which it had withdrawn in Committee I. At the present stage of international legal development, the criminal law was not the proper vehicle for dealing with the problem of weapons. Grave breaches were meant to be the most serious type of crime; Parties had an obligation to punish or extradite those guilty of them. Such crimes should therefore be clearly specified, so that a soldier would know if he was about to commit an illegal act for which he could be punished. The amendment, however, was vague and imprecise. What standard would be applied, for example, in deciding whether a bullet expanded or flattened "easily" in the human body? Again, with regard to the reference to "asphyxiating, poisonous or other gases", opinions differed as

to whether tear gas was covered by the Geneva Protocol of 1925; in his delegation's view, its use should not constitute a grave breach of Protocol I. The amendment would also make it unlawful to use certain gases in retaliation, whereas under Protocol I only first use of such gases was unlawful. It would also punish those who used the weapons, namely, the soldiers, rather than those who made the decision as to their use, namely, Governments.

8. Draft Protocol I had been the subject of difficult negotiations, which had finally resulted in an acceptable compromise. It was thus particularly unfortunate that the Conference was now being obliged to reopen the matter. His delegation was unable to support the amendment and considered that its adoption by the Conference would seriously prejudice the acceptance of Protocol I as a whole.

9. Miss POMETTA (Switzerland) said that her delegation fully supported the Philippine amendment. It would be a step forward to state expressly that any violation of The Hague Declaration of 1899 and the Geneva Protocol of 1925 would constitute a grave breach. The rules laid down in those two instruments were undisputed and indisputable, and the amendment would have a deterrent effect on any State tempted to violate them, by exposing the members of its armed forces to the penalties applicable under the Geneva Conventions.

10. Mr. GRIBANOV (Union of Soviet Socialist Republics) said that, since the matters dealt with in the proposal were already covered in other international instruments, and particularly in the Geneva Protocol of 1925, his delegation considered that it would be unwise to refer to them again in Protocol I. Also, the wording of the proposal was ambiguous and could give rise to differing interpretations. The result might be that innocent people would be prosecuted.

11. Article 74, on the other hand, represented a balanced compromise which had been arrived at after lengthy discussion and had been adopted by consensus. Any attempt to amplify its provisions might well destroy that balance. His delegation was therefore unable to support the amendment and would appeal to the delegation of the Philippines to withdraw it.

12. Mr. FELBER (German Democratic Republic) said that, in his delegation's view, the amendment lacked clarity and precision, and would destroy the balanced compromise which had been arrived at after lengthy negotiations in Committee I. It was therefore unable to support the amendment.

13. Mr. HUSSAIN (Pakistan) said that his delegation continued to support the Philippine amendment for the reasons it had stated in Committee I.

14. It had been said that the word "easily" was not sufficiently precise. But one might also ask what exactly was to be understood by "indiscriminate" and "non-defended localities" in paragraphs 3 (b) and (d) of Article 74. Words could be understood or misunderstood at will; if the intention was to misunderstand them, any legal provision, no matter how sacrosanct, could be subverted.

15. The time had come for the Conference to decide once and for all whether it wished to save mankind from the cruelties inflicted in time of war. As stated in the explanatory note to the amendment (CDDH/418), the aim was simply to reaffirm The Hague Declaration of 1899 and the Geneva Protocol of 1925. It was therefore regrettable that those who opposed the amendment should claim to be acting in the name of principle. If the amendment were not included in the Protocol, the Conference would have failed to take a decisive step at a turning point in the affairs of mankind.

16. Mgr. LUONI (Holy See) said that his delegation was in favour of any proposal to alleviate the inhumanities of war and therefore supported the Philippine amendment. Certain rules deserved to be repeated; repetition was a good method of teaching.

17. Mr. DRAPER (United Kingdom) said that, while the motives behind the Philippine proposal were praiseworthy, it gave rise to serious objections. In the first place, the explanatory note to the proposal was misleading in that it was not an accurate statement either of existing law or of the relationship between the proposal and that law. A significant number of the States party to the Geneva Protocol of 1925 had entered a reservation thereto; for those States the Protocol contained no absolute prohibition on the use of the weapons mentioned in it, but rather a prohibition on first use only. Nor was it convincing to state that the Geneva Protocol of 1925 represented no more than the existing customary law of war; ever since the adoption of resolution XXVIII by the XXth International Conference of the Red Cross (Vienna 1965), States had been urged in United Nations resolutions to accede to that Protocol in accordance with its express terms. Such a situation was entirely inconsistent with the contention made in debate that the Geneva Protocol of 1925 reflected existing customary international law. That contention could not be supported.

18. Another equally important objection to the proposal was that the uses envisaged would constitute grave breaches and would therefore be treated as the most serious form of war crime. Thus, a heavy burden of penal responsibility would fall not on Governments but on the soldier, who would be subject to the most serious international penal process that could be brought against him and possibly to the death penalty. Humanitarian law, however, encompassed justice to the individual and its cause would not be advanced if the soldier were placed in such a position. Consequently, the proposal hardly seemed to be a fitting addition to paragraph 3 of Article 74.

19. If the proposal were thrust into the carefully constructed framework of rules that had been elaborated at the third session of the Conference, it could not but disturb one of the best pieces of drafting in the Protocol. He therefore appealed to the Philippine representative to display the same spirit of generosity as in Committee I and withdraw his proposal.

20. Mr. BLOEMBERGEN (Netherlands) said that in most criminal law systems the primary concern was that those guilty of a crime should be punished and that the innocent should not. Although breaches of The Hague Declaration of 1899 or the Geneva Protocol of 1925 could perhaps be defined under the Philippine proposal, the perpetrator of such breaches was not identified in any way. It could be the soldier who carried out the act, the Government issuing the order or the State as a whole. Innocent people might be prosecuted and punished, and since the breach in question was a grave one they might be prosecuted and punished anywhere in the world. It was the duty of the States represented at the Conference to do everything in their power to protect their citizens, when abroad, from being prosecuted and punished for a crime which they had not committed. In his delegation's view such a risk was implicit in the Philippine amendment and it would therefore urge the sponsor not to press it.

21. Mr. SADI (Jordan) said that, as a supporter of the principle behind the Philippine amendment, he felt that it would be more generally acceptable if it were amended to apply only to the first user of weapons prohibited by international conventions.

22. Mrs. SUDIRDJO (Indonesia) regretted that her delegation was unable to support the present text of the Philippine amendment. It would have preferred the first draft submitted in Committee I. Its objection was to the replacement of the words "dum-dum bullets" by "bullets which expand or flatten easily in the human body". If the amendment was put to the vote, her delegation would abstain.

23. Mr. AL-FALLOUJI (Iraq) said that he had already made a statement on the Philippine amendment in Committee I and would not repeat it. Some of the arguments put forward against the amendment in the plenary, however, were completely contradictory. Some delegations had said that it was unnecessary because such a provision already existed in The Hague Declaration of 1899 and the Geneva Protocol of 1925. Other delegations had stated that they could not support it because it constituted a change in the existing law.

24. In his view, the amendment represented a new step in international law. The use of dum-dum bullets and gas had been prohibited for a very long time but the user was not liable to criminal proceedings. It was high time that the use of such appalling weapons was made a grave offence.

25. As Article 74 stood without the Philippine amendment, a person who, for example, intentionally wounded a prisoner of war committed a grave crime but the user of the weapons referred to in the Philippine amendment did not. That was discriminatory and showed that the law was faulty. He had got the impression from the debate that States which had the weapons in question were not in favour of banning them while those which did not were.

26. With regard to the argument that the text was not good because it did not define the user, the same could be said of the whole of Article 74.

27. Mr. ABDINE (Syrian Arab Republic) said that his delegation fully supported the Philippine proposal, which was a perfectly reasonable text. Article 74 included cases which were much less grave than those referred to in the amendment. It was not realistic to say that, for example, an unjustified delay in the repatriation of prisoners of war was a grave breach, but that causing death from bullet wounds was not.

28. The problem certainly came within the purview of the Conference, which should recognize the logical consequences of its adoption of Article 33. Use of the weapons referred to in the Philippine amendment was a breach of Article 33. It was a grave breach, and the fact should be restated in Article 74.

29. The Philippine amendment restated the existing law but with a slight difference, which ought to remove the objections of those States which had made reservations to The Hague Declaration of 1899 and the Geneva Protocol of 1925.

30. Mr. DI BERNARDO (Italy) said that at the third session of the Conference his delegation had expressed great interest in the idea of making the use of weapons already prohibited by international law a grave breach. It therefore felt great sympathy for the Philippine amendment. However, on reconsidering the problem, it had become convinced that the inclusion of the amendment in Article 74 was not really desirable or useful. It was not desirable because it would reopen the whole debate on Article 74, which was the outcome of very lengthy and complicated negotiations, and that might upset the delicate balance which had been achieved. It would not be useful because it dealt with means and methods of warfare which were already prohibited by the existing law. Moreover, the examples given were not fully acceptable; it was on other weapons that action was required. That, however, was a matter that lay outside the competence of the Conference.

31. The amendment raised other difficult problems. The prohibition of certain weapons in earlier international treaties was not always absolute, since it sometimes applied to their first use only. Would it become absolute in Protocol I if the Philippine amendment were adopted? Another point was that the prohibitions referred to in the amendment were contained in international treaties, which bound only those States that were parties to them. Would a State which became a Party to Protocol I be bound by the prohibition contained in the Philippine amendment even if it was not a party to the treaty which prohibited a specified weapon? If that was not the case, Protocol I would impose different obligations on different States, despite the fact that they were all Contracting Parties to the Protocol.

32. For all those reasons, his delegation could not support the Philippine amendment and would abstain if it were put to the vote.

33. Mr. AL-HADDAD (Yemen) said that his delegation supported the Philippine amendment. It was in conformity with The Hague Declaration of 1899 and the Geneva Protocol of 1925 and there could be no objection to including it in Article 74. On the contrary, it was essential and would strengthen the Protocol.

34. Mr. SAARIO (Finland) said that his Government attached the greatest importance to the prohibition of dum-dum bullets in The Hague Declaration of 1899 and to the prohibition of chemical and bacteriological warfare in the Geneva Protocol of 1925. His delegation was very much impressed by the laudable motives which had led the Philippine delegation to propose an amendment to Article 74 aimed at reaffirming and strengthening those prohibitions.

It was therefore with great regret that it found itself unable to support the amendment. That was so for a number of reasons. Firstly, it held the general view that articles which had been adopted by consensus at committee level should not be reconsidered by the plenary unless there were particularly strong reasons for making changes which met with general support. Secondly, Article 74 was the outcome of lengthy and difficult negotiations and purported to establish a careful balance between different points of view. His delegation was not happy about certain aspects of Article 74, or rather about what had been left out of it, but it had joined in the consensus and was ready to accept the consequences of that decision. Thirdly, the text of the Philippine amendment had certain shortcomings. It could be interpreted as establishing that the only categories of weapons prohibited by existing international conventions were dum-dum bullets and chemical and bacteriological weapons. His delegation was not willing to agree that no other weapons might be considered as prohibited by treaty law. One of the questions on the agenda of the Conference had been the question of prohibiting or restricting the use of certain conventional weapons. If in the near future new rules concerning such weapons were adopted, the proposed addition to Article 74 would appear to be the reverse of progressive.

35. While from that point of view the amendment seemed to be too restrictive, it was also too broad in another sense. It appeared to define the use of the weapons in question as a grave breach under all circumstances. However, as could be seen, for instance, from the numerous declarations of reciprocity attached to the Geneva Protocol of 1925, there might be circumstances in which Governments did not consider themselves bound to observe a particular prohibition. In such cases, it was not possible to define the use of the weapon as a grave breach, bearing in mind also all the serious consequences that would follow from such a definition.

36. In view of those and other similar considerations, he appealed to the Philippine delegation not to press its amendment to a vote.

37. Mr. ABADA (Algeria) said that when in Committee I the Philippine delegation had decided not to press for a vote on its amendment at that stage, he had hoped that the respite would enable everyone to understand the issues better, and more particularly in relation to Article 86 bis, so that a generally acceptable solution could be found. It might be that amendment CDDH/418 was misplaced in Article 74, but his delegation thought the substance of the proposal had merit. It was a simple reaffirmation of the principles of positive humanitarian law and deserved the Conference's support.

38. Miss AL-JOUA'N (Kuwait) said that the comments made by the delegations opposed to the Philippine amendment were contradictory. Her delegation agreed with the statements made by the representatives of Iraq, Jordan and the Syrian Arab Republic and supported the Philippine amendment.
39. The PRESIDENT said that if there were no further comments he would put the Philippine amendment to the vote.
40. Mr. SADI (Jordan) proposed that in the first line of the amendment the word "first" should be inserted before the word "use".
41. Mr. URQUIOLA (Philippines) accepted that amendment.
42. Mr. DOUMBIA (Mali) said that the phrase "pour la première fois" in French was not clear.
43. The PRESIDENT suggested the word "premier emploi".
44. Mr. RABARY-NDRANO (Madagascar) thought that the wording should be "en premier lieu".
45. Mrs. HERRAN (Colombia) said that the amendment was not clear. Did prohibition of first use of the weapons in question mean that second use was permitted?
46. Mr. de ICAZA (Mexico) said that the sub-amendment changed the sense of the original amendment. He proposed that it should be voted on separately.
47. Mr. SADI (Jordan) explained that his sub-amendment simply meant that a country was not to be the first to use the prohibited weapons. If those weapons were nevertheless used, in violation of the Protocol, the country on which they were used could retaliate with similar weapons. The sub-amendment was concerned with a real possibility which had troubled a number of delegations, and he had submitted it in order to make the original amendment more widely acceptable.
48. Mr. PAOLINI (France) said that the problem raised by the sub-amendment did not apply solely to the French text. What was really meant was "first use during an armed conflict" ("utiliser en premier lieu au cours d'un conflit armé").
49. The PRESIDENT asked the representative of Jordan if he accepted the French representative's interpretation of his sub-amendment.

50. Mr. SADI (Jordan) said that he had made his meaning clear. Any drafting changes should be referred to the Drafting Committee.

51. Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, said that there was no point in referring matters to the Drafting Committee unless its Chairman understood what was required. He failed to understand the present problem.

52. The PRESIDENT suggested a short suspension of the meeting.

It was so agreed.

The meeting was suspended at 11.30 a.m. and resumed at 11.40 a.m.

53. Mr. URQUIOLA (Philippines) withdrew his acceptance of the Jordanian sub-amendment.

54. Mr. SADI (Jordan) withdrew his sub-amendment to the Philippine amendment.

55. The PRESIDENT invited representatives to vote on the amendment to Article 7⁴ proposed by the Philippines (CDDH/418).

At the request of the representative of the Philippines, the vote was taken by roll-call.

Afghanistan, having been drawn by lot by the President, was called upon to vote first.

In favour: Afghanistan, Algeria, Saudi Arabia, Austria, Colombia, Ivory Coast, Egypt, Ecuador, Ghana, Honduras, Iraq, Socialist People's Libyan Arab Jamahiriya, Jordan, Kenya, Kuwait, Lebanon, Madagascar, Mali, Malta, Mexico, Mozambique, Nicaragua, Oman, Pakistan, Panama, Peru, Philippines, Qatar, Syrian Arab Republic, United Republic of Tanzania, Holy See, Senegal, Sudan, Sri Lanka, Switzerland, Tunisia, Uruguay, Venezuela, Yemen, Democratic Yemen, Yugoslavia.

Against: Federal Republic of Germany, Australia, Belgium, Bulgaria, Canada, Denmark, United States of America, Finland, France, Hungary, India, Luxembourg, Monaco, Mongolia, New Zealand, Netherlands, Poland, Portugal, German Democratic Republic, Byelorussian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic, United Kingdom of Great Britain and Northern Ireland, Czechoslovakia, Union of Soviet Socialist Republics, Zaire.

Abstaining: Brazil, United Republic of Cameroon, Cyprus, Cuba, Spain, Greece, Guatemala, Indonesia, Iran, Ireland, Israel, Italy, Japan, Morocco, Mauritania, Nigeria, Norway, Uganda, Republic of Korea, Socialist Republic of Viet Nam, Romania, Swaziland, Sweden, Thailand, Turkey.

The result of the vote was 41 in favour, 25 against, with 25 abstentions.

Having failed to obtain the necessary two-thirds majority, the Philippine amendment to Article 74 (CDDH/418) was rejected.

Explanations of vote

56. The PRESIDENT reminded representatives that explanations of vote could be submitted in writing, for attachment to the summary record.

57. Mr. MBAYA (United Republic of Cameroon) said it was important that humanitarian aims should not be pursued to the detriment of national defence. His delegation would have supported the Philippine amendment if it had incorporated the Jordanian sub-amendment, since it would then have safeguarded the absolute right of every State to organize its national defence as effectively as possible. In the circumstances, his delegation had had no alternative but to abstain.

58. Mr. SADI (Jordan) said that the result of the vote explained why he had proposed his amendment.

59. Mr. NUNÉZ (Cuba) said that he had abstained in the vote because although the amendment was in essence a reaffirmation and development of humanitarian law, it was capable of various interpretations. Among all the multilateral humanitarian instruments concerned with control of armaments, his country attached particular importance to the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972. His country was a party to both. The amendment was therefore essentially in line with his country's convictions. If, however, only the first use of prohibited weapons were regarded as a breach, there was a danger that the guilty party might not be recognized and the crime go unpunished.

A case in point in recent years was a war of aggression in which changes in the ecology had been brought about with disastrous effects. In that instance it was not the soldiers who had been guilty.

60. Mr. MARTIN HERRERO (Spain) said that his delegation had abstained in the vote because the arguments for and against the amendment were fairly equally balanced. Moreover, the subject had achieved a consensus in the Committee and he did not consider that it should be the subject of a majority vote.

61. Mrs. GUEVARA ACHÁVAL (Argentina) said that she had been prevented from voting because she had not been able to attract the President's attention. She would have voted in favour of the amendment.

62. Mr. HUSSAIN (Pakistan) said that he had voted for the amendment for the reasons stated before the vote. He was satisfied with the result, because the failure to achieve a majority by only one vote meant that most delegations accepted the amendment in principle. He hoped that it would not be too long before the purport of such an amendment became part of international humanitarian law.

63. Mr. MOKHTAR (United Arab Emirates) said that he had been absent when the vote had been taken. Had he been present, he would have voted in favour of the Philippine amendment.

64. Mr. ROUCOUNAS (Greece) said that his delegation had expressed sympathy with the Philippine amendment in Committee I and had also viewed the Jordanian sub-amendment with favour. In its proper context such a proposal could not fail to receive support, since it referred to international conventions in force.

65. Article 74, however, had been the subject of long and difficult negotiations, which had led to a consensus. It was because of the risk that a vote might break the consensus that his delegation had abstained. With or without the Philippine amendment, general international law and particular international conventions remained intact.

66. Mr. MILLER (Canada) expressed his delegation's satisfaction with the result of the vote. He would have welcomed an opportunity to give fuller consideration to the Jordanian sub-amendment and regretted that his delegation had had to oppose the Philippine amendment, for reasons which would be set out in a written statement.

67. Mr. DIXIT (India) said that his delegation's explanation of its vote would be submitted in writing.

68. Miss BOA (Ivory Coast) said that her delegation had voted in favour of the Philippine amendment, but would abstain on Article 74 as a whole if a vote were taken.

69. She pointed out that the representatives of Argentina and of the United Arab Emirates had raised their cards during the vote but had not been seen. Although their votes would not have altered the result, she hoped that all votes would be recorded on the next occasion.

70. The PRESIDENT said that he took note of that remark. But if representatives were absent when their names were called, it was difficult to return to them later.

71. Mr. MOKHTAR (United Arab Emirates) said that he had arrived only two or three minutes after the start of the vote and had held his card up for at least three minutes, but had not been seen.

72. The PRESIDENT enquired whether a vote was requested on Article 74 as a whole and whether anyone wished to speak on the article.

In the absence of any such request, Article 74 was adopted by consensus. *

73. Mr. SHERIFIS (Cyprus) said that his delegation welcomed with particular satisfaction the adoption of Article 74, as one of the cardinal provisions of Protocol I. That welcome stemmed from the basic position of the Government of Cyprus, namely that the raison d'être of the Conference was not only to reaffirm and develop humanitarian law, but also to ensure its application in time of war with all its consequences.

74. Relevant to that concern were, firstly, the definition of what constituted a grave breach, and secondly how to establish the facts concerning allegations that grave breaches had been committed. The answer to the first question was furnished by Article 74 and that was why his delegation considered it to be of paramount significance. The answer to the second question could, to a large extent, be given by Article 79 bis and for that reason his delegation had taken an active interest in that article.

* Article 85 in the final version of Protocol I.

75. The provisions of Article 74 were of universal concern and application. They applied to cases which might occur - although it was hoped they would not - in the future, after the entry into force of the Protocol. They were also applicable in cases which might exist at the very time of entry into force. In that connexion, he drew attention to the three paragraphs of Article 2 common to the four Geneva Conventions of 1949 in conjunction with Article 3 of draft Protocol I and, in particular, paragraph (b) thereof.

76. Mr. DI BERNARDO (Italy) said that his delegation had joined the consensus on Article 74 in a spirit of co-operation and compromise, in spite of its doubts and difficulties regarding the article. In the first place, the text was not wholly satisfactory because the list of grave breaches contained therein was incomplete: there were other breaches which deserved to be equally severely condemned and it was unfortunate that they had not been included. The limited number of grave breaches listed in the article had serious consequences. The list would henceforth be considered as rigid and fixed. Each State was of course at liberty to list other actions which would contribute grave breaches in its national legislation, applying to its own armed forces. But such national rules would not be applied to the armed forces of other Parties to the conflict, who would be guilty of breaches qualified as grave by the legislation of the first State while not included in the list contained in Article 74. A State was free therefore to do more in its own legislation than Article 74 demanded, but only with regard to its own armed forces. On the contrary, with regard to members of opposing armed forces, it must abide by Article 74.

77. Secondly the formulation of numerous hypothetical instances of grave breaches was often dangerous because of its lack of precision, and in criminal matters that was a highly serious situation, for here above all each hypothetical breach should have been described with precision and clarity. In many cases that had not been done, for example in paragraph 3 (b) and (c), where it was left to the judge to decide whether or not the advantage obtained from an attack had been excessive. The same criticism could be made of paragraph 4 (c), in which the basic notion was acceptable but the "practices" which the text condemned were not described.

78. Article 74 would raise many problems of domestic law. In the majority of cases national legislators would have to play a substantial role to fill gaps and to give the provisions a clarity which was lacking. The principle danger of Article 74 was precisely that it opened the way to a serious lack of uniformity at the domestic law level, which must militate against its being respected.

79. His delegation had, nevertheless, expressed itself in favour of Article 74 and felt particular satisfaction at identifying in paragraph 4 (d) a grave breach with which his country was much concerned, namely, attacks against historic monuments, places of worship or works of art.

80. Mr. NAHLIK (Poland) said that specialists in domestic law had often reproached international law for its failure to provide sanctions for those individuals guilty of contravening its rules. Leaving the prosecution and punishment of individuals guilty of having broken the rules of armed conflict to the State of which they were nationals had often meant, in practice, that their punishment in no way equalled the gravity of the fault committed and had even led to declarations of impunity.

81. The Nürnberg Judgement had marked a step forward in that field by establishing "international criminal law". Article 74 of Protocol I was a further step forward in that it was not limited to a brief general statement but mentioned a number of acts which should henceforth be considered as "grave breaches". It was right that in paragraph 5, grave breaches should be described as "war crimes", thus establishing a direct relationship between the Protocol and the Nürnberg law. International criminal law would thus become a homogeneous entity capable of playing an effective role not only in the punishment, but also to a large extent in the prevention, of such crimes.

82. Poland, where, during the Second World War, particularly atrocious crimes had been perpetrated, could not but express its satisfaction that Article 74 would, in future, provide a solid basis for the punishment of war crimes in a manner commensurate with their gravity.

83. Mr. TODORIĆ (Yugoslavia) said that his delegation would furnish a written explanation of vote on the Philippine amendment.

84. Mgr. LUONI (Holy See) said that paragraph 4 (d) should be referred to the Drafting Committee, so as to bring it into line with Article 47 bis as adopted by the Conference.

85. Mrs. SUDIRDJO (Indonesia) said that if there had been a vote on Article 74 as a whole her delegation would have abstained, since, as it had explained during the debate in Committee, it entertained strong reservations concerning paragraph 5. To classify grave breaches as war crimes would only lead to confusion and was incompatible with the system so far observed under the Geneva Conventions, which only dealt with the humanitarian aspects of international law.

86. Further, in accordance with the attitude of the Indonesian delegation during the discussions in the Working Group and at Committee level, it also wished to express a reservation with regard to paragraph 3 (f), where the words "or of other protective signs" had been retained.

87. Mr. HUSSAIN (Pakistan) expressed his delegation's gratification at the consensus reached on Article 74, in the negotiation of which his delegation had played an active part. It had proposed that a paragraph be included in Article 75 bis to deal with delay in the repatriation of prisoners of war or civilians. But since such a provision had been included in Article 74, paragraph 4 (b), now adopted, his delegation would not press for its inclusion in Article 75 bis.

88. Mr. ULLRICH (German Democratic Republic) said that his delegation was convinced that penal sanctions against violations of the Conventions and of the Protocol represented an important means of guaranteeing the application and implementation of international humanitarian law. By defining grave breaches of the Conventions and Protocol, the inhuman and criminal nature of some war crimes was underlined. Other delegations were quite right to point out that there were possibly other war crimes which might be as serious as the grave breaches defined here, or even worse, but that was no reason for not singling out certain grave breaches, as had been done in Article 74.

89. His delegation, which had taken an active part in the elaboration of Article 74, very much regretted that the list of grave breaches was limited and in many aspects restricted. It had not, however, been possible to reach a consensus on other violations.

90. His delegation wished to stress that the definition of grave breaches within the system of the Conventions and Protocol was a specific form of international co-operation in the prosecution of war crimes, but that it did not determine or limit the scope of war crimes. There were many other war crimes which were extremely grave violations of international law. It was for that reason that his delegation welcomed paragraph 5 of Article 74, which expressly established the connexion between grave violations of the Protocol and war crimes.

91. Mr. ABI-SAAB (Egypt) said that the adoption of Article 74 was a landmark in the reaffirmation and development of international humanitarian law. His delegation had actively participated in the elaboration of the text and was gratified by the consensus reached.

92. The Egyptian delegation had made great efforts to strengthen the mechanics of implementation of the Conventions and the Protocol and considered that Article 74 constituted a major guarantee that the theory expressed would be applied in practice. The list of grave breaches would be a further effective weapon towards implementation of the Protocol, as it represented a barrier to attempts by guilty individuals to cover up atrocious crimes without the State being the wiser. The text of Article 74 represented an advance on the system of the Conventions in that it went further in the detailed and more precise description of punishable acts, which was necessary if the system of grave breaches of the Conventions was to be converted into a workable system of internal penal law. In addition, Article 74 went a step further than the Geneva Conventions, which had been to a great extent concerned with individual victims, in that it showed concern for collectivities of victims and sometimes for whole populations as, for example, in paragraph 4 (a) and (c).

93. His delegation regretted that the Philippine amendment had been rejected, thus leaving a gap in the list of grave breaches, but understood that the effects of using prohibited weapons came within the scope of the article as adopted. In that respect, he associated his delegation with the comments of the Greek representative.

94. Mr. EL HASSEEN EL HASSAN (Sudan) expressed his delegation's satisfaction at the adoption of Article 74 by consensus. At the Committee stage, several delegations had expressed their opposition to some of the paragraphs and had stated that they would vote against them. He was pleased to note that they had not done so.

95. His delegation would have been even happier if the Philippine amendment, as sub-amended by the Jordanian delegation, had been included.

96. Mr. PAOLINI (France) said that, although his delegation had not opposed the consensus on Article 74, it would have abstained if there had been a vote.

97. The French delegation could not approve paragraph 3 (b), for the same reason as that expressed in connexion with Article 46, namely, the ambiguity of the definition of indiscriminate attacks. It could not accept that military actions which were so inadequately defined should be considered to be grave breaches and, according to paragraph 5, to constitute war crimes.

98. As regards paragraph 4, the French delegation considered that the grave breaches referred to in sub-paragraphs (a), (b) and (c), should normally be subject to the same penal stipulations as those stated in paragraph 3, that is to say, that they should have caused death or serious physical injury in order to be considered as grave breaches. Such an interpretation alone would provide the desired unity of the juridical system applicable to grave breaches of uniform nature provided for in Article 74.

99. Mr. SAWAI (Japan) said that his delegation would submit an explanation of its vote in writing.

100. He suggested, however, that in order to expedite the work of the Conference, explanations of votes on amendments should be made either before or after the adoption of an article as a whole and not before or after the adoption of each amendment. That would be in accordance with the proposals made by the General Committee (CDDH/253), as adopted by the Conference.

101. Mr. AJAYI (Nigeria) said that his delegation was pleased by the consensus reached on Article 74, which it considered to be an important article designed to ensure respect for and adherence to the provisions of Protocol I. It grouped together the essential principles of that Protocol and of other international instruments. His delegation approved in particular paragraph 4 (c), and understood paragraph 4 (d) to be the equivalent of the amendment to Article 47 bis (CDDH/412/Rev.2) previously adopted.

102. Miss POMETTA (Switzerland) said that if there had been a vote on Article 74, her delegation would have abstained. The grave breaches listed were by their very nature reprehensible, but their definition was too imprecise. Her delegation therefore expressed its reservations regarding the article.

The meeting rose at 12.40 p.m.

ANNEX

to the summary record of
the forty-fourth plenary meeting

EXPLANATIONS OF VOTE

AUSTRALIA

Original: ENGLISH

Article 74 of draft Protocol I

Article 74 was the product of delicate and protracted negotiation at the third session of the Conference. Although the Australian delegation did not oppose the adoption of that article by consensus, it would have abstained on the article if it had been put to the vote.

As we stated in our explanation of vote at the third session of the Conference, when the article was adopted by Committee I, Article 74 is not only vague and impracticable but also inconsistent with the basic tenets of criminal law shared by a large number of States throughout the world. The Australian delegation considers that any behaviour which could give rise to punishment on the basis of universal jurisdiction should, among other things, be carefully identified. Not only should the nature of the offence be clear but the subject and object of the offence should also be clearly identifiable. It is essential that those who engage in warfare should not be confronted with accusations and criminal proceedings for matters which they could not reasonably expect to be a grave breach.

The Australian delegation hopes that the article will be interpreted and applied with serious concern for the rights of persons accused of war crimes. In the view of the Australian delegation, greater precision in Article 74 would have ensured better implementation of the article and greater justice for all.

The Australian delegation opposed the amendment proposed by the Philippine delegation (CDDH/418) because it did not believe that the subject matter was an appropriate one for Protocol I. The restriction or prohibition of weapons was a matter to be examined by the Ad Hoc Committee on Conventional Weapons, whose procedure and terms of reference were quite different from those of the Main Committees responsible for the negotiation of Protocols I and II.

BELGIUM

Original: FRENCH

Article 74 of draft Protocol I

The representative of Belgium refers in explanation of his vote to the explanation he gave at the time of the article's adoption by Committee I.

CANADA

Original: ENGLISH

Philippine amendment to Article 74 (CDDH/418)

The Canadian delegation voted against the Philippine amendment (CDDH/418) to Article 74. In so doing it was motivated by opposition to including in the Protocol references to specific weapons. The particular weapons are forbidden by international law and their use, other than by way of reprisal, already constitutes a war crime. However, not all war crimes amount to grave breaches open to universal criminal jurisdiction. The amendment refers to the individual user to whom the bullets in question had been issued and who may have no knowledge of the nature of the bullet or its effect. At this point we would emphasize that in our view this language taken from The Hague Declaration of 1899 concerning the Prohibition of Using Projectiles the Sole Object of which is the Diffusion of Asphyxiating or Deleterious Gases, only refers to dum-dum bullets.

Moreover, as worded, the amendment is in absolute terms leaving no room for deviation. It ignores the fact that The Hague Convention as well as the reservations to the Geneva Protocol recognize that the weapons in question may be used by way of retaliation. We felt, in addition, that the description of the weapons, though in the language of the relevant instruments, is unsatisfactory in view of the historical arguments that have surrounded their interpretation and the technological developments that have come about since those instruments were signed.

In addition, we are very conscious of the fact that Article 74 is the result of a very carefully prepared compromise and we felt it most unwise to tamper with this agreed text.

Finally, all these questions were within the competence of a special committee of this Conference. We did not feel that in the light of the activities of the Ad Hoc Committee it was proper to include in Protocol I any matter concerning weapons until we know the results of that body's activities.

Article 74 of draft Protocol I

The Canadian delegation is gratified that Article 74 was accepted by consensus, particularly in view of the lengthy discussions which took place in its framing and the fact that in its final form it represents a carefully balanced compromise.

From the point of view of substance we regard Article 74 as a further step in the reaffirmation and development of humanitarian law and a major contribution to the processes of enforcing the law of war. We hope that this elaboration of the international criminal law of armed conflict will enable us to suppress as well as punish those breaches of the law which are sufficiently grave to form the basis of universal jurisdiction, thus affirming the international responsibility which rests on all States to punish those guilty of such breaches.

While we participated in the consensus relating to this article, we are aware that from the point of view of its actual enforcement there may well be difficulties. Where some of the breaches are concerned, there may be difficulty in framing indictments and even in the actual definition of a particular breach with a view to its embodiment in the national law. Nevertheless, we are convinced that with goodwill this article will in fact make a major contribution to the development of humanitarian law and stand as a landmark in international criminal law.

EGYPT

Original: ENGLISH

Article 74 of draft Protocol I

The Egyptian delegation considers the adoption of Article 74 as one of the landmarks of the reaffirmation and development of humanitarian law by this Conference. Our delegation has participated actively in the elaboration of the present text and it is a special source of gratification for us to see that it is accepted by consensus, in spite of earlier resistance and reticence.

The Egyptian delegation had consistently endeavoured, throughout our long and arduous labour, to favour the perfecting and strengthening of the mechanisms of implementation of the Geneva Conventions and Protocol I, for we consider that the only test of usefulness of whatever we adopt here is in the extent to which it will bear on action in practice, that is, in implementation. In this respect, the system of grave breaches and the individual penal responsibility which it establishes constitutes a serious deterrent, by piercing the abstract veil of State responsibility and reaching out for the real perpetrators of atrocities and horrors.

Although we do not consider the present text as ideal or complete, we do consider that it constitutes a great advance over the articles of the Geneva Conventions on the subject; and this for two main reasons. In the first place, the very length and detailed character of the article, which for other articles constitute a drafting defect, are an important asset here; for this is a penal text, and in penal law, the more the specification of the incriminated act and the individualization of the circumstance engaging penal responsibility, the better. In this respect, the long list provided in the article we have just adopted constitutes a mini-penal code of humanitarian law. In the second place, the present text remedies a weak point in the grave breaches articles of the Geneva Conventions. These articles place all the emphasis on violations which are inflicted on individuals, compared with the relative neglect of those violations with large global effects affecting groups and whole populations. This neglect has been remedied by Article 74, especially paragraph 4 (a) and (c). This is an important advance, for we consider that responsibility should increase, and not be diluted or evaporate, with the increase of the number of victims.

In the same vein, the Egyptian delegation wants to express its disappointment at the failure of the Philippine amendment, establishing as a grave breach the use of prohibited weapons, to be adopted. We consider that the distinction between the Law of Geneva, and the Law of The Hague is totally artificial, and that we are leaving here a very large gap in the system we are establishing. I note, however, that the article as it stands now does cover the use of such weapons through their effects. Thus, if we have failed to consider the use of such weapons as a grave breach, the article, as well as the articles of the Geneva Conventions on grave breaches, consider that the effects produced by these weapons on the victims may constitute grave breaches. And, as was said by the representative of Greece, the adoption of this article does not affect in any way the international treaties in force which prohibit the use of these weapons and attribute legal consequences to such use.

FRANCE

Original: FRENCH

Article 74 of draft Protocol I

Although not opposed to the consensus, the French delegation wishes to state that had there been a vote on Article 74, it would have abstained.

It cannot support sub-paragraph (b) of paragraph 3 of Article 74. When the Conference was considering Article 46, which we were against, we stressed the ambiguity of the definition of indiscriminate attacks.

The French delegation cannot agree to having military actions that are so ill-defined regarded as grave breaches and, according to paragraph 5, as war crimes. In the circumstances, it could not but oppose paragraph 3 (b).

With regard to the provisions of paragraph 4, we think that the grave breaches covered by points (a), (b) and (c) should normally be subject to the same legal conditions as those stated in paragraph 3, that is to say that to be regarded as grave breaches they should cause death or serious injury to body or health. This interpretation alone makes it possible to preserve the necessary uniformity of the law on the grave breaches covered by Article 74, which are similar in kind.

INDIA

Original: ENGLISH

Article 74 of draft Protocol I

The Indian delegation voted against the amendment contained in document CDDH/418 for the reason that these weapons have not been explicitly defined in the substantive provisions of Protocol I. In the absence of specific listing of such weapons, it will be extremely difficult for an ordinary soldier in the field at the theatre of war to decide whether a particular weapon falls in the prohibited category or not. In these circumstances it will be unjust to make the soldier responsible for a grave breach and to punish him. Further, there is another important reason against the proposal. The proposal does not include all the category of weapons which are equally inhuman or rather more inhuman, inter alia the nuclear weapons. Nobody in this Conference can deny that these weapons fall into the most inhuman category of weapons. But, for the reasons best known to the sponsor of the proposal, nuclear weapons have been excluded. Whatever may be the political or other reasons for the exclusion of nuclear weapons from this proposal, the Indian delegation finds it difficult to support a proposal in principle which is unjust and perpetuates illogical discrimination.

JAPAN

Original: ENGLISH

Article 74 of draft Protocol I

The delegation of Japan wishes to make the following observations on Article 74, adopted at the forty-fourth plenary meeting on 30 May 1977:

1. The appropriateness of inclusion in Article 74 of some of the acts enumerated in paragraph 4 is open to doubt as, in the final analysis, they belong to the realm of political responsibility of the heads of States or the heads of governments.
2. As those same acts mentioned above are not precisely defined, difficulties may arise in the incorporation of the provisions relating to the acts into national penal legislation.
3. In paragraph 3 (d), the reference to Article 52 (Non-defended localities) and Article 53 (Demilitarized zones) which appeared in the ICRC draft, should have been retained in order to make the scope of application of this provision more clearly delimited.

MOZAMBIQUE

Original: FRENCH

Article 74 of draft Protocol I

The delegation of my country considers it regrettable that, owing to the opposition of a minority, the plenary Conference did not adopt the amendment proposed by the Philippines.

Article 74 deals with the repression of breaches. In paragraph 3, it draws up a list of acts regarded as grave breaches. The rejection of the Philippine proposal leaves a large gap in that list; we would even say that this negative action weakens the humanitarian effectiveness of this Protocol.

The great majority of the arguments put forward by the opponents of the amendment lead us to conclude that they were more worried about the prosecution of the killer than anxious to defend the thousands on thousands of persons against whom the methods of war that this amendment would have prohibited will be used.

The result is that the prohibition contained in Article 33 is no more than a moral and theoretical obligation.

In recent decades there has been an incredible proliferation of methods of war which strike hard at the civilian population.

While this Conference is meeting here, the people of Mozambique are being bombed by the illegal and racist régime of Ian Smith, which is using napalm and other materials causing superfluous injury.

As far as we are concerned, the rebel Ian Smith is merely the agent of those who provide him with the means of killing our people and who claim that adoption of the Philippine amendment would be dangerous and lead to injustice by condemning the soldier who resorts to such methods of warfare.

My delegation nevertheless joined in the consensus, with the hope that the wishes of the majority will one day be reflected in this article, thus reaffirming and developing The Hague Declaration of 1899 and the 1925 Geneva Protocol concerning prohibition of methods of warfare that may cause superfluous injury.

ROMANIA

Original: FRENCH

Article 74 of draft Protocol I

The delegation of Romania joined in the consensus on Article 74, which represents a basic regulation of international humanitarian law, and takes this opportunity of expressing its satisfaction that a provision of that kind has been incorporated in Protocol I.

In our view, it is expedient to specify the categories of grave breaches of the Geneva Conventions of 1949 and of this Protocol, for that is a legal means of imposing respect for the provisions of those documents. The implementation of the provisions of the Geneva Conventions of 1949 and of this Protocol is of capital importance for the reaffirmation and development of international humanitarian law applicable in armed conflicts. Scrupulous respect by all for the Conventions and the Protocol is one of the requirements of a process which must be the constant concern of the High Contracting Parties.

In view of these general considerations, it is natural that the Romanian delegation should attach special importance to the question of the repression of breaches of the Geneva Conventions and of Protocol I - a question that is "reflected" in Article 74 and, to a certain extent, in the following articles.

The Romanian delegation considers that, on the whole, the text of Article 74 represents a praiseworthy effort and a step forward in international humanitarian law. Nevertheless, we think that it would have been preferable to single out and quote as examples the most notorious grave breaches, while at the same time leaving open the possibility of sanctioning other actions prohibited by the Geneva Conventions and the Protocol. In this way, the attention of the international community could have been drawn, once again, to the negative consequences of violation of the Protocol's provisions.

Furthermore, as the Romanian delegation understands this article, its provisions are aimed at reinforcing the protection of the victim of aggression, and in no way limit the victim's right to defend himself, on his own territory, by every possible means, against the aggressor.

SPAIN

Original: SPANISH

Article 74 of draft Protocol I

The Spanish delegation, in explaining its position concerning the amendment submitted by the delegation of the Philippines to Article 74, wishes to emphasize that, as on other occasions, its abstention in the vote on that amendment is not due to any mere indifference. Quite to the contrary; this amendment, like any other proposal, has both virtues and defects. They are so equally balanced that the Spanish delegation decided to abstain. The amendment was originally adopted in the Committee by consensus, and although a consensus is not sacred and can be revised at a plenary meeting, such a course should be exceptional and should be followed only for very compelling reasons. Furthermore, the amendment involves an element of repetition and is consequently somewhat redundant. Also, there is a certain dialectical weakness in repetitions based on the possibility, which always exists, of potential breaches; on the other hand, breaches are one thing, and the proceedings and penalties to which such breaches may give rise are quite another. To that extent the amendment is undoubtedly useful. It is also appropriate to take every opportunity of reaffirming the competence of this Conference in the field of the use of weapons, which remains desirable.

In this situation the Spanish delegation, while fully understanding the motives leading the Philippine delegation and another to submit and support the said amendment, but believing that in this instance more than any other majority decisions are desirable, decided to abstain.

SWEDEN

Original: ENGLISH

Article 74 of draft Protocol I

The Swedish delegation abstained in the vote on the proposal in document CDDH/418. Our abstention was not, however, due to any lack of understanding of the motives behind that proposal. When Article 74 was adopted by Committee I at the third session, my delegation joined in the consensus but declared that had there been a vote we would not have been able to vote in favour of the article. That position was due to our dissatisfaction with what was left out of Article 74. Above all, we missed a reference to methods and means of combat. The amendment submitted by the Philippines would to a considerable extent have bridged that gap.

However, it was submitted to the Conference at a very late stage and the text had not had the benefit of being moulded in a working group. This was unfortunate, since the proposed addition to the list of grave breaches was a legally complex one and the wording had to be carefully drafted in order to correspond to existing law in the field of prohibitions of conventional weapons.

Moreover, and this was our main objection, Article 74 is a delicate compromise which took shape after lengthy negotiations. The adoption of the Philippine proposal could therefore endanger the consensus reached earlier on that article and even have negative repercussions on Protocol I as a whole. The Swedish delegation therefore - regrettably - found itself unable to support the amendment at this late hour of the Conference.

YUGOSLAVIA

Original: FRENCH

Article 74 of draft Protocol I

The Yugoslav Government welcomes the adoption by consensus of Article 74, which we regard as an important step towards strengthening the rule of humanitarian law applicable in armed conflicts and the repression of war crimes. This type of crime, which has troubled the conscience of mankind for many years, has unhappily not yet been rooted out, and we have seen appalling examples of such crimes even in the very recent past. Admittedly the drafting of Article 74 cannot in itself have the immediate effect of stopping breaches of international law in armed conflicts. On the other hand, until now, we have had no list or definition of war crimes, apart from Article 6 (b) of the Charter of the Nürnberg Tribunal, whereas the article on grave breaches contains both a fairly complete list of such

breaches, and definitions of them. It thus fills an important gap in international law, leaving no further ambiguity in this field. This is a clear reason for welcoming the adoption of Article 74, and for hoping at the same time that the listing of these prohibited acts will deter those who might be tempted to go beyond what is lawful in particular situations in armed conflicts.

The Government of the Socialist Federal Republic of Yugoslavia deeply regrets that the use of unlawful methods or means of combat was not included in the grave breaches, particularly since to have done so would merely have been to have codified an already existing rule of customary law, because there can be no doubt that to use prohibited weapons or unlawful methods of making war is already to act unlawfully, that is, it is a war crime punishable by existing international law.

With a view to filling part of the gap thus left in Article 74, the Yugoslav delegation supported the Philippine proposal in document CDDH/418. We regret the fact that the Conference did not adopt that proposal. Nevertheless, the Yugoslav Government would once more reiterate here its firm belief that violation of the provisions of Article 33 of the Protocol is a grave breach punishable in law, in just the same way as the breaches listed in Article 74, and has the same meaning as that given to those breaches in paragraph 5 of Article 74.

SUMMARY RECORD OF THE FORTY-FIFTH PLENARY MEETING

held on Monday, 30 May 1977, at 3.10 p.m.

President: Mr. Pierre GRABER Federal Councillor,
Head of the Federal
Political Department
of the Swiss Confederation

In the absence of the President, Mr. D.M. Miller (Canada),
Vice-President, took the Chair.

ADOPTION OF THE ARTICLES OF DRAFT PROTOCOL I (CDDH/401) (continued)

1. The PRESIDENT invited the Conference to continue its consideration of the articles of draft Protocol I, beginning with Article 76.

Article 76 - Failure to act

Article 76 was adopted by consensus. *

2. Mr. NASUTION (Indonesia) said that he would transmit his delegation's comments on the article to the Secretariat in writing.

Article 76 bis - Duty of commanders

Article 76 bis was adopted by consensus. **

Article 77 - Superior orders

3. Mr. AMIR-MOKRI (Iran) said that during the discussions in Committee I his delegation had opposed the insertion of Article 77 in draft Protocol I.

4. Mr. FREELAND (United Kingdom) said that his delegation, which had already voted against Article 77 in Committee I, could not accept that there ought to be one system of law which related to grave breaches of the Conventions and the Protocols, while other breaches, including breaches of customary law and of other Conventions, were subjected to an entirely different system. That state of affairs would clearly lead only to confusion in an area where it was vital to have simple rules which could be readily understood by soldiers.

* Article 86 in the final version of Protocol I.

** Article 87 in the final version of Protocol I.

5. His delegation also saw very considerable difficulty regarding the content of the system for grave breaches which would be established by Article 77. The words "or should have known" in paragraph 2 appeared capable of at least two interpretations. If those words were to be taken as meaning that a soldier was to be expected to carry out his own detailed investigation of the facts of a situation before complying with an order, the result would not merely be impracticable but totally impossible in a combat situation.

6. Much the best course would be the omission of the article, leaving the situation to be regulated by the existing rules of international law concerning superior orders. Those rules were well understood and clearly explained in existing manuals on the law of armed conflict. Accordingly, his delegation would vote against the adoption of Article 77.

7. Mr. de ICAZA (Mexico) said that his delegation would abstain in the vote because it considered that Article 77 should apply not merely to grave breaches, but to all breaches.

The result of the vote was 36 in favour, 25 against and 25 abstentions.

Not having obtained the necessary two-thirds majority, Article 77 was rejected.

Explanations of vote

8. Mr. EL HASSEEN EL HASSAN (Sudan), Mr. SADI (Jordan), Mr. REED (United States of America), Mr. CERDA (Argentina) and Mr. SABEL (Israel) said that they would transmit their delegations' comments on Article 77 which had just been rejected to the Secretariat in writing.

9. Mr. ABDINE (Syrian Arab Republic) said that he had voted against Article 77 because it contravened international law. The article ruled on a matter of discipline between the individual concerned and the Government or authority to which he was subordinate, a matter which came under the exclusive competence of the internal laws of a State. Moreover, Article 77 was based on the rather dubious hypothesis that any subordinate would be able, in delicate circumstances, to distinguish between a legal and an illegal act and to make a valid appreciation of the legality of the order received. That hypothesis was pure fiction, for it was rarely that subordinates were acquainted with the legal nuances of often very lengthy texts, while any

elementary knowledge that they might have of them would not enable them to make a valid judgement. In addition, Article 77 might well give rise to abuses under the screen of humanitarian law. It entailed incitement to disobedience of orders, which ran counter to the military codes of most States. Finally, since the article pertained to the responsibility of States or authorities in matters of international law, it would hardly be logical to retain a provision under which the establishment of guilt would be left to the decision of the internal law authorities, in the absence of a competent international tribunal.

10. Mr. ALKAFF (Democratic Yemen) and Mr. MOKHTAR (United Arab Emirates) said that they had voted against Article 77 and that they would transmit their delegations' comments to the Secretariat.

11. Mrs. ROULLET (Holy See) and Mrs. SUDIRDJO (Indonesia) said that they had voted in favour of Article 77 and would transmit their delegations' comments to the Secretariat.

12. Mr. KAKOLECKI (Poland) expressed his regret that Article 77 had not been adopted, for it was based on the principles applied at Nürnberg, later confirmed in resolutions of the United Nations General Assembly and now a part of international law. Despite the rejection of the article, the Nürnberg principles remained important norms of international law.

13. Mr. OFSTAD (Norway) considered that the rejection of Article 77 did not weaken the validity of the Nürnberg principles and of the rules of international law.

Article 79 - Mutual assistance in criminal matters

Article 79 was adopted by consensus. *

14. Mr. KAKOLECKI (Poland), Mrs. SUDIRDJO (Indonesia) and Mr. PAOLINI (France) said that they would transmit their delegation's comments on that article to the Secretariat.

Article 79 bis - International Fact-Finding Commission

15. The PRESIDENT pointed out that a number of amendments had been submitted to Article 79 bis, to be found in documents CDDH/415 and Add.1 and 2 and Corr.1, CDDH/416 and CDDH/420.

* Article 88 in the final version of Protocol I.

He suggested that the plenary Conference should consider the various amendments in succession, beginning with those furthest removed in substance from the original proposal.

It was so agreed

Paragraph 1 (b) - Amendment by the United States of America
(CDDH/416)

16. Mr. ALDRICH (United States of America) explained that the two amendments proposed by his delegation to Article 79 bis were closely linked and were designed to indicate clearly that resort to the International Fact-Finding Commission would be mandatory for the Parties which were prepared to accept in advance the mandatory nature of the system. The amendment to paragraph 1 (b) provided that the members of the Fact-Finding Commission could not be elected until twenty High Contracting Parties had agreed to accept the competence of the Commission pursuant to paragraph 2, in other words had declared that they recognized ipso facto and without special agreement the competence of the Commission in relation to any other State accepting the same obligation. That provision would reinforce the mandatory nature of the investigation system proposed.

17. The word "jurisdiction" in the second line of his delegation's amendment should be replaced by the word "competence".

18. Mr. GRIBANOV (Union of Soviet Socialist Republics) took the view that the mandatory nature of the Fact-Finding Commission's competence was unacceptable because that would infringe the sovereignty of States and permit direct interference in the internal affairs of States and peoples. There should be no supranational body; the Parties should simply undertake to respect the provisions of the Protocol. The proposed body should act only with the consent of the Parties concerned and its decisions should apply only to the States which recognized its competence.

19. Mr. VALLARTA (Mexico) recalled that his delegation had always supported the idea of setting up a mandatory fact-finding system although it was prepared to consider the United States proposal with an open mind. He noted, however, that the original text of paragraph 2 (a) would enable States to accept or refuse the Commission's competence in specific instances and he feared that the proposed amendment - which provided for the recognition ipso facto of that competence and without special agreement - would remove that choice. It might be better to allow States to take a decision in each specific case.

20. Mr. ALDRICH (United States of America) explained that his amendment was intended to clarify the provisions of paragraph 2 (a) of the original text, which were not sufficiently explicit. Under the system proposed in the amendment, Parties would be able either to decide to accept the mandatory competence of the Fact-Finding Commission or, if they preferred, to agree to take a decision in each specific instance. The proposed amendment therefore seemed to meet the concern of the Mexican representative.

The United States amendment to paragraph 1 (b) was adopted by 49 votes to 2, with 34 abstentions.

21. Mr. BINDSCHEDLER (Switzerland), explaining his delegation's vote, said that the adoption of the amendment proposed by the United States would have the effect, in practice, of preventing the Fact-Finding Commission from being set up for another twenty years.

Paragraph 2 (a) - Amendment CDDH/415 and Add.1 and 2 and Corr.1

22. Mr. CLARK (Nigeria), introducing the amendment, said that it was not his intention to re-open the controversy that had preceded the adoption of Article 79 bis in Committee. Paragraph 2 of Article 79 bis was based on political and administrative considerations. Its object was therefore narrow and limited. Since the adoption of Article 79 bis, the sponsors of the proposed amendment had re-examined the situation in the light of draft Protocol I as a whole, and a number of points had become clear to them.

23. They took the view that in its present form paragraph 2 (a) was incomplete, because it did not address itself to the specific problems of occupied territories. The notion of sovereignty, which was synonymous with independence, was of capital importance. To say that the temporary occupation of a territory derogated substantially from the owner's sovereignty over it was to deny the United Nations principle that the acquisition of territory by force was illegal and inadmissible.

24. Paragraph 2 of Article 79 bis was contrary to the spirit and the letter of the fourth Geneva Convention of 1949 and Protocol I. If the Occupying Power was permitted to refuse the intervention of the Fact-Finding Commission, it could proceed with impunity to violate the provisions relating to the protection of the civilian population and civilian objects in occupied territory and even ignore the outcry of world opinion.

Now that there was no mention of reprisals in the texts adopted, it was important that no Occupying Power should be given a pretext for refusing to adhere strictly to the provisions of the Convention and Protocol I. Paragraph 2 introduced another dangerous doctrine by placing the aggressor and the victim of his aggression on a footing of equality in law and in fact. It would, in fact, sanction the military advantage gained by the adversary, a notion alien to international law, the Geneva Conventions and Protocol I. Sovereignty could be relinquished only by the consent of the Parties concerned. Several international organizations had in numerous resolutions expressed grave concern for the fate of peoples in occupied territories and called for international action along the lines proposed by some twenty States in amendment CDDH/415 and Add.1 and 2 and Corr.1. Such action had led, for instance, to the setting up of the Fact-Finding Commission on Namibia.

25. It was not by coincidence that the sponsors of the proposed amendment were from non-aligned developing countries in Africa, Asia and Latin America: it was their struggle for independence which justified the Conference's objective of codifying humanitarian law applicable in armed conflicts. Although he understood the concern of some delegations with regard to the issue of mandatory competence, the proposed amendment was not opposed to their position of principle but simply sought to create an exception to a general rule. He hoped that it would be adopted unanimously.

26. Mr. VALLARTA (Mexico) supported the observations of the Nigerian representative. Opposition to an amendment such as was proposed in document CDDH/415 and Add.1 and 2 and Corr.1 would, in his view, be contrary to the fundamental objectives of international law. It would be tantamount to recognizing a de facto situation in contempt of the principle of the sovereignty of States. Mexico had supported the idea of inserting in draft Protocol I a provision for a mandatory fact-finding system in cases of violation of the provisions of that Protocol or of the Geneva Conventions. It considered that refusal to accept that mandatory system would be incompatible with the principles of international law. Many delegations, however, had rejected it on the grounds that it constituted a violation of the sovereignty of States. That argument was indefensible but his delegation respected the views of others.

27. Nevertheless, the situation was completely different in the case of an occupied territory. In that case it was difficult to understand why the consent of the Occupying Power would be necessary when a State no longer able to exercise sovereignty over its territory asked the proper organization to carry out

an enquiry. Under international law, the Occupying Power had no say in the matter and the enquiry had to be held.

28. Mr. GOZZE-GUCETIĆ (Yugoslavia) said that it was with great reluctance that his delegation had joined in the consensus on Article 79 bis in Committee I, for it would have liked the Fact-Finding Commission to have mandatory competence. Moreover, its explanation of vote was given in the annex to summary record CDDH/I/SR.73. It was precisely the aim of amendment CDDH/415 and Add.1 and 2 and Corr.1, proposed by a number of delegations to introduce an element of compulsion in paragraph 2 (a) of Article 79 bis. It was alleged by some delegations that to give mandatory competence to the Fact-Finding Commission would infringe national sovereignty. It was, however, precisely in order to protect the sovereignty of a country under temporary occupation that an effort was being made to compel the Occupying Power to accept an enquiry into any alleged breach of the Conventions and the Protocol. Indeed, the most frequent violations of human rights occurred in occupied territories as a result of endeavours by the Occupying Power to "pacify" occupied populations. Yugoslavia, like many other countries, had had a bitter experience of that in the Second World War. The Occupying Power should therefore be prevented from acting arbitrarily and should be compelled to submit to an enquiry if grave breaches were alleged to have occurred. A clause of that nature would help to force the Occupying Power to comply with the law in order not to risk the censure of the international community, and so the protection of victims would be strengthened in advance by a dissuasive provision of that kind. Some delegations had also claimed that it would be difficult to name the Occupying Power. It might be awkward to define the aggressor in legal terms, but it could not be said that it was difficult to name the Occupying Power. The Yugoslav delegation sincerely hoped that the proposed amendment (CDDH/415 and Add.1 and 2 and Corr.1) would be adopted.

29. Mr. BINDSCHEDLER (Switzerland) said that he had given sympathetic consideration to amendment CDDH/415 and Add.1 and 2 and Corr.1. He recognized the validity of the principle invoked by the sponsors and of the reasons given by the Mexican and Yugoslav delegations. Unfortunately, the text was not well thought out; in particular, the term "In the case of an occupied territory" was not suitable. A more specific term was needed, for example, something like "in the case of a violation of the rules in occupied territory". The Drafting Committee might be asked to revise the text to give it a legal form.

30. Mr. AL HADDAD (Yemen) said that he agreed with the delegations of Nigeria, Mexico and Yugoslavia and asked for his country to be added to the list of sponsors of the proposed amendment.

31. The PRESIDENT said that that would be done.

32. Mr. ABI-SAAB (Egypt) considered that, despite the claims made during the discussion, Article 79 bis in its present form did not constitute progress over the Conventions which provided for a procedure of enquiry based on the agreement of the Parties; a procedure which had never really been put into practice. Experience had thus shown that without the principle of mandatory competence there would be no enquiry. Unfortunately, Committee I had been unable to adopt such a bold solution. The Egyptian delegation considered that the proposed amendment (CDDH/415 and Add.1 and 2 and Corr.1) provided, for want of anything better, a partial solution for the particularly difficult case of occupied territories. As experience had shown, most violations of human rights and humanitarian law occurred in occupied territories. He urged the Conference to approve the proposed amendment; it was not an ideal solution but it was a minimum if a practical means of implementing the Protocol was to be ensured.

33. Mr. PARTSCH (Federal Republic of Germany) said that delegations were in agreement on the principle but that his delegation, while favouring mandatory competence for the Fact-Finding Commission, felt obliged to keep to the compromise reached in Committee. That was why it was against the proposed amendment, which might destroy that understanding. Moreover, the Occupying Power could not be assimilated to the aggressor. His delegation would therefore vote against amendment CDDH/415 and Add.1 and 2 and Corr.1.

34. Mr. DI BERNARDO (Italy) said that he had always wanted observance of the Geneva Conventions and the Protocols to be based on mandatory and automatic systems applicable in all circumstances to cases of violation. It had proved impossible to achieve that aim and the Fact-Finding Commission provided for in Article 79 bis was of a purely optional character. The amendment under consideration introduced an exception in the case of occupied territories. The Italian delegation could not agree to a special exception in that one case, whereas requirements were the same in all cases and the rules should be the same for all. Moreover, the Fact-Finding Commission would in practice find it impossible to carry out its mandate in occupied territories without the agreement of the Occupying Power. The Italian delegation was therefore against the proposed amendment.

35. Mr. GREEN (Canada) regretted that he could not agree to the proposed amendment (CDDH/415 and Add.1 and 2 and Corr.1). Although his delegation had from the outset favoured a mandatory system, it was, like the Italian delegation, very much opposed to any form of exception and was well aware that, for the enquiry to proceed effectively, the Commission would have to be able to visit the site of the alleged breach, something which could be done only with the consent of the Power in control of the territory. That a State whose territory was occupied retained sovereignty over it was beyond dispute, but it was no denial of that sovereignty to recognize realities. Finally, if the proposal was adopted, it would be applicable only to situations arising after the entry into force of the Protocol. In addition, the Canadian delegation considered itself bound by the "package deal" to which the representative of the Federal Republic of Germany had referred, and it was therefore unable to support the proposed amendment.

36. Mr. GRAEFRATH (German Democratic Republic) said that he too could not agree to assimilating the occupier to the aggressor. He wondered whether the sponsors of the amendment would be prepared to amend the beginning of the sentence to read "In the case of a territory occupied as a result of an aggression", which might be a good solution.

37. Mr. SABEL (Israel) said that amendment CDDH/415 and Add.1 and 2 and Corr.1 had been submitted directly to a plenary meeting of the Conference and there had been no chance of considering it in Committee. He thought the text was quite inappropriate. Referring to a statement by the observer for Amnesty International to Committee I (CDDH/I/SR.37), he recalled one of the recommendations made to the Conference by an Amnesty mission of investigation. The recommendation stated: "Provision should be made for an automatic system of independent international investigation into allegations of infringements of the Geneva Conventions originating from any quarter".

38. His delegation considered that the proposed amendment was completely unacceptable.

39. Mr. JADKARIM (Sudan), speaking as a sponsor of the text under consideration (CDDH/415 and Add.1 and 2 and Corr.1), stressed that the Occupying Power should not have the final word and that the populations of occupied territories should not be left in its power. The mandatory nature of the enquiry was thus the only guarantee for the population of an occupied territory.

40. Mr. CERDA (Argentina) said that in Committee I, his delegation had accepted the text of Article 79 bis, which represented a sufficiently middle course between the opposing positions taken during the debate on whether the Fact-Finding Commission should be mandatory. In any case in amendment CDDH/415 and Add.1 and 2 and Corr.1, of which his country was a sponsor, the situation was very clear if the principles of international law were correctly applied. In the case of occupied territories, it seemed that the consent of the Occupying Power was not required for the enquiry requested by the Power in whom sovereignty resided. Consequently, his delegation reiterated that the amendment re-stated a general principle of international law. Bearing in mind the explanations given by the representative of Nigeria to the delegations which had claimed that the amendment would destroy a compromise negotiated within the Conference, he emphasized that his delegation had not been consulted about any negotiations of that kind.

41. Mr. de BREUCKER (Belgium) stated that the proposed amendment gave rise to great perplexity. It was indeed necessary for the Fact-Finding Commission to have mandatory competence in all circumstances and for an enquiry to be instituted on "any alleged violation of the Conventions or of this Protocol". Committee I, however, had had great difficulty in reaching agreement on the establishment of the Fact-Finding Commission and the proposed amendment might upset a balance which had been hard to achieve. In the first place, the concept of an "occupied territory", which had altered and extended since 1907, had to be defined. Nevertheless, the essential requirement was that the Fact-Finding Commission should exist; once that was achieved, any rejection of the Commission by the Occupying Power would be made known to world opinion and would bring condemnation of the attitude of the Occupying Power.

42. The proposed reference to a "territory occupied as a result of aggression" would do nothing to make the situation clearer, for the aggression would be contested; his delegation was therefore against any introduction of the concept of aggression into the text.

43. If the choice lay between a Protocol which would probably not be ratified, as the USSR representative and other delegations had implied, and a Protocol embodying the principle of the Commission's mandatory competence to act in occupied countries, he was in favour of a Protocol which could be universally accepted.

44. Mr. BRECKENRIDGE (Sri Lanka), referring specifically to the amendment relating to occupied countries, said that he had been concerned to hear various delegations refer to a compromise. His country had not taken part in any agreement of that sort. He was afraid that the Conference was in process of limiting the scope of humanitarian law to political law, which would cast doubts on its moral level. His delegation therefore supported the adoption of amendment CDDH/415 and Add.1 and 2 and Corr.1, whatever the consequences for Article 79 bis as a whole.

45. Mr. SHERIFIS (Cyprus) said that he would comment on two aspects of the discussion only. Firstly, with reference to the claim made by those not in favour of the proposed amendment that the sovereignty of States would be infringed, the discussion had demonstrated that there was no basis for that claim and, in the event, the sympathies of the Conference should, on the contrary, lie with those whose territories were occupied. He considered that the suggestions made by the Swiss delegation for the consideration of the Drafting Committee were apposite and that the text would be improved if, as he hoped, the proposed amendment was adopted.

46. With respect to the compromise mentioned by some representatives, his delegation, together with that of Sri Lanka and many other non-aligned countries, did not think that the principle embodied in amendment CDDH/415 and Add.1 and 2 and Corr.1 was in any way influenced by any supposed compromise and he hoped that delegations would vote in favour of the amendment.

47. Mr. CLARK (Nigeria) said that he was sorry that an impression was being created by some delegations that there had been a compromise. That was not so. In any case he did not wish to start a controversy on that issue. He had been surprised to hear the representatives of Canada and the Federal Republic of Germany state that exceptions could not be made to a law. That seemed a curious doctrine. Finally, the suggestion of the Swiss delegation did no violence to the amendment and should be considered by the Drafting Committee.

48. Mr. de ICAZA (Mexico), speaking on behalf of the sponsors of amendment CDDH/415 and Add.1 and 2 and Corr.1, requested that a roll-call vote should be taken.

A roll-call vote was taken on amendment CDDH/415 and Add.1 and 2 and Corr.1.

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

In favour: Afghanistan, Algeria, Saudi Arabia, Argentina, Bangladesh, United Republic of Cameroon, Cyprus, Colombia, Ivory Coast, Cuba, Egypt, United Arab Emirates, Ecuador, Ghana, Greece, Guatemala, Iraq, Iran, Socialist People's Libyan Arab Jamahiriya, Jordan, Kuwait, Lebanon, Madagascar, Mali, Malta, Morocco, Mauritania, Mexico, Mozambique, Nigeria, Oman, Uganda, Pakistan, Panama, Peru, Philippines, Qatar, Syrian Arab Republic, Republic of Korea, Democratic People's Republic of Korea, United Republic of Tanzania, Romania, Senegal, Swaziland, Sudan, Sri Lanka, Switzerland, Tunisia, Uruguay, Venezuela, Yemen, Democratic Yemen, Yugoslavia and Zaire.

Against: Germany, Federal Republic of, Australia, Belgium, Bulgaria, Canada, Chile, Denmark, Spain, United States of America, Finland, France, Hungary, Ireland, Israel, Italy, Luxembourg, Monaco, Mongolia, Netherlands, Poland, Portugal, German Democratic Republic, Byelorussian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic, United Kingdom of Great Britain and Northern Ireland, Czechoslovakia, Turkey and Union of Soviet Socialist Republics.

Abstaining: Austria, Brazil, India, Indonesia, Japan, Kenya, Liechtenstein, Nicaragua, Norway, New Zealand, Socialist Republic of Viet Nam, Holy See, Sweden and Thailand.

The result of the vote was 54 in favour, 28 against and 14 abstentions.

Not having obtained the necessary two-thirds majority, the proposed amendment (CDDH/415 and Add.1 and 2 and Corr.1) was rejected.

Explanations of vote

49. Mr. SIDERIS (Greece) said that the vote which had just taken place on paragraph 2 of Article 79 bis marked the end of a lengthy and arduous effort in which his delegation had shared unstintingly in the hope of seeing effective and satisfactory implementation machinery set up, thus dispelling old apprehensions and legitimate fears and ruling out any over-individualistic attitude.

50. His delegation, which had voted in favour of amendment CDDH/415 and Add.1 and 2 and Corr.1, had stated in Committee I (see CDDH/I/SR.73, annex) its view concerning the need for a mandatory procedure. The lack of enthusiasm for paragraph 2 of

Article 79 bis as approved by Committee I was mainly due to the fact that the provision in question appeared to favour the aggressors rather than the victims and the Great Powers rather than the small countries. His delegation's view was that the amendment would provide a procedure having at least a minimum credibility and efficacy, which paragraph 2 as approved by Committee I failed to do.

51. The vote which had just taken place confirmed the Greek delegation's view that the vast majority of the Conference favoured a mandatory system for the whole of the procedure. For lack of a few votes, the concept of a mandatory procedure was set aside for the moment, but he remained convinced that the discussion which had just taken place had not been in vain and would inspire a future generation of jurists and diplomats to adopt the only solution called for by the very nature of humanitarian law, the effective implementation of provisions which could lessen human suffering in armed conflicts and thus serve the interests of the entire international community. It was to be hoped that when that time came the voice of the small countries would be heard and their interests taken into consideration.

52. Mr. AL-FALLOUJI (Iraq) observed that after the vote just taken by rejecting the amendment (CDDH/415 and Add.1 and 2 and Corr.1) to paragraph 2 of Article 79 bis, the Conference had in fact agreed that an enquiry in an occupied territory would take place only at the request of a single Party, namely the Occupying Power. Thus the concept of balance between the two parties had been set aside. In practice, therefore, the Conference had sanctioned the principle that the Occupying Power was alone sovereign to take the decision of requesting an enquiry. Some representatives had spoken of violation of sovereignty. Did that mean that the Occupying Power alone was sovereign in a country whose territory it occupied? If such a policy were accepted, the Conference would no longer be undertaking a humanitarian task but would be justifying the violation of an occupied country's sovereignty, which was obviously the most dire of all policies.

53. By the vote just taken, the Conference had favoured the Party that was always the most favoured, whereas it ought to have balanced paragraph 2 to take account of the least-favoured Party. Needless to say, such a decision would affect Iraq's position with regard to Article 79 bis, which it considered discriminating against the occupied territories and favouring the Occupying Power, which alone retained the sovereign right to request that an enquiry should be opened.

54. Mr. GHAREKHAN (India) recalled that in Committee I his delegation had stated its position clearly and had explained why it was against a mandatory enquiry procedure. Its position of principle remained the same; it still considered that an enquiry procedure could not be imposed upon a country against its will. His delegation fully understood the motives of the sponsors of amendment CDDH/415 and Add.1 and 2 and Corr.1 and wished to point out that in various international bodies it had supported all measures designed to put a stop to unlawful occupation. He wished to assure the representative of Nigeria that India supported, and would continue to support, all efforts to end the occupation of Namibia. Similarly, with regard to the territories unlawfully occupied in other parts of the world and which the sponsors of the amendment had had in mind, India wholeheartedly supported all the measures designed to put an end to such occupation. That was why it had not opposed the amendment.

55. Mr. ABI-SAAB (Egypt) said that he deplored the outcome of the vote on amendment CDDH/415 and Add.1 and 2 and Corr.1 and found it very revealing that the great majority of third world countries had voted in favour of it. In rejecting the amendment, the Conference had discarded the only article that provided for a mandatory implementation system and, consequently, Article 79 bis remained theoretical and had no practical value. The vote had been a bitter lesson, showing that when considerations of theory were done with and it came to undertakings of a practical nature, most States, namely the big and the powerful, wavered and shirked their responsibility.

56. Mr. ARMALI (Observer, Palestine Liberation Organization), speaking at the invitation of the President, said that he only wanted to say how disappointed and grieved the national liberation organizations were after the vote which had just been taken. It amounted to a condemnation of all international efforts to put an end to the violations of human rights, which were now doomed to paralysis and impotence. In point of fact, the vote was a reward for occupation. The arguments advanced before the vote to justify the rejection of the proposed amendment seemed strange enough, especially the argument that the Occupying Power might have taken over the territory for reasons of self-defence and because it feared that it was open to attack. Did that entitle it to contravene the rules of humanitarian law or to violate the provisions of the Protocols or of the 1949 Conventions? The Conference's task was to study ways of developing humanitarian law and, as the representative of Iraq had pointed out, political arguments were out of order. The vote showed that an Occupying Power would always have the last word and could go on occupying a

territory without incurring any condemnation. Thus, in recent years, fact-finding commissions whose probity, morality and impartiality were above suspicion had been denied the right to institute enquiries in occupied territories. He could not but deeply deplore the backward step the Conference had taken in rejecting amendment CDDH/415 and Add.1 and 2 and Corr.1.

57. Mr. ALDRICH (United States of America) said that he had voted against amendment CDDH/415 and Add.1 and 2 and Corr.1, which he did not think was acceptable. It would be so if it was considered that the Occupying Power was always the aggressor and the occupied territory always the victim. That was not so in every case, as was shown by the example of the United States of America, which after the Second World War had been the Occupying Power in Europe and in the Far East.

58. If there had been an adequate consensus he would not have opposed the amendment despite his reservations concerning it.

59. Mr. NUÑEZ (Cuba) said that he had voted in favour of the amendment although he regretted that the suggestion by the German Democratic Republic had been submitted too late for the sponsors to take in into account.

60. Mr. de ICAZA (Mexico) expressed disappointment that a minority had prevented a large majority from making its voice heard - a majority that included forty-four countries of the third world which were absent and had not participated in the vote. It was clear that Protocol I would not reflect reality but would represent the dictatorship of a minority.

61. Mr. GRAEFRATH (German Democratic Republic) said that he had always supported any measures of defence against aggression and he regretted that the sponsors of amendment CDDH/415 and Add.1 and 2 and Corr.1 had not been able to accept his proposal.

62. Mr. MOKHTAR (United Arab Emirates) said that in rejecting amendment CDDH/415 and Add.1 and 2 and Corr.1 the Conference was endorsing the principle that might was right. Article 79 bis as it stood offered countries whose territory was occupied no means of recourse to legal machinery for their own defence. Situations would soon arise which would necessitate reconsideration of the article. Yet the amendment would have had every chance of being accepted if it had been given the full attention and importance it deserved. The vote which had just been taken dealt a serious blow to the efforts made towards the development of humanitarian law and could only induce feelings of pessimism.

63. The representatives of Czechoslovakia, Chile, Finland, Guatemala, Indonesia and Turkey stated that they would transmit to the Secretariat their explanations of vote on amendment CDDH/415.

Paragraph 2 - Amendment by the United States of America (CDDH/416)

64. Mr. ALDRICH (United States of America) introducing amendment CDDH/416, said that it should be considered as a whole since it concerned the whole of Article 79 bis, paragraph 2. As in paragraph 1, the word "competence" had been replaced by the word "jurisdiction".

65. The purpose of the amendment was to enable the Parties to commit themselves in advance to accepting the proceedings of the Fact-Finding Commission when the enquiry was requested by another Party who had also committed itself to do so. In the new sub-paragraph (d) the obligation to obtain the consent of the Party which was the subject of the enquiry was retained. He hoped that, if the amendment was adopted, countries would make their declaration recognizing the competence of the Fact-Finding Commission at the time when they became Parties to Protocol I or at any other time.

66. Mr. CLARK (Nigeria) said that he would find it difficult to accept the United States amendment since the new paragraph 2 was reminiscent of Article 85 on reservations, which it had been decided to delete. He had voted against the amendment because it made no distinction between the aggressor and the victim.

67. Mr. BRECKENRIDGE (Sri Lanka) said that he wished to make an oral amendment to sub-paragraph (d) of the text proposed by the United States delegation for Article 79 bis, paragraph 2 (CDDH/416). It would replace the full stop at the end of the sub-paragraph by a comma, and add a phrase to read "except in the case of a territory occupied as a result of aggression, in which case the request of the Party whose territory is occupied will suffice for the institution of an enquiry".

68. Mr. EL HASSEEN EL HASSAN (Sudan) favoured the insertion of that phrase and asked that a vote should be taken immediately on the amendment.

69. Mr. AL-FALLOUJI (Iraq) said that if the phrase was inserted he could accept the wording proposed by the United States delegation for paragraph 2. Otherwise he would be obliged to vote against Article 79 bis as a whole.

70. Mr. SHERIFIS (Cyprus) said that he hoped that the sub-amendment proposed by the delegation of Sri Lanka could be accepted by the United States representative.

71. Mr. ALDRICH (United States of America) pointed out that it was not in a purely national interest, but in the interests of all, that he had submitted his amendment, the purpose of which was to introduce some kind of mandatory system. The phrase which the representative of Sri Lanka proposed to insert introduced a provision which would never be applied, since no country would be willing to admit that it was the aggressor. If the sub-amendment was retained, he would prefer to withdraw the amendment submitted by his delegation.

72. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) noted that the sub-amendment submitted orally by the delegation of Sri Lanka in effect reintroduced the proposal in document CDDH/415 and Add.1 and 2 and Corr.1 which the Conference had just rejected; that contravened rule 32 of the rules of procedure, on which he would insist if the delegation of Sri Lanka pressed for its oral sub-amendment to be put to the vote. If the United States representative withdrew his amendment, the Sri Lanka sub-amendment would lapse ipso facto.

73. In reply to a question by the PRESIDENT, Mr. BRECKENRIDGE (Sri Lanka) said that he maintained his sub-amendment.

74. Mr. HUSSAIN (Pakistan), invoking rule 31 of the rules of procedure, submitted the United States amendment on behalf of his own delegation.

75. Mr. de ICAZA (Mexico) pointed out that, under rule 31 of the rules of procedure, a motion to which an amendment had been submitted could not be withdrawn.

76. Mr. HUSSAIN (Pakistan), after reading out rule 31 of the rules of procedure, said that it was for the President to decide - and he would accept his decision - whether rule 31 could be interpreted as authorizing the United States representative to withdraw his amendment, despite the sub-amendment submitted to it.

77. The PRESIDENT ruled that the Conference had before it an amendment by the United States, taken up by the Pakistan delegation and a sub-amendment by the Sri Lanka delegation to that text, both of which he would put to the vote.

78. In reply to Mr. MBAYA (United Republic of Cameroon), Mr. SHERIFIS (Cyprus), Mr. CLARK (Nigeria) and Mr. MOKHTAR (United Arab Emirates), the PRESIDENT summed up the position and stated that the Conference had before it a Pakistan amendment - which had appeared originally in the text presented by the United States delegation - and a Sri Lanka sub-amendment, which he read out.

At the request of the representative of the Ukrainian Soviet Socialist Republic, a vote was taken by roll-call on the Sri Lanka amendment.

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

In favour: Madagascar, Mali, Malta, Morocco, Mauritania, Mexico, Mozambique, Nicaragua, Nigeria, Oman, Uganda, Pakistan, Panama, Peru, Philippines, Qatar, Syrian Arab Republic, Democratic People's Republic of Korea, Socialist Republic of Viet Nam, United Republic of Tanzania, Romania, Holy See, Senegal, Swaziland, Sudan, Sri Lanka, Tunisia, Uruguay, Venezuela, Yemen, Democratic Yemen, Yugoslavia, Afghanistan, Algeria, Saudi Arabia, Argentina, United Republic of Cameroon, Cyprus, Colombia, Ivory Coast, Cuba, Egypt, United Arab Emirates, Ecuador, Ghana, Greece, Guatemala, Iraq, Iran, Socialist People's Libyan Arab Jamahiriya, Jordan, Kenya, Kuwait, Lebanon.

Against: Monaco, Mongolia, New Zealand, Netherlands, Poland, Portugal, German Democratic Republic, Byelorussian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic, United Kingdom of Great Britain and Northern Ireland, Sweden, Switzerland, Czechoslovakia, Union of Soviet Socialist Republics, Germany, Federal Republic of, Australia, Austria, Belgium, Bulgaria, Canada, Chile, Denmark, Spain, United States of America, Finland, France, Hungary, Ireland, Israel, Italy, Japan, Liechtenstein, Luxembourg.

Abstaining: Norway, Republic of Korea, Thailand, Turkey, Brazil, India, Indonesia.

The result of the vote was 54 in favour, 33 against, and 7 abstentions.

Not having obtained the necessary two-thirds majority, the Sri Lanka amendment was rejected.

79. The PRESIDENT put to the vote the United States amendment (CDDH/416), which had been taken up by the Pakistan delegation.

The amendment to paragraph 2 was adopted by 43 votes to 13, with 33 abstentions.

Paragraph 3 (a) - Amendment by the United States of America (CDDH/416)

80. Mr. ALDRICH (United States of America) said that his delegation had wished to introduce a greater degree of flexibility in the machinery for appointing the members of the Chamber undertaking the enquiries. If several countries participated in a war, it would be rather difficult to find neutral members. The proposal could be adopted by consensus.

The United States amendment to paragraph 3 (a) (CDDH/416) was adopted by consensus.

81. Mr. AL-FALLOUJI (Iraq) regretted that the proposals submitted in Committee by his delegation had not been accepted.

Paragraph 7 - Amendment by the United States of America (CDDH/416); amendment by Austria, Denmark and Sweden (CDDH/420)

82. The PRESIDENT proposed that consideration should be given first of all to the United States amendment, the furthest removed from the original text.

83. Mr. ALDRICH (United States of America) stated that the amendment proposed by his delegation was of a purely technical nature. Experience proved, as Canada already knew full well, that commissions often found it hard to survive, owing to lack of funds. For that reason, the text proposed provided for greater precision in financing and reimbursing. As far as amendment CDDH/420 was concerned, it could be said that it pertained just as much to the United States amendment as to the original text.

84. Mr. PARTSCH (Federal Republic of Germany) suggested that the word "make" at the end of the second line of the amendment should be replaced by the word "made".

85. Mr. CLARK (Nigeria) recalled that Article 1 provided for the accession of liberation movements, and said that many delegations would like to know the implications of the amendment so far as such movements were concerned. In the case of Namibia, for instance, would the South West Africa People's Organization (SWAPO) have to pay towards enquiry costs?

86. Mr. MBAYA (United Republic of Cameroon) said he thought there was a contradiction between paragraph 2 of the original text, which gave the Commission no power of decision, and the text proposed by the United States delegation, which gave it such powers ("unless the Commission specifies otherwise"). It seemed wrong at first sight that the Commission should be able to decide that this or that State should bear a percentage of the costs.

87. Mr. PAOLINI (France) considered that the fears expressed by the representative of the United Republic of Cameroon were justified. It would be better to ensure that reimbursements could not be interpreted as sanctions. In the circumstances, it would be enough to replace, in paragraph 7 proposed by the United States, the phrase "by the Party or Parties against which the allegations are made" by the words "by the other Party". Such a change did not amount to a sub-amendment but was merely a correction which the United States delegation should have no difficulty in accepting.

88. Mr. ALDRICH (United States of America) approved the correction proposed by the representative of the Federal Republic of Germany. In reply to the observations of the Nigerian representative, he explained that liberation movements would have rights and duties equal to those of States. Lastly, in reply to the Cameroonian representative, he said that the phrase "unless the Commission specifies otherwise" could be deleted.

89. Mr. MBAYA (United Republic of Cameroon) recalled that the French delegation had also proposed an amendment; he requested that, if the United States amendment was not adopted, the original text should be amended to avoid giving the Fact-Finding Commission excessive powers.

90. Mr. BINDSCHIEDLER (Switzerland) supported the argument of the Cameroonian representative and said he hoped that the Conference would revert purely and simply to the original text, especially since it would be difficult, without the danger of discouraging a Party requesting an enquiry, to require it to pay an advance.

91. Mr. ALDRICH (United States of America) replied that resources were needed to cover the operation of the Commission, and that it would be better to provide in advance for a precise method of financing.

92. Mr. CLARK (Nigeria) considered that the correction proposed by the French delegation still did not justify the amendment. The retention of the phrase "unless the Commission specifies otherwise" might work in favour of the liberation movements.

93. Mr. HUSSAIN (Pakistan) said he feared the discussion was becoming deadlocked in proposals and counter-proposals, and called for a suspension of the meeting so that the delegations concerned could clarify the situation.

94. The PRESIDENT invited the representatives of the United Republic of Cameroon, the United States of America, France and Nigeria to concert their proposals during the suspension of the meeting.

The meeting was suspended at 6.35 p.m. and resumed at 6.50 p.m.

95. Mr. ALDRICH (United States of America) announced that the four delegations concerned had agreed to delete the phrase beginning with the word "unless" in proposed paragraph 7 and to accept the inclusion of a provision for voluntary contributions to solve the problems of States and liberation movements in financial difficulties.

The United States amendment to paragraph 7, as amended, was adopted by 35 votes to 11, with 35 abstentions.

96. The PRESIDENT asked whether the delegations of Austria, Denmark and Sweden wished to press their amendment (CDDH/420).

97. Mr. BRING (Sweden) introduced the amendment (CDDH/420) proposed by the three countries. The sponsors, he said, doubted whether the method of financing provided for in the original text would enable the Commission to operate at all times and in all circumstances. In order partially to remedy that situation, therefore, provision should also be made for the payment of voluntary contributions. It should now be an easy matter to adopt that proposal by consensus.

The amendment by Austria, Denmark and Sweden (CDDH/420) was adopted by consensus.

98. The PRESIDENT recalled that the amendments adopted concerned paragraph 1 (b), the whole of paragraph 2, paragraph 3 (a) and paragraph 7.

99. Mr. de ICAZA (Mexico), supported by Mr. MBAYA (United Republic of Cameroon), Mr. BRECKENRIDGE (Sri Lanka) and Mr. SHERIFIS (Cyprus), moved the adjournment of the meeting and of the consideration of Article 79 bis as a whole.

The motion was carried.

The meeting rose at 7 p.m.

ANNEX

to the summary record of
the forty-fifth plenary meeting

EXPLANATIONS OF VOTE

ARGENTINA

Original: SPANISH

Article 77 of draft Protocol I

The Argentine delegation was constrained to vote against the proposed text of Article 77 of draft Protocol I for the following reasons:

The delegation considers that the system for the prevention and repression of breaches of the 1949 Geneva Conventions and of Protocol I is perfectly structured and balanced as set forth in Articles 74, 76 and, more particularly, in the text recently adopted by consensus as Article 76 bis (Duty of commanders). There is, therefore, a sufficient guarantee that the High Contracting Parties will see to it that their respective legislations prevent and repress any kind of violation, by commission or omission, on the part of their nationals, of the Conventions or this Protocol.

Particular reference should be made in this connexion to the requirement regarding prevention and suppression imposed on military commanders with respect to their subordinates by Article 76 bis. Argentina was glad to join the consensus on that article because it sets up proper machinery for the apportionment of responsibility in the task of ensuring respect for and observance of international humanitarian law by States, on the basis of superior authority.

On the other hand, the wording proposed in Article 77 presents my Government with a number of serious problems. There is, in fact, no agreement among international lawyers regarding the delicate subject of how far subordinates may question the orders of their military superiors. There is also the problem of the limits beyond which the responsibility derived from the duty of obedience under military penal law is involved, at least with respect to orders which do not involve obvious offences.

The main difficulty, however, lies in deciding, according to rank, the extent to which orders may be questioned and the consequent penal responsibility of the agent. It is obviously wrong to say, for example, that a corporal and a general stand in the same position in this respect.

Even when these logical distinctions are allowed, there will still be problems such as those of determining the extent to which a query is permissible at each intermediate level, and the problem of assessing the mental capacity of the person charged (i.e. his ability to decide whether in the circumstances he was, or should have been, aware that he was committing a grave breach of the Conventions or of this Protocol).

For the reasons given, and because to have done otherwise would have rendered little service to the cause of international humanitarian law, the Argentine delegation decided to vote against Article 77.

CANADA

Original: ENGLISH

Article 77 of draft Protocol I

The Canadian delegation voted against the deletion of this article since it was of opinion that, having included Article 76 bis on the duty of commanders and Article 74 on grave breaches, it was only meet and proper that an article on individual responsibility should be included. We agree that under customary international law an accused is unable to plead as a defence that the criminal act with which he was charged was in compliance with superior orders that had been given to him. While denying this avenue of defence, the Canadian delegation is aware that compliance with an order to commit an act which the accused knew or should have known was clearly unlawful may be taken into consideration by way of mitigation of punishment.

We do not consider that to deny the availability of this defence is in any way contrary to the maintenance of military discipline. Since all States are presumed to abide by the law and to intend to fulfil their international obligations in good faith, the Canadian delegation is convinced that no State will encourage or tolerate any of its commanders ordering their subordinates to commit an illegal act amounting to an act clearly contrary to the international law of armed conflict.

So far as we understood the reasons of those opposing the inclusion of Article 77, and in particular the United Kingdom delegation, this was not an issue of substance affecting the rule, but a doubt concerning the interpretation of the article as worded.

While we would have liked to see Article 77 adopted as part of the Protocol, we can console ourselves with the knowledge that the article was in fact broadly in accordance with existing international law, which continues to operate in so far as breaches of the Conventions and the Protocol are concerned.

CZECHOSLOVAKIA

Original: SPANISH

Article 79 bis of draft Protocol I; amendment proposed in document CDDH/415 and Add.1 and 2 and Corr.1.

My delegation supported Article 79 bis in Committee I and will support it vigorously in the plenary Conference also, but only because amendment CDDH/415 and Add.1 and 2 and Corr.1 was rejected by roll-call vote, so that the optional system has remained the only system provided for in the article.

My delegation well understands the motives that inspired the sponsors of amendment CDDH/415 and Add.1 and 2 and Corr.1. My Government has always supported and will always support in future, the rights of occupied territories against the aggressor. But the text of the amendment is ambiguous, and, moreover, we are dealing here above all with a question of principle. In accordance with the specific instructions of my Government, we cannot support the idea of a mandatory competence for the International Fact-Finding Commission. We were therefore obliged to vote against the amendment.

DEMOCRATIC YEMEN

Original: ARABIC

Article 77 of draft Protocol I

My country's delegation, while fully alive to the humanitarian motives underlying Article 77, wishes to point out that the humanitarian aspect has already been dealt with in Articles 76 and 76 bis, both of which were adopted by consensus.

On juridical grounds, and also for practical reasons, my delegation voted in Committee I as well as in the plenary of the Conference against retaining Article 77. On juridical grounds, because in the article there is a certain imbalance between international humanitarian law and the internal law on which all military discipline is based. That principle is confirmed by the constitutional regulations of all countries and by the principles of international law. The relationship between citizens and the authority under whose jurisdiction they come in institutional matters is essentially a question of internal law of the State to which they belong.

The practical reasons are concerned with the contents of the article, which raises difficulties because of its exaggeration and ambiguity. According to the article, a mere subaltern bears an enormous responsibility, not only when he is fully aware that he is committing a breach of the Conventions or of the Protocol, but also - and to a very large degree - when the article assumes that the soldier knew, or should have known, that he was committing a breach. It is also an exaggeration to expect the soldier to grasp the nuances in dense legal texts so as to be able to make a suitable assessment of the orders he receives. There can be little doubt that such a situation might well shake the military discipline in force in the various States.

My delegation is convinced of the need to delete the entire article, but wishes to say that so far as the other articles are concerned, the Conference has achieved a real development of international humanitarian law, and my country would like to see that progress consolidated. My country also wishes to play a major part in the evolution and development of international humanitarian law.

EGYPT

Original: ENGLISH

Article 79 bis of draft Protocol I

The Egyptian delegation has already expressed its disappointment at the failure of the Conference, by a very narrow margin, to adopt the amendment to Article 79 bis in document CDDH/415 and Add.1 and 2 and Corr.1. This amendment would have gone a long way in remedying the grave defect of this article, which is the absence of any compulsory competence of the proposed Fact-Finding Commission.

We consider that the article as it finally emerged is much ado about nothing; another rhetorical exercise evading the real issues and obstacles which have been at the basis of the relative ineffectiveness of humanitarian law up to now and which are at the very basis of this Conference. This is why we have considered it more honest and forthright to vote against the truncated version of Article 79 bis which has finally emerged.

FRANCE

Original: FRENCH

Article 79 of draft Protocol I

Article 79, which the Conference has adopted, on mutual assistance in criminal matters and on extradition, calls for the following comments by the French delegation:

(1) Paragraph 2, on co-operation in the matter of extradition, seems out of place in the general context of Article 79. It should be remembered that originally this article dealt only with mutual judicial assistance, and extradition was the subject of a separate article.

As to the substance, the provisions of this paragraph are inadequate, for they are drafted in vague terms and fail to fill the gaps in the 1949 Geneva Conventions in the matter of extradition.

(2) With regard to paragraph 3, which is unbalanced and loosely drafted, the second sentence clearly applies not only to mutual judicial assistance proper but also to extradition, the expression "mutual assistance in criminal matters" being obviously used in a broad sense, including extradition.

Notwithstanding these defects of paragraphs 2 and 3 of Article 79, the French delegation did not wish to dissociate itself from the consensus which the article obtained.

HOLY SEE

Original: FRENCH

Article 77 of draft Protocol I

The delegation of the Holy See voted in favour of Article 77. It keenly regrets that this article failed to obtain the necessary majority. By codifying the principle established at Nürnberg, it confirmed a major development in humanitarian law.

Article 77 in no way encouraged indiscipline in the armed forces, as has been claimed, but emphasized and encouraged the responsibility of everyone, whatever his rank. In so doing, it acknowledged the rights and also the obligations of the individual conscience.

Right at the beginning of draft Protocol I, in Article 1, paragraph 2, the Conference asserted the primacy of the public conscience. But without free and active individual consciences, there is no public conscience.

The two paragraphs constituted, in the view of the delegation of the Holy See, an indivisible whole: paragraph 1 was logical and necessary to counterbalance paragraph 2. By rejecting

Article 77, the Conference has placed future combatants in a dilemma: to obey superior orders involving them in grave breaches of the Conventions and the Protocol, with the risk of being brought before a victors' court, as at Nürnberg; or to follow the dictates of their conscience and refuse to obey such orders, with the risk of finding themselves facing the law of their own country in all its stringency.

We may be certain that, in most cases, they will prefer to gamble, so to speak, on their country's victory, and carry out the orders they receive, no matter what their nature.

Thus, in rejecting Article 77, the Conference has in a sense written off the principles of law established at Nürnberg; in other words, it has taken humanitarian law back a step.

It has also shown that it regards "subordinates", whether combatants or civilians, not as human beings with minds of their own, but as irresponsible creatures.

INDONESIA

Original: ENGLISH

Articles 76, 76 bis, 77, 79 and 79 bis of draft Protocol I

Article 76

My delegation joined the consensus on Article 76, although it finds it rather difficult to give its wholehearted support to this article dealing with failure to act. Apart from the considerable differences in this respect between various penal systems, it may be envisaged that national Governments may have already enacted legislation which might be contrary to the provisions of this article.

Article 76 could be easily interpreted as interfering in the internal affairs of a State.

My delegation expresses its reservations concerning Article 76 of draft Protocol I.

Article 76 bis

My delegation abstained at the Committee level when Article 76 bis, regarding "Duty of commanders", was put to the vote.

We would like to draw the attention of representatives to the fact that in most developing countries, such as Indonesia, we have difficulties in implementing the substance of the words "to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and this Protocol".

Article 77

My delegation was in favour at Committee level of including the word "grave" in both paragraph 1 and paragraph 2 of Article 77, concerning "Superior orders".

However, in line with the reservations which have been expressed by the Indonesian delegation in regard to Article 74, paragraph 5, my delegation finds it rather difficult to classify those grave breaches as war crimes under international law.

My delegation expresses its reservations to this article, and therefore voted against its adoption.

Article 79

My delegation abstained at the Committee level when Article 79 regarding "Mutual assistance in criminal matters" was put to the vote.

In the view of my delegation it is not necessary to have a provision on extradition either in the Conventions or in this Protocol.

My delegation believes that an extradition treaty must first exist between the requesting and the requested State before a person or persons taking refuge in the territory of the latter, after having committed a crime in another country, can be surrendered.

Even though such a treaty exists, the decision whether to grant extradition or not is still subject to some restrictions which have to be fulfilled by the requesting State.

Article 79 bis

Regarding Article 79 bis concerning the "International Fact-Finding Commission", my delegation wishes to reiterate that whatever the name and whatever the motives, this article deals with a matter of principle, namely the establishment of a compulsory international body. In the opinion of my delegation there should be no provision for such a fact-finding commission in Protocol I.

That is why my delegation was against Article 79 bis, and my delegation expresses its reservations to this specific article.

At the same time my delegation would like to stress that in other international forums the Indonesian delegation has always consistently given its full and wholehearted support to the just cause of the peoples of Palestine and Namibia as referred to by the distinguished co-sponsors of amendment CDDH/415 and Add.1 and 2 and Corr.1.

However, due to the difficulties my delegation has in regard to Article 79 bis as a whole, for the reasons it has just put forward, my delegation regrets that it is not in a position to support amendment CDDH/415 and Add.1 and 2 and Corr.1, and abstained on it.

ISRAEL

Original: ENGLISH

Article 77 of draft Protocol I

Israel voted in favour of Article 77 as contained in document CDDH/401.

The article is a reflection of existing customary international law clearly enunciated in the Nürnberg principles and embodied in Article 125 of the Israel Military Justice Law.

We regret that Article 77 was not adopted, although there was a majority in favour, and wish to state that the rule continues to be governed by customary international law.

POLAND

Original: ENGLISH

Article 79 of draft Protocol I

In the field of repression of grave breaches, the Polish delegation has always attached special importance to co-operation on extradition. We have been convinced that as a general rule extradition to the country where the grave breach was committed should be given certain preference, as was stated, in particular, in General Assembly resolution 3074 (XXVIII) of 3 December 1973 on Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity.

Therefore, my delegation wishes to express profound satisfaction with the adoption of Article 79, paragraph 2 of which contains a distinct obligation to give due consideration to the request of the State in whose territory the alleged offence has been committed.

ROMANIA

Original: FRENCH

Article 79 bis of draft Protocol I

The Romanian delegation voted in favour of Article 79 bis concerning the International Fact-Finding Commission.

Our positive attitude was governed by the fact that the competence of that Commission is, in principle, optional and that the institution of an enquiry at the request of a Party to the conflict is to take place with the consent of the other Party or Parties concerned.

We consider that Article 79 bis, in its approved form, is an acceptable compromise and at the same time represents a step forward in the reaffirmation and development of international humanitarian law applicable in armed conflict.

We still harbour some doubts, however, as to the composition of the Commission and its capacity of ensuring the protection of the victim in all cases in an objective way. In our view, the Commission should be a broader-based body, established on equitable geographical foundations, so as to enable all the States interested in its activities to participate.

In this connexion, the Romanian delegation wishes to state that it also voted in favour of amendment CDDH/415 and Add.1 and 2 and Corr.1, according to which, in the case of an occupied territory, a request made by the Party whose territory is occupied will suffice for instituting the enquiry. We voted in favour of this amendment because it aims at reinforcing the protection of a victim of aggression and ensuring for the victimized country sovereignty over its entire territory.

We regret that our Conference did not adopt that amendment in plenary.

SPAIN

Original: SPANISH

Article 77 of draft Protocol I

The fundamental concept of this article is that no person, and especially no combatant, shall feel himself obliged to carry out an action in obedience to an order of his superior when he is fully aware that such an action implies the commission of a grave breach of the Conventions or the Protocol.

The fact of having acted pursuant to such an order, in obedience to a superior, does not exonerate him from penal responsibility, if he is aware of the nature of his action or must of necessity realize its gravity.

The article fails to achieve its purpose of strengthening, in serious cases, respect for the provisions of the Conventions and the Protocol by those compelled to obey the orders of a superior. Paragraph 1 of the proposed text encourages the infringement of national laws, and this is unacceptable as the objective of an international rule.

What ratio juris requires of an international penal regulation declaring an action to be an offence is the adaptation of the rule of national law to the rule of a Convention, so that provision is made in the former for the type of offence specified in the latter. Paragraph 2 refers to penal responsibility. That responsibility exists when the circumstances in which the penal offence takes place do not prevent the realization that the order received implies the commission of a grave offence, although the fact must be considered, as an attenuating circumstance, that it is rationally impossible to disobey orders received. For that reason the principle affirmed in paragraph 2 is a valid one and must be considered in the light of the consequences resulting from the strict application of the provisions of Article 76 bis, which was approved by consensus.

It would have been enough, therefore, simply to mention it in this article as a consequence of the preceding one, in which the necessities of discipline are reconciled with the need for humanitarian training in the armed forces.

SUDAN

Original: ARABIC

Article 77 of draft Protocol I

The Sudanese delegation voted against the retention of Article 77 because paragraph 1, in particular, presents a certain threat to armed forces discipline, the fundamental basis without which no armed forces can exist. So far as I know, and so far as my studies of military law suggest, not even the most advanced of States have yet succeeded in arriving at that formula, which explicitly prohibits the application of any sanction against a soldier who disobeys his superiors on the grounds that obedience to an order might involve a serious breach of the Conventions. These States have not adopted that formula, for they are fully aware of the danger represented by that text, which leaves the door wide open to insubordination by soldiers, who may thus discuss the orders of their superiors to make sure they are not contrary to the provisions of the Conventions, and by so doing create conditions liable to lead to defeat on the battlefield. Most States have based themselves on the Charter of the Nürnberg Tribunal, which does not absolve the accused of responsibility but allows the court to take cognizance of the grave breach committed in the execution of the orders, although solely with a view to establishing extenuating circumstances of which the prisoner may avail himself. This is provided for in paragraph 2 of Article 77, and if the article had been put to the vote paragraph by paragraph, we would have voted against the retention of paragraph 1 but in favour of paragraph 2.

UNITED STATES OF AMERICA

Original: ENGLISH

Article 77 of draft Protocol I

We voted against Article 77. The basic reason for this is that the provision does not go far enough. We are aware that many States here have indicated that no a contrario conclusions should be drawn from the limited scope of the article. We believe that such an argument is not sufficient for us to support it in the light of the fact that the primary reason why Article 77 is limited to grave breaches is the unwillingness of many to state explicitly that breaches are covered. We believe that this basic unwillingness to provide a defence to combatants who refuse to commit an obviously illegal act is one that does not augur well for the future implementation of the Protocol.

Given the limited scope of applicability of this provision, and the basic reasons for this limited scope, we voted against this article.

YEMEN

Original: ENGLISH

Article 79 bis of draft Protocol I

The delegation of Yemen expresses its deep regret and sorrow that the amendment to Article 79 bis proposed by a number of countries, including Yemen, and contained in document CDDH/415 and Add.1 and 2 and Corr.1 was rejected by 28 votes, a number which is not and cannot truly reflect the will and the wishes of the Conference, in particular in the light of the fact that the said amendment carried 54 affirmative votes.

Furthermore, we believe that the denial to a State, victim of aggression and whose territory is occupied as a result of this aggression, to request the institution of an enquiry constitutes a grave violation of the basic principles of international humanitarian law and the Universal Declaration of Human Rights.

My delegation wishes, in this connexion and for the above-mentioned reasons, to put on record its rejection of Article 79 bis, entitled International Fact-Finding Commission.

SUMMARY RECORD OF THE FORTY-SIXTH PLENARY MEETING

held on Tuesday, 31 May 1977, at 10.10 a.m.

President: Mr. Pierre GRABER Federal Councillor,
Head of the Federal
Political Department of
the Swiss Confederation

In the absence of the President, Mr. D. M. Miller (Canada)
Vice-President, assumed the Chair.

ADOPTION OF THE ARTICLES OF DRAFT PROTOCOL I (CDDH/401)(continued)

Article 79 bis - International Fact-Finding Commission (concluded)

1. The PRESIDENT invited delegations to resume consideration of Article 79 bis. He reminded them that at the forty-fifth meeting (CDDH/SR.45) some amendments or parts of amendments had been accepted, namely, the amendment submitted by the United States of America (CDDH/416) and the amendment submitted by Austria, Denmark and Sweden (CDDH/420).

2. He asked representatives to take a decision on Article 79 bis as a whole as amended.

3. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that he would like Article 79 bis as a whole to be put to the vote.

Article 79 bis, as amended, was adopted by 49 votes to 21,
with 15 abstentions.*

Explanations of vote

4. Mr. QUENTIN-BAXTER (New Zealand) said that at the current session and at earlier sessions his delegation had taken a special interest in the question of establishing an International Fact-Finding Commission. It was therefore all the more regrettable that it had been unable to vote in favour of the text of Article 79 bis which had just been adopted by the Conference.

5. The reasons for his delegation's abstention were the following: first, paragraph 2 (b) imported the jurisdictional system contained in the "optional clause" of the Statute of the International Court of Justice. That was a complex system which had occupied much of the time of the Court. It was singularly inappropriate that a body which had only a fact-finding function, and which met under the urgency of a wartime situation, should be faced with complicated legal issues relating to its own jurisdiction.

* Article 90 in the final version of Protocol I.

6. Secondly, that provision also imported the inequalities of the jurisdictional system established by the "optional clause", which meant that it placed the Party which made a general declaration at the disposal of a Party which made a much more limited declaration for a specific purpose.

7. Thirdly, Article 79 bis departed from the system of the International Court by requiring the Parties to pay the expenses of an enquiry, whereas the services of the Court itself were placed freely at the disposal of those who resorted to it.

8. For all those reasons, his delegation did not consider that the article just adopted was likely to be of practical value. The only way in which it might be made effective would be if a number of the States which became Parties to Protocol I felt strongly enough about the matter and might then agree among themselves upon a standard form of declaration.

9. Mr. QUINTERO (Colombia) said that he would transmit his explanations of vote in writing to the Secretariat.

10. Mr. SADI (Jordan) said that his delegation had abstained in the vote, although it was in favour of the establishment of an International Fact-Finding Commission, because it did not consider document CDDH/401 satisfactory.

11. Mr. SAWAI (Japan), Mrs. SUDIRDJO (Indonesia), Mr. SERUP (Denmark), Miss EMARA (Egypt) and Miss AL-JOUA'N (Kuwait) said that they would transmit their explanations of vote in writing to the Secretariat.

12. Mr. AMIR-MOKRI (Iran) said that, although his delegation had voted in favour of Article 79 bis, it had some reservations on paragraph 5 (a). The International Fact-Finding Commission in question should, by definition, restrict itself to ascertaining the facts and should not pronounce judgement.

13. Mr. SAARIO (Finland) said that he would transmit his explanations of vote in writing to the Secretariat.

14. Mr. PAOLINI (France) said that, in accordance with the position that his delegation had explained to Working Group B and in Committee I on Article 79 bis, it had voted in favour of the revised article, the purpose of which was to improve the enquiry procedure established by the 1949 Geneva Conventions in the event of violation, without however, making the enquiry mandatory.

15. The French delegation held that the implementation of the obligations of the Conventions and Protocol I was first and foremost the responsibility of the signatory States. The body responsible for an enquiry, to which Article 79 bis gave the title of "International Fact-Finding Commission", could not have any legal jurisdiction.

16. Any such enquiry in an armed conflict was bound to rely on the consent of the two Parties to the conflict. That was why the French delegation had been against two proposed amendments, the effect of which would have been to make the enquiry mandatory in certain cases.

17. Mr. CHAUNY (Peru), Mr. GREEN (Canada) and Mr. DI BERNARDO (Italy) stated that they would submit their explanations of vote to the Secretariat in writing.

18. Mr. BRECKENRIDGE (Sri Lanka) said that his delegation had voted against the adoption of Article 79 bis for two reasons: it felt that it was pointless to appoint eminent persons to posts in certain regions when in occupied zones an enquiry commission of that kind would not be admitted; secondly, it seemed anomalous that each Party should be expected to defray the expenses of the procedure.

19. Mr. de STOOP (Australia) said that he would submit his explanations of vote to the Secretariat in writing.

20. Mr. SAMAD (Afghanistan) said that, considering the important role which the Fact-Finding Commission could play, he was not really opposed to Article 79 bis. His delegation had voted in favour of the article in Committee I, but the adoption of some positive points and the rejection of others had weakened its effectiveness and that had made the voting difficult in the plenary meeting.

21. Mr. MENCER (Czechoslovakia) said that he would submit his explanations of vote to the Secretariat in writing.

Mr. Graber took the Chair.

New article on responsibility to precede Article 80

22. The PRESIDENT invited the Conference to adopt the new article to precede Article 80 as drafted.

The new article on responsibility to precede Article 80 was adopted by consensus.*

Explanations of vote

23. Mr. VALLARTA (Mexico) said that his delegation had supported the new article to precede Article 80 without prejudice to the cases not covered by the article in which it might be found that a Party to the conflict bore some responsibility. For example, the State was responsible for all acts committed by its bodies and not only for acts committed by persons forming part of its armed forces. Similarly, his delegation held that the article did not rule out the possibility of a State incurring liability, and consequently being required to pay compensation, if it had not taken steps to prevent its nationals from committing the offences covered by the Geneva Conventions, Protocol I and its domestic legislation.

24. Mr. DONOSO (Ecuador) said that he fully agreed with the representative of Mexico.

25. Mr. VAN LUU (Socialist Republic of Viet Nam) said that his delegation, together with the delegations of Algeria and Yugoslavia, had sponsored the article on responsibility. It thanked all the delegations, particularly that of the United States of America, which had helped to achieve the consensus in Committee and later in the plenary Conference.

26. The well-known principle of The Hague Conventions laying down the obligation to compensate for serious breaches of humanitarian law, reaffirmed in the conditions of present-day warfare, represented beyond all doubt a step forward in the development of international humanitarian law.

27. Indeed, at the present time wars of aggression of the colonial, neo-colonial or racist type were almost always conducted on the very territory of the peoples who were victims of aggression and occupation. The crimes committed during such wars by expeditionary or occupying forces usually led to such destruction and damage in the territory of those peoples that it took many years for them to return to normal living conditions.

28. That being so, the article entitled "Responsibility" met the legitimate and well-founded requirements of peoples suffering from aggression or oppression.

* Article 91 in the final version of Protocol I.

29. Moreover, it was fully responsive to the wishes expressed by the United Nations General Assembly at its sixth Special Session, in April/May 1974, and by the Heads of State or Government of the Non-Aligned Countries at their Fifth Conference, in August 1976, when they had demanded reparations for the developing countries that had suffered foreign occupation which had inflicted on them serious loss of life and property, together with the reduction or deterioration of the natural resources or other resources of such States, territories or peoples.

30. Mr. SHERIFIS (Cyprus) said that his delegation had supported the article to precede Article 80 in the belief that it was essential that those who violated the provisions of the Conventions or the Protocol should know that they would be bound to provide compensation.

New article on co-operation to be included before or after Article 70

31. Mr. MBAYA (United Republic of Cameroon) said that he would like some clarification of the text of the article, but he was not asking for it to be put to the vote for the moment.

32. The text of the article was approximately the same as that of the text proposed by France on "exceptional measures in the event of grave breaches" (CDDH/I/GT/107/Rev.1), which had been the subject of lengthy debate and had appeared unacceptable to some delegations because it justified reprisals.

33. Norway had then proposed an almost identical text (CDDH/I/348).

34. The text now submitted was even shorter and needed some clarification. The statement "The High Contracting Parties undertake to act jointly or individually, in co-operation with the United Nations ..." gave rise to the question of to what end they would so act. Such action would rather tend to increase violations of the Conventions and the Protocol.

35. Moreover, the title itself needed clarification. It was too short and could be interpreted in various ways.

36. Mr. ABDINE (Syrian Arab Republic) said, in reply to the representative of the United Republic of Cameroon, that the text was the result of a compromise. Three amendments dealing with reprisals had been submitted in Committee, one by France (CDDH/I/GT/107/Rev.1), another by Poland and the Syrian Arab Republic (CDDH/I/GT/113), and a third consisting of the second paragraph only of the proposal by Poland and the Syrian Arab Republic (CDDH/I/351).

37. The text in document CDDH/401 might seem confused, but it was designed to overcome the difficulties; the second part of the sentence indicated that the High Contracting Parties undertook to act in co-operation with the United Nations. There was thus absolutely no question of resorting to the threat or use of force, as stated in Article 2, paragraph 4 of the United Nations Charter. It might be appropriate to refer to that paragraph in the article, in order to preclude any wilful misinterpretation.

38. Mr. DIXIT (India) said that although he did not wish to go into the background of the article, it seemed to authorize reprisals while purporting to prevent them. It was therefore confusing.

39. The amendment submitted by Poland and the Syrian Arab Republic (CDDH/I/GT/113) contained two paragraphs. Paragraph 1 prohibited reprisals, and paragraph 2, which had been retained and formed the new article to be inserted before Article 70 entitled "Co-operation", said that "... the High Contracting Parties undertake to act ... in co-operation with the United Nations ...". Through the deletion of paragraph 1 of document CDDH/I/GT/113, the proposed new article had the opposite effect and in fact authorized collective reprisals.

40. He therefore proposed that the order of words should be reversed, and that the second part of the sentence should read as follows: "... the High Contracting Parties undertake, in co-operation with the United Nations and in conformity with the United Nations Charter, to act jointly or individually". He asked the representative of the Syrian Arab Republic whether he was prepared to accept that amendment.

41. Mr. BRECKENRIDGE (Sri Lanka) said he agreed that the wording should be amended, as it was unclear. He endorsed the Indian delegation's proposal, although he would have preferred the words "through the United Nations in conformity ...". The word "and" before "in conformity with the United Nations Charter" should be deleted.

42. Mr. KAKOLECKI (Poland) said that, in withdrawing its proposal in the Working Group (paragraph 1 of the new article in document CDDH/I/GT/113), his delegation had not changed the Syrian proposal (paragraph 2) in any way. It had in fact agreed to the prohibition of measures of reprisal in other important articles of the Protocol which it had endorsed. He supported the Sri Lanka representative's suggestion.

43. Mr. MBAYA (United Republic of Cameroon) said that the representative of the Syrian Arab Republic had not replied to his questions. He felt that the present text did not permit of any remedy against situations resulting from grave, repeated or continued breaches of the Conventions or Protocol by one of the Parties to the conflict. It failed to specify the nature and purpose of the action which the High Contracting Parties could undertake in co-operation with the United Nations.
44. Moreover, no light had been shed on the title. He suggested that "Co-operation" be replaced by "Measures in the event of grave breaches of the Conventions or this Protocol".
45. Mr. ABDINE (Syrian Arab Republic) said that his delegation was not the author of the present title and did not object to the Cameroonian representative's suggestion.
46. As for the nature of the action proposed, there was no need to spell it out. It was, in fact, the action prescribed by the United Nations Charter and could not be undertaken without the consent of the General Assembly or the Security Council. General international law would apply during a legal vacancy, in other words when neither the General Assembly nor the Security Council was in session.
47. He approved the Sri Lanka representative's suggestion that the word "and" should be deleted.
48. Mr. BRECKENRIDGE (Sri Lanka) pointed out that, so far as the Security Council was concerned, there could be no question of a legal vacancy.
49. The PRESIDENT observed that the text had been adopted without change at the Committee stage as early as 13 May 1977, (Seventy-second meeting - CDDH/I/SR.72) and he urged delegations wishing to obtain clarifications on a text that had been adopted in Committee to approach the Chairman or Rapporteur of the Committee concerned, without waiting for the plenary meeting, and then, if need be, to submit concrete proposals.
50. Mr. DIXIT (India) asked the representative of Sri Lanka to withdraw his request for deletion of the word "and", since the text had been adopted by consensus in Committee I.
51. Mr. CERDA (Argentina) pointed out that the word "serious" ("graves") had been omitted from the Spanish text.

52. The PRESIDENT said that the mistake would be rectified. If there were no objections, he would consider that there were no amendments to the article.

53. Mr. MARTIN HERRERO (Spain) said that, in view of the doubts which prevailed concerning the substance of the text, his delegation would be unable to agree to the new article in the form proposed. So as not to delay the work of the Conference, he asked that the text be put to the vote.

The new article to be inserted before or after Article 70 was adopted by 50 votes to 3, with 40 abstentions.*

Explanations of vote

54. Mr. MBAYA (United Republic of Cameroon) said that his delegation had voted against the article because of the inadequacy of the text, which was muddled, as the representative of the Syrian Arab Republic himself admitted. Moreover, there were cases in which delegations were unable to obtain clarifications of a text from the Chairman or Rapporteur of the Committee concerned; and his delegation reserved the right to take the floor at plenary meetings whenever it thought necessary.

55. Mr. GREEN (Canada) said that his delegation had abstained because it considered that the article served no useful purpose; no provision in the Protocol could change the Charter of the United Nations or alter the obligations incumbent upon the Members of that Organization. Moreover, it did not consider that the article should be interpreted in such a way as to prevent any victim of a breach of Protocol I from taking whatever action it thought necessary for its own survival, pending a decision by the United Nations, particularly as the Charter recognized the right of self-defence. His delegation was aware of the political realities that might hinder or delay the United Nations in coming to a decision. The undertaking to co-operate with the United Nations in conformity with the Charter could not be construed as imposing any obligation upon a State to await its own destruction in the hope that the United Nations might come to its assistance in sufficient time.

56. Mr. VAN LUU (Socialist Republic of Viet Nam) said that his delegation had abstained because of the ambiguity of the phrase "in situations of serious violations of the Conventions" as used in connexion with the undertaking "to act ... in co-operation with the United Nations ...". In his delegation's opinion, such a commitment could not be binding on a State in case of resistance to aggression or continuation of that resistance.

* Article 89 in the final version of Protocol I.

It would only be valid in cases of grave breaches of the Conventions or of the Protocol during a given conflict, and when the High Contracting Parties initiating such co-operation were acting of their own free will.

57. Mr. SHERIFIS (Cyprus) said that his delegation had voted in favour of the text in a spirit of conciliation, but that it would have preferred the version proposed by the representative of Sri Lanka.

58. Mr. SALAS (Chile) said that his delegation had voted in favour of the text on the understanding that the Spanish version would be amended on the lines indicated by the representative of Argentina.

59. Mr. LONGVA (Norway) said that the Conference was on the point of completing its work on Protocol I but did not yet know what would be the outcome of its deliberations on Protocol II. For various reasons, the preference of his delegation had always been for the adoption of a single Protocol ensuring the protection of all war victims, irrespective of the different legal and political categories of armed conflicts. Since two separate Protocols were envisaged, he wished to have it put on record, before the final provisions of Protocol I were considered, that his delegation reserved the right to revert to the question of the accommodation in Protocol I of provisions at present regarded as belonging to Protocol II, should Protocol II prove unsatisfactory. That might involve the inclusion of at least one additional provision in the final clauses.

60. Mr. DI BERNARDO (Italy), Mr. DIXIT (India), Mr. NASUTION (Indonesia), Mr. MARTIN HERRERO (Spain), Mr. PAOLINI (France) and Mr. CHAUNY (Peru) said that they would submit explanations of vote to the Secretariat in writing.

Code of International Crimes in Violation of the Geneva Conventions of 1949 and the draft Additional Protocols (CDDH/56/Add.1/Rev.1)

61. Mr. GLORIA (Philippines) reminded the meeting that his delegation had submitted a "Code of International Crimes in Violation of the Geneva Conventions of 1949 and the draft Additional Protocols" (CDDH/56/Add.1/Rev.1) and that, in a spirit of co-operation, it had been willing not to press for consideration of the code and had agreed that it should be merely annexed to the documents of the Conference. Committee I had adopted the Philippine proposal by consensus, since at its seventy-fourth meeting (CDDH/I/SR.74), as was stated in paragraph 57 of its report (CDDH/405/Rev.1), it had decided that the code should become a Conference document available for consultation and

subsequent study. His delegation would like to know what action had been or would be taken to give effect to that decision.

62. Mr. de ICAZA (Mexico), Rapporteur of Committee I, confirmed that Committee I had taken that decision. The document was a most useful one for specialists in international humanitarian law. It had already been issued, but he suggested that the Secretariat should circulate it to the delegations again.

It was so agreed.

Article 80 - Signature

Article 80 was adopted by consensus. *

Statement by the Observer for the Sovereign Order of Malta

63. Mr. de FISCHER-REICHENBACH (Observer for the Sovereign Order of Malta), speaking at the invitation of the President, reminded the meeting that in the course of the Conference, his delegation had on several occasions drawn attention to the services the Order could render within the framework of the additional Protocols under consideration. He referred, *inter alia*, to performance of the functions of a substitute for Protecting Powers, to many other activities of relief societies and to the provision of assistance to victims of armed conflicts.

64. The Order of Malta was the oldest humanitarian organization in the West. It had been active for some 900 years. It traditionally enjoyed functional sovereignty, which enabled it to extend its assistance without regard to nationality, race, sex, language, religion, status or place. It maintained relations with sixty-seven countries and diplomatic relations with more than forty Powers in nearly all the continents. During the first half of the twentieth century, it had given substantial assistance to the victims of two world wars.

65. In 1929, the Conference convened to revise the Geneva Convention of 1906 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field had declared, in its Final Act, that the provisions laid down by the new Geneva Convention of July 1929 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, regulating the situation of relief societies assisting armies in the field, were applicable to the national organizations of the Sovereign Order of Malta. In 1949, the Order had not asked for a repetition of that declaration, since the countries that had prepared the 1949 Geneva Conventions were for the most part the same as those that

* Article 92 in the final version of Protocol I.

had signed the 1929 Convention. Since then, the international community had been increased by almost 100 new countries, and perhaps not all of them were fully aware of the nature of the humanitarian activities of the Sovereign Order of Malta.

66. To ensure the efficiency of its work as well as the protection of its staff and its humanitarian organizations, the Sovereign Order of Malta wished to state formally that it considered itself bound by the Geneva Conventions and would likewise consider itself bound by the Protocols as soon as they came into force. The Sovereign Order of Malta asked the General Committee of the Conference to be so good as to choose the best formula to ensure the continuation of the tradition inaugurated at the 1929 Conference.

67. The PRESIDENT said that that request would be transmitted forthwith to the General Committee.

Article 81 - Ratification

Article 81 was adopted by consensus. *

68. Mr. NASUTION (Indonesia) said that he would submit a statement in writing on Article 81 to the Secretariat.

Article 82 - Accession

Article 82 was adopted by consensus. **

69. Mr. SAWAI (Japan) and Mr. de STOOP (Australia) said that they would submit statements in writing on Article 82 to the Secretariat.

Article 83 - Entry into force

Article 83 was adopted by consensus. ***

70. Mr. SHERIFIS (Cyprus) said that his Government very much hoped that Protocol I, drafted by the international community after much time and effort, would come into force soon. Moreover, he wished to pay a tribute to the host country and to the ICRC.

* Article 93 in the final version of Protocol I.

** Article 94 in the final version of Protocol I.

*** Article 95 in the final version of Protocol I.

71. Mr. BLOEMBERGEN (Netherlands) and Mr. NASUTION (Indonesia) said that they would submit written statements on Article 83 to the Secretariat.

Article 84 - Treaty relations upon entry into force of this Protocol

72. Mr. SABEL (Israel) requested a vote on Article 84. His delegation would vote against the article, particularly paragraph 3, which it considered to be incompatible with the fundamental principles of international law, for although the "authority" envisaged in the paragraph was not a State, yet according to Article 84, paragraph 3, the Conventions and the Protocol would immediately come into force for that "authority". International responsibility of the kind that only States could incur, however, was an essential ingredient of the régime of the Conventions and the Protocol. The provisions of those instruments were in that respect incompatible with the proposed article. Moreover, the definition of the armed conflicts envisaged by the provision was unclear and included high subjective terms. The provision would enable any movement or group to claim that it should be granted the rights stated in the paragraph, and thereby impose obligations upon States. The depositary State of the Protocol would be placed in an intolerable position as it would have to decide who might be considered an "authority" and what declarations it was to communicate.

73. In paragraph 3 (b) of Article 84, it was stated that "the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party ...". In practice, however, many of the obligations contained in the Conventions and Protocol I could not be fulfilled by such "authorities", because non-State entities by definition did not have the necessary machinery, such as courts, legal systems and courts of appeal. In fact, such bodies would benefit from a unilateral declaration without having to bind themselves in any way. Thus, the provision in question could be interpreted as putting the said "authorities" in a much better position than States that were not parties to the Conventions and Protocol I, for while such a State could come within the régime of the Conventions and Protocol I only if it "accepts and applies the provisions thereof" (Common Article 2, last sentence, of the 1949 Conventions; Article 84, paragraph 2, of the proposed Protocol I), the "authority" need only make a declaration in order to benefit from that régime. The Israeli delegation considered it essential that such declarations should be subject to the proviso that the "authority" should apply the Conventions and the Protocol in practice and in fact, for only conditions of that kind could ensure that such "authorities" would comply with the provisions of those instruments.

74. Lastly, the Israeli delegation wished to emphasize that the principle of bona fides, which applied to international treaties, applied also to unilateral declarations, including the declarations envisaged in Article 84, paragraph 3. In other words, a declaration made by an "authority" which in practice did not comply with the Conventions and the Protocol, and whose behaviour showed that it had no intention of so doing, was not a bona fide declaration, and therefore invalid and devoid of legal effect.

75. Mr. JEICHANDE (Mozambique) requested a roll-call vote on Article 84 of draft Protocol I.

Qatar, having been drawn by lot by the President, was called upon to vote first.

In favour: Qatar, Syrian Arab Republic, Republic of Korea, German Democratic Republic, Democratic People's Republic of Korea, Socialist Republic of Viet Nam, Byelorussian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic, United Republic of Tanzania, Romania, United Kingdom of Great Britain and Northern Ireland, Holy See, Senegal, Sudan, Sri Lanka, Sweden, Switzerland, Czechoslovakia, Tunisia, Turkey, Union of Soviet Socialist Republics, Uruguay, Venezuela, Yemen, Democratic Yemen, Yugoslavia, Zaire, Afghanistan, Algeria, Germany (Federal Republic of), Saudi Arabia, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, United Republic of Cameroon, Canada, Chile, Cyprus, Colombia, Ivory Coast, Cuba, Denmark, Egypt, United Arab Emirates, Ecuador, United States of America, Finland, France, Ghana, Greece, Guatemala, Honduras, Hungary, India, Indonesia, Iraq, Iran, Ireland, Iceland, Italy, Socialist People's Libyan Arab Jamahiriya, Japan, Jordan, Kenya, Kuwait, Liberia, Liechtenstein, Luxembourg, Madagascar, Mali, Malta, Mauritius, Mauritania, Mexico, Monaco, Mongolia, Mozambique, Nicaragua, Nigeria, Norway, New Zealand, Oman, Uganda, Pakistan, Panama, Netherlands, Peru, Philippines, Poland, Portugal.

Against: Israel.

Abstaining: Thailand, Spain.

Article 84 was adopted by 93 votes to one, with 2 abstentions.*

* Article 96 in the final version of Protocol I.

Explanations of vote

76. Mr. ABI-SAAB (Egypt) said that he was reluctant to explain a vote, the result of which had amply demonstrated that it should not have taken place. But the argument put forward by the one delegation that had asked for the vote and which was the only one to vote against the article, could not be left unanswered. That argument against the accession of liberation movements to instruments of humanitarian law had been raised and refuted on several occasions. It had been said that those movements were in no position to apply many of the obligations of the Conventions and the Protocol which presupposed the existence of the machinery of a State and that that would lead to the unequal application of humanitarian law to the Parties to the conflict.

77. That argument had been refuted by experience. Without going into details, it sufficed to remind the Conference of two elements. The first was the proposal made by the ICRC during the preparation of the 1949 Geneva Conventions to the effect that all those Conventions should apply to all armed conflicts including internal ones. Thus, even if wars of national liberation were considered as mere internal conflicts, the ICRC, which was the organization best placed to judge the practicalities of the application of the Conventions, did not consider, as far back as the 1940s, that there was any practical impossibility for the integral application of the Conventions in such conflicts. The second element was that the situation of resistance movements in countries under total occupation, to which the Conventions fully applied, was materially identical to that of the liberation movements. The problem was not one of non possumus on the part of liberation movements, but of non volumus on the part of their adversaries.

78. Mr. EL HASSEEN EL HASSAN (Sudan) agreed with the Egyptian delegation.

79. Mr. BLOEMBERGEN (Netherlands) said that his delegation understood that only the declarations of authorities effectively meeting the conditions laid down in Article 1, paragraph 4 of Protocol I could have the effects sought in Article 84.

80. Mrs. CONTRERAS (Guatemala), Mr. KANTAR (Turkey), Mr. EL HASSEEN EL HASSAN (Sudan), Mr. WANE (Mauritania) and Mr. MARTIN HERRERO (Spain) said that they would submit written explanations of vote to the Secretariat.

81. Mr. MOKGAKALA (Observer for the Panafricanist Congress (PAC)), speaking at the invitation of the President, said that a unilateral declaration would present no difficulties for the Central Committee of PAC. Some articles caused his delegation concern, in particular the new article on mercenaries. Criminals would have full freedom to act and kill for money. It was to be hoped that the humanitarian spirit would allow of a favourable evolution of international law.

Amendment to reintroduce Article 85 - Reservations (CDDH/421)

82. Mr. ABADA (Algeria) pointed out that the need for an article prohibiting certain reservations had been discussed at length in Committee I and that a decision had already been taken. The twenty-one sponsors of the amendment, however, supported by a number of others, had felt that the question of reservations was important enough to be brought up again in the plenary Conference but in a slightly different manner. Rather than the initial list of articles proposed for the vote in Committee I, the sponsors had preferred a new and shorter list comprising Articles 1, 41, 42, 42 quater and paragraph 3 of Article 84. Those texts represented a development of humanitarian law and bore witness to a widening of concern in the international community. The articles for which there were to be no reservations had all been adopted at plenary meetings of the Conference, either by consensus or by large majority votes. He hoped that the amendment submitted would be adopted by consensus.

83. Mr. VALLARTA (Mexico) said that he thought it essential that Protocol I should include a clause prohibiting reservations to certain articles. He would admittedly have preferred a greater number of provisions to which reservations could not be made, but in view of the opposition of certain delegations to even a minimal list he fully supported the proposal made by an impressive number of countries. The rejection of Article 85, which was in line with Article 19 of the Vienna Convention on the Law of Treaties, would mean that, in an international armed conflict, it would be difficult to determine precisely what humanitarian law applied either to armed forces or to the civilian population; that would clearly run counter to the aims of the present Conference and deprive Protocol I of its very backbone.

84. Mr. FREELAND (United Kingdom) said he would vote against the proposal for an Article 85 on reservations. That was not because his Government had formed an intention to make reservations to any of the articles specified in the proposal, nor because of any lack of understanding of the importance which many delegations

attached to those articles. It was essentially because his delegation considered that the articles specified had been selected on a basis which distorted the significance of the contents of the Protocol as a whole. There were many articles in the Protocol of an undoubtedly humanitarian character which were not included in the list. Rather than embark on a necessarily invidious process of selection it was far better to have no list of non-reservable articles and to leave the matter to be regulated by the test prescribed in the Vienna Convention on the Law of Treaties. His delegation was also concerned to note that draft Article 85 departed from that test by speaking of reservations that were incompatible with "the humanitarian aim and purpose" of the Protocol rather than with its object and purpose, a difference which could well give rise to confusion and difficulty.

85. Mr. ALDRICH (United States of America) said that, while he agreed that reservations should so far as possible be prohibited, he could not help noting that the articles mentioned in amendment CDDH/421 were of a political rather than a humanitarian nature, whereas many other articles were of an essentially humanitarian character. In the circumstances, and although his Government had not the least intention of making any reservations, he would oppose the inclusion of the clause proposed.

86. Mr. DOUMBIA (Mali) requested that a roll-call vote should be taken.

87. Mr. DI BERNARDO (Italy) said that he would have to oppose the adoption of Article 85, which, a contrario, would give the impression that each State would be authorized to regard the unmentioned provisions of the Protocol as being open to reservations. That would be absolutely unacceptable. The proposed text admittedly reaffirmed the customary principle - enshrined in the Vienna Convention and in the Advisory Opinion of May 28th 1951 of the International Court of Justice concerning reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (I.C.J. Reports 1951, p.15) - whereby reservations were inadmissible if they were incompatible with the object and purpose of the treaty, but the excessively small number of provisions specified would increase the danger of an a contrario interpretation. At the present stage of the work his delegation thought it safer to have no provision at all on reservations.

88. Mr. GOZZE-GUČETIĆ (Yugoslavia) pointed out that the five provisions mentioned in the draft related to essential elements of the regulation of humanitarian law as established in Protocol I and that they were based on the new humanitarian and political facts of the armed conflicts besetting the present-day world. His Government therefore considered that any reservation to those provisions would affect the very essence of the Protocol and that any State entering a reservation to them could no longer be regarded as a Party to the Protocol. It would therefore seem logical formally to prohibit such reservations.

89. Mrs. SUDIRDJO (Indonesia) recalled that since the XXIIInd International Conference of the Red Cross in Teheran in 1973 her delegation had always favoured the possibility of entering, in respect of given articles of the Protocols, reservations which were not incompatible with the object and purpose of the Protocols. Accordingly, it would abstain in the vote, although its abstention in no way reflected a change in its attitude with regard to the five articles mentioned.

90. Mr. ABDINE (Syrian Arab Republic) pointed out that the proposed text (CDDH/421) consisted of two quite different parts. In the first place, there was a stipulation in line with Article 19 of the Vienna Convention on the Law of Treaties to the effect that "The High Contracting Parties may not formulate reservations that are incompatible with the humanitarian aim and purpose of this Protocol". That was merely the reaffirmation of a general principle of jus cogens. The text then went on to mention, purely by way of example, five articles of the Protocol, the choice of which was in no way an indication of a fear that some States would want to make reservations concerning national liberation movements.

91. Mr. RABARY-NDRANO (Madagascar), speaking as a sponsor of the draft article, wished to make it clear that the text was intended, not to restrict the right to make reservations to some articles, but solely to preserve the purpose of the Protocol. He was surprised that the same people who in Committee I had opposed a text giving a long list of articles were now complaining that the new list submitted to them was too short.

92. Mr. BRECKENRIDGE (Sri Lanka) confessed himself unable to understand the attitude of delegations which, having rejected a text giving, in their opinion, too detailed a list of articles, were seeking to oppose a new text on the grounds that it was too restrictive.

93. Mr. PAOLINI (France) recalled that after lengthy discussion and votes it had been decided in Committee I to delete any clause on reservations, since it had proved impossible to obtain agreement on any list of articles not open to reservations. Only the rule of international law whereby a reservation might be formulated only if it was compatible with the object and purpose of the treaty concerned could be applied to Protocol I. The French delegation would therefore vote against the adoption of draft Article 85.
94. Mr. GREEN (Canada) said that his delegation would vote against the proposed article. It might seem inconsistent to permit reservations regarding the obligations of humanitarian law, but there would have to be complete agreement among Parties on the nature of those obligations and on what constituted the humanitarian object and purpose of the Protocol. The very fact that Protocol I was the result of a consensus, however, showed that no such agreement existed and that the interpretation of the Protocol was highly subjective. Canadian opposition to the proposal did not mean that Canada intended to make the slightest reservation. It was a pity that the articles chosen by the sponsors as representative of humanitarian law were purely political, as if the articles which were of a fundamentally humanitarian character were less important. That would change the whole character of the Protocol.
95. Mr. von MARSCHALL (Federal Republic of Germany) agreed with the representatives of Canada, France, Italy, the United Kingdom of Great Britain and Northern Ireland and the United States of America.
96. Mr. AMIR-MOKRI (Iran) said that in Committee I he had opposed any clause on reservations because of the difficulty of formulating a list of articles not open to reservations. He still considered that the rule of international law should be followed.
97. Mr. KANTAR (Turkey) said that his delegation would be unable to support amendment CDDH/421 and would vote against it. His delegation understood the motives of the co-sponsors of the amendment and the delegation's position regarding the article mentioned therein had been expressed on various occasions.
98. The Turkish delegation believed that the adoption of an article drafted along such lines might prevent some States from becoming Parties to the Protocol, and felt that States should have a greater opportunity to become Parties to that document.
99. The approach of his delegation to matters concerning the Conference had always been and still was to try to find feasible solutions but not necessarily desirable ones.

100. Bearing that fact in mind, it might be recalled that the Turkish delegation, in an endeavour to narrow the gap between the two main divergent views on Article 85 so that a compromise might be reached, had submitted a proposal on the general lines of Article 19 of the Vienna Convention on the Law of Treaties. However, it had been the feeling of the majority of the Committee that the Protocol should not contain an article on reservations and his delegation had agreed.

101. The position of his delegation remained unchanged. It had serious doubts whether an article on reservations would serve its purpose and felt that it might give contrary results.

At the request of the representative of Mali, a vote was taken by roll-call.

Gabon, having been drawn by lot by the President, was called upon to vote first.

In favour: Ghana, India, Iraq, Socialist People's Libyan Arab Jamahiriya, Jordan, Kenya, Kuwait, Lebanon, Madagascar, Mali, Mauritius, Mexico, Mozambique, Nigeria, Oman, Uganda, Panama, Peru, Qatar, Syrian Arab Republic, Democratic People's Republic of Korea, Socialist Republic of Viet Nam, United Republic of Tanzania, Romania, Senegal, Somalia, Sudan, Sri Lanka, Tunisia, Yemen, Democratic Yemen, Yugoslavia, Zaire, Afghanistan, Algeria, Saudi Arabia, Bangladesh, United Republic of Cameroon, Cyprus, Cuba, Egypt, United Arab Emirates.

Against: Guatemala, Honduras, Iran, Ireland, Iceland, Israel, Italy, Japan, Liechtenstein, Luxembourg, Nicaragua, Norway, New Zealand, Netherlands, Portugal, Republic of Korea, United Kingdom of Great Britain and Northern Ireland, Holy See, Sweden, Switzerland, Thailand, Turkey, Germany (Federal Republic of), Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Denmark, Ecuador, Spain, United States of America, Finland, France.

Abstaining: Greece, Hungary, Indonesia, Jamaica, Mongolia, Philippines, Poland, German Democratic Republic, Byelorussian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic, Czechoslovakia, Union of Soviet Socialist Republics, Uruguay, Venezuela, Argentina, Bulgaria, Ivory Coast.

The result of the vote was 42 in favour, 36 against and 17 abstentions.

Not having obtained the necessary two-thirds majority, Article 85 (CDDH/421) was rejected.

The meeting rose at 1 p.m.

ANNEX

to the summary record of the
forty-sixth plenary meeting

EXPLANATIONS OF VOTE

AUSTRALIA

Original: ENGLISH

Articles 79 bis, 82 and 85 of draft Protocol I

Article 79 bis

The Australian delegation supported from the outset a provision in Protocol I establishing a Fact-Finding Commission which would be mandatory for all Parties to Protocol I. It regrets that the Conference was unable to agree on such an article, which would have represented a development on the system foreshadowed by the Geneva Conventions.

The Australian delegation voted in favour of Article 79 bis, which includes a number of matters originally proposed by Australia.

My delegation felt obliged to vote against the proposed amendment (CDDH/415 and Add.1 and 2 and Corr.1) to paragraph 2 (a) for several reasons. First, the term "occupied territory" had no precise meaning. Secondly, the implication which can be drawn from amendment CDDH/415 and Add.1 and 2 and Corr.1 is that the proposed amendment was to apply retrospectively as well as prospectively. Thirdly, the provision introduced an element of discrimination and would not have been applicable impartially to all situations. Fourthly, the drafting of the proposed amendment was unsatisfactory.

Article 82

The drafting of Article 82 could give rise to an interpretation that accessions are permissible, not only when the Protocol is open for signature, but also during the six-month period between the signing of the Final Act and the opening of the Protocol for signature. The Australian delegation believes that on a proper reading of Articles 80 and 82, the Protocol cannot be acceded to before it is open for signature.

Notwithstanding this, the Australian Government will respect the depositary Government's wish that the Protocol should be open for accession only after the period for signature has expired.

Article 85

The Australian delegation voted against the proposal in document CDDH/421 because it believes that the articles mentioned in the non-reservable list in that proposal have been selected on political rather than on humanitarian considerations. The Australian delegation has consistently held the view that a list of non-reservable articles would be subjective and arbitrary.

The normal practice of the Australian Government is not to make reservations when becoming a Party to a treaty. The Australian delegation is of the opinion that in a treaty as technical and complex in its detailed application as Protocol I it is essential that flexibility on the question of making reservations should be available. This would, in our view, assist in achieving a maximum number of ratifications or accessions to a treaty reaffirming and developing humanitarian law applicable in armed conflicts.

Flexibility can be achieved by omitting any reference to reservations in the treaty concerned. The Geneva Conventions of 1949, the International Covenants on Human Rights and other treaties dealing with related subject-matters already provide relevant precedents on this matter.

The Australian delegation notes with satisfaction that this was also the solution adopted for Protocol I. As a result of the omission of any reference in Protocol I to reservations, we understand that Parties to the Protocol will be bound by the principles of customary international law enshrined in Article 19 of the Vienna Convention on the Law of Treaties. In the view of the Australian delegation, these are the only limits which should be placed on a State's right to make reservations to Protocol I.

AUSTRIA

Original: FRENCH

Article 85 of draft Protocol I

The Austrian delegation voted against Article 85 in the form proposed by several delegations, which is to be found in document CDDH/421.

The reasons for our objections are the following:

First of all, the 1949 Geneva Conventions, too, did not themselves envisage provisions concerning reservations which, for all that, proved to be realistic and wise. In Committee I we discussed this problem in great depth and at length, and we finally came to the conclusion that a provision of that nature should not be inserted in Protocol I.

Next, we are of the opinion that, if it was the intention to single out certain specific articles against which no reservations could be formulated in any circumstances, there would then be several other articles just as important from the humanitarian point of view as those expressly referred to in the amendment.

Lastly, the Austrian delegation considers that the general rules of customary international law, in the form in which they have been codified in Part II, Section 2 of the Vienna Convention on the Law of Treaties, are sufficiently explicit and clear to be applied, if necessary, to Protocol I.

The Austrian delegation would, however, make a point of stressing that its objections in no way mean that the Austrian Government intends to enter a large number of reservations or to formulate any reservations whatsoever that would run counter to the aim and purpose of Protocol I.

BELGIUM

Original: FRENCH

Article 85 of draft Protocol I

The Belgian delegation has always held the view on reservations that it was better to have a Protocol ratified by a large number of States even at the cost of some reservations, as in the case of the 1949 Geneva Conventions, than for States not to accept the Protocol because of the impossibility of entering reservations. My delegation even stated in Committee I that it would prefer to face an enemy that was a Party to the Protocol subject to certain reservations, than an enemy that was not a Party to the Protocol because it had been prevented from acceding to it by a provision prohibiting reservations. This reasoning led the Belgian delegation to prefer not to have any article on reservations, leaving the question to be governed by the general rules of international law. Committee I wisely decided in the end to follow that course. The amendment in document CDDH/421, which would make certain articles not subject to any reservation because such reservations were regarded as incompatible with the humanitarian aims and purposes of the Protocol conflicted with that basic notion, even though the Belgian delegation itself voted in favour of Articles 1, 41, 42, 42 quater and 84, paragraph 3.

The Belgian delegation also considers that, apart from Articles 41 and 42, applicable in all armed conflicts, whether between States or between a State and a national liberation movement in accordance with Article 1, paragraph 4, the other articles listed in the amendment referred to, since they relate in fact to the field of application of the Protocol and to a specific category of persons taking part in the hostilities, are based on a political philosophy rather than on a humanitarian purpose. Further, in view of the risk of preventing universal accession to the Protocol, the Belgian delegation voted against the amendment to include such an article on reservations.

CANADA

Original: ENGLISH

Articles 79 bis and 84 of draft Protocol IArticle 79 bis

The Canadian delegation abstained when this proposal was discussed in Committee I, but voted in favour on this occasion.

We had favoured a mandatory system from the beginning and would have been happy if that had been achieved. It was because this proved impossible that we thought it best to abstain during the earlier debate. However, Canada has always believed in peaceful settlement of all disputes and is committed to supporting all forms of conciliation and enquiry procedures. We felt, therefore, that though the mandatory procedure was rejected it was in accordance with our constant practice just referred to that we support the procedure finally agreed upon. Moreover, we take some satisfaction from the fact that by way of an "optional clause" the Commission is able to operate on a mandatory basis in respect of those States which wish to proceed by this avenue. It is our hope that this International Fact-Finding Commission, which we regard as supplementing and improving the enquiry procedures already embodied in the Geneva Conventions, will prove successful in its tasks and make a true contribution to the determination of violations, with a view to their repression, and we trust that the very fact of its existence will serve to warn potential violators of the implications of their act and thus also contribute to the prevention of breaches.

Article 84

The Canadian delegation voted in favour of Article 84 since it establishes the mechanism whereby a national liberation movement can accept the obligations imposed by this Protocol upon the Parties to an international conflict.

We would point out, however, that although the title of this article makes reference to treaty relations upon entry into force of this Protocol, Canada does not agree that national liberation movements have the capacity to contract a treaty either by international customary law or in accordance with the Vienna Convention on the Law of Treaties.

Further, we would point out that in the view of the Canadian delegation only a national liberation movement which is truly such a movement, which fully satisfies the conditions laid down by Article 1, paragraph 4, and undertakes to observe all the obligations laid down in Protocol I, and does in fact carry out those obligations, is competent to make the declaration envisaged by this article.

CHILE

Original: SPANISH

Article 79 bis of draft Protocol I

The Chilean delegation voted against the amendment to Article 79 bis of draft Protocol I, contained in document CDDH/415 and Add.1 and 2 and Corr.1, for the following main reasons:

(a) The amendment conflicts with certain specific provisions of our Basic Charter relating to the sovereign rights of the State;

(b) The amendment means that one of the Parties to the conflict would be entitled to decide unilaterally whether an enquiry should be made. This is not in accordance with the general tenor of the article, particularly with the provisions of paragraph 2 (a) which require the consent of the other Party or Parties concerned before carrying out an enquiry;

(c) It is submitted that the plenary Conference itself should take cognizance of and consider an amendment to a provision so serious and so important that it was the subject of lengthy consideration and discussion by the relevant Committee, as was the remainder of the system submitted to us for consideration. The same process would have adduced de facto and de jure reasons for adopting the amendment;

(d) Lastly, our delegation wishes to state that the arguments advanced by certain delegations during the discussion of this amendment, designed to lend political colour to the statements of those who opposed its adoption, do not affect us. Our vote was based solely on legal and procedural considerations, as indicated above.

COLOMBIA

Original: SPANISH

Article 79 bis of draft Protocol I

The delegation of Colombia had abstained in the vote on Article 79 bis because during the various stages of adoption it had supported the principle of mandatory jurisdiction for the Fact-Finding Commission. In that way the Commission would have the power to investigate every act denounced when a Party to a conflict had committed a grave breach or any other grave violation of the Conventions or Protocol. His delegation considered that the adoption of such a principle would develop and complete the Geneva Conventions of 1949 which was a task for the Conference. As at present drafted the article added nothing to the former situation.

As a compromise solution and in view of the difficulties which the principle of mandatory jurisdiction raised for some delegations, Colombia, in a constructive spirit, became a co-sponsor of amendment CDDH/415 and Add.1 and 2 and Corr.1 which aimed at establishing mandatory jurisdiction for occupied territories. The circumstances in which that amendment had failed to obtain the necessary majority in the vote on which the approval of paragraph 1 of the proposal in document CDDH/416 rested and which reduced substantially the mandate, caused his delegation to abstain in the vote on Article 79 bis as a whole.

DEMOCRATIC YEMEN

Original: ARABIC

Article 85 of draft Protocol I

My country's delegation co-sponsored the amendment in document CDDH/421, proposing the insertion of an Article 85 concerning reservations. It is convinced that the terms of that article are fully in accord with the aims of the Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law Applicable in Armed Conflicts.

In essence, the proposed article would exclude any reservation incompatible with the humanitarian objectives of Protocol I, especially in regard to the articles referred to in the amendment. The effect of any reservation regarding the aforesaid articles would be to divest Protocol I of important and basic principles.

It is our firm hope that the work of the Conference will succeed in developing international humanitarian law. The articles which are singled out in the amendment as being excluded from any reservation are of signal importance in this development. They play a part in the development of international law by extending protection to national liberation movements in their struggle against colonialism and alien occupation and the racist régimes which have deprived them of their elementary human rights as laid down in international instruments.

My delegation voted in favour of the amendment and deplores its rejection. However, this negative vote will not stand in the way of our endeavours to assert the rights of oppressed peoples fighting for humanitarian protection. The international community will always bear the responsibility for such protection.

DENMARK

Original: ENGLISH

Article 79 bis of draft Protocol I

As one of the original sponsors of Article 79 bis, the Danish delegation had the honour, on its own behalf and on behalf of New Zealand, Norway and Sweden, to introduce two years ago the first draft of this article. Subsequently, my delegation participated actively in the preparation of the successive drafts of Article 79 bis, based on the same principles as those contained in the original draft.

These principles can be described as follows: It is recognized, on the one hand, that the whole field of responsibility for observance of the humanitarian rules of warfare is a very delicate one indeed, and that caution and prudence must necessarily dictate any attempt at drawing up rules of procedure for assistance in determining such responsibility. On the other hand, it does appear that the time has come to make a move in this direction and to seek a solution to the vital question of an effective control in the application of the rules for the protection of victims in armed conflicts.

These considerations have led my delegation to the conviction that the establishment of a proper enquiry procedure within the framework of the Protocol would be desirable and could offer some guarantees in this respect. This procedure cannot be the enquiry procedure already found in the Geneva Conventions of 1949, which has never been applied in practice. What is required is not merely a machinery on an ad hoc basis but a permanent body in existence prior to the dispute giving rise to an enquiry. The composition of this body and its competence and procedure must be such as to ensure that an enquiry is carried out with a maximum degree of speed, objectivity and impartiality. Finally, access to an enquiry procedure must be on an effective mandatory basis.

The International Fact-Finding Commission envisaged in Article 79 bis and the proposed rules regarding the competence and procedure of this Commission do not, in the view of my delegation, meet the requirements of a proper enquiry procedure. In particular, no provision is made for a satisfactory mandatory arrangement. However, in the perspective of the solution adopted in 1949, Article 79 bis as now adopted represents a step forward on the admittedly long road towards an effective control of the observance of the rules for the protection of the victims in armed conflicts. For this reason we found it possible to cast a positive vote on the present text of Article 79 bis.

ECUADOR

Original: SPANISH

Article 85 of draft Protocol I

The delegation of Ecuador voted against Article 85 as presented in the amendment in document CDDH/421 entitled "Reservations" because it considers that humanitarian law is international law and it is therefore wrong to distort the rules of general law and of the Vienna Convention on the Law of Treaties, even though we agree with the provisions of the articles mentioned in the amendment. To have voted in favour would have impinged on the sovereign right of those who do not accept those provisions.

New article to be inserted before or after Article 70

We abstained from voting on the new article entitled "Co-operation" to be inserted either before or after Article 70 because the Geneva Conventions and the Protocol provide their own procedures in the event of breaches. This does not mean that we, as members of the United Nations, will no longer act not only in co-operation with the United Nations but also through that Organization in the various situations that might arise.

FINLAND

Original: ENGLISH

Articles 79 bis and 85 of draft Protocol IArticle 79 bis

It is well known that Article 79 bis had a stormy past in Committee I. It was the subject of lengthy debate both in Committee I and in its Working Group A, and was adopted in Committee only after numerous votes had taken place. The text adopted in Committee consequently does not represent the ideal solution to most delegations. Given the widely divergent opinions on a number

of central points, my delegation nevertheless feels that the text adopted in Committee comes very near a balance between different points of view. Furthermore, my delegation believes that the mere establishment of an International Fact-Finding Commission is an important contribution to international humanitarian law in that it envisages a set procedure to aid us further in the implementation of the Geneva Conventions of 1949 and Protocol I. For these reasons, my delegation was able to vote in favour of the optional system as regards the Commission's competence in the form it appears in document CDDH/401, although the preferred solution for our part would have been to establish a Commission with mandatory powers.

It is perhaps to be taken as a sign of the vital importance delegations attach to this article, that two amendments have been submitted to paragraph 2 of Article 79 bis. My delegation fully understands the wish of the sponsors of the amendment in document CDDH/415 and Add.1 and 2 and Corr.1 to strengthen the Commission's powers, at least partially. It is the opinion of the Finnish delegation, however, that the method whereby the sponsors sought to reach this goal is not well chosen. Whatever the solution adopted in order to reconcile the wishes of those who support mandatory powers for the Commission and those who support an optional system, it is of paramount importance that the final solution should result in clear and practicable rules. This criterion, we suggest, is met by paragraph 2 of Article 79 bis as adopted by Committee I, which allows States the right to choose to accept the Commission's competence a priori with respect to any future violations, or to decide on a case-by-case basis whether to accept the Commission's competence or not. The solution suggested in amendment CDDH/415 and Add.1 and 2 and Corr.1, on the other hand, would in certain cases have left the Commission's competence to be decided by the type of conflict in question. There are other attendant difficulties. Without going into the question of defining the concept of occupied territory, it is by no means always certain that the Occupying Power is the party guilty of violations in a conflict, unless the act of occupation per se is to be taken as unjustified. These are some of the reasons why the Finnish delegation, although sympathizing with the concern of the sponsors of amendment CDDH/415 and Add.1 and 2 and Corr.1 voted against that amendment.

The Finnish delegation considers that the wording of the amendment in document CDDH/416 constitutes an improvement of Article 79 bis as adopted in Committee with regard to paragraphs 1 (b), 2 (a), 2 (d), and 3 (a). We also approve of the changes suggested to paragraph 7 of Article 79 bis in document CDDH/416, para. 4, and document CDDH/420. Consequently, the Finnish delegation voted in favour of the amendments in document CDDH/416, as well as for Article 79 bis as a whole.

Article 85

The Finnish delegation regrets that it has had to vote against proposed Article 85 in document CDDH/421. This, however, cannot in any way be construed as implying any hesitation on our part as regards the articles listed in the proposal. On the contrary, the Finnish delegation has taken an active part in the long and difficult work leading to the adoption of those articles and has consistently given them its full support in terms of voting or acceptance by consensus. Furthermore, it is the opinion of the Finnish delegation that these articles are part and parcel of the very foundation of Protocol I and, as such, should be considered as non-reservable.

We voted against the proposed Article 85 for two main reasons. First, the selection of articles in the proposed list is, in our opinion, one-sided. Any list of non-reservable articles leaving open the possibility of a contrario interpretation as regards reservations to certain fundamental provisions on the protection of the wounded and sick, the civilian population, as well as the most fundamental guarantees of humanitarian treatment, is unacceptable to us.

Secondly, we are concerned over the terminological disparity between the proposed text and the language used by the Vienna Convention on the Law of Treaties of 1969 prohibiting reservations incompatible with the object and purpose of the Convention.

Notwithstanding the fact that Protocol I now lacks a provision on non-reservable articles, the Finnish delegation believes the Vienna Convention rules on the subject matter to be applicable as customary international law.

FRANCE

Original: FRENCH

New article to be inserted before or after Article 70, and Article 85 of draft Protocol I

New article before or after Article 70

The French delegation's vote on the new article after Article 70 is to be explained only in the light of the discussions in Committee I on a French proposal submitted in Committee for an Article 74 bis - "Exceptional measures in the event of grave breaches".

The French delegation noted that the idea of "reprisals" offended feelings which are still very much alive in those countries which suffered the most in the Second World War and in subsequent conflicts. Most of those countries, however, recognized the humanitarian intent and scope of our proposal.

We sought to reconcile the provisions prohibiting reprisals in principle that had already been adopted in Committees II and III with humanitarian provisions regulating the exceptional measures which no country would hesitate to take if, during a conflict, it was a victim of obvious and deliberate grave breaches of the humanitarian obligations laid down in the Protocol.

It would be unrealistic to pretend otherwise, and humanitarian law itself would be jeopardized if—as in a draft Article 70 submitted by Poland — there were to be a categorical and absolute prohibition of reprisals: this would give an aggressor a sort of bonus, for a Government would be forbidden in advance to take the only measures which could halt such breaches and ensure the survival of the nation in the exceptional circumstances that may arise.

From the discussions in the Conference, it appeared that the time was not yet ripe for providing a legal framework for the problem of retribution for grave breaches of humanitarian law. This was recognized by the withdrawal in Committee I of both the French proposal and the Polish proposal on reprisals. The French delegation considers that, in the circumstances, the existing rules of customary international law continue to apply, along with any special prohibitions that have been adopted.

Concerning the new article to be inserted before (or after) Article 70, submitted in Committee by the Syrian Arab Republic, the French delegation abstained in the vote in plenary because of the imprecision of the text. It considers, however, that included in the action which, under the article adopted, can be taken "jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter", are the measures in the exercise of the inherent right of self-defence recognized in Article 51 of the United Nations Charter.

Article 85

The French delegation voted, as it did in Committee I, against the amendment prohibiting reservations on certain articles of the Protocol.

It wishes to point out that there is no clause of that nature in the Geneva Conventions. Moreover, Protocol I considerably exceeds the provisions of the Conventions in that it tends, on certain points, to confuse humanitarian law and the laws of war governed by The Hague Conventions of 1907. Some of the provisions of Articles 33 to 51, in Paras III and IV of Protocol I, give imprecise regulations on certain aspects of the laws of war and entail considerable difficulties in interpretation, which gave rise to a great many speeches at the time of voting in plenary. This lack of precision is all the more dangerous in that it does not lie within the strictly humanitarian framework of the Conference and Protocol I.

The French delegation wishes to state that, since the proposed Article 85 has been rejected by the Conference, the rule of international law governing formulation of reservations that are not incompatible with the aim and purpose of the treaty is the only one which can be applied to Protocol I.

GERMANY, FEDERAL REPUBLIC OF Original: ENGLISH

Article 84, para. 3 of draft Protocol I

The Federal Republic of Germany joined in the consensus on the following understanding:

Article 84, paragraph 3, of draft Protocol I constitutes the legal basis for the humanitarian protection of liberation movements, since "the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect" by the declaration envisaged in Article 84, paragraph 3 (a). As is clear from this wording, this provision is not only a technical supplement to paragraph 4 of Article 1 of this Protocol. It is of a constituent character and determines the date from which rights and obligations under Protocol I are established for the Parties to the conflict. The Federal Republic of Germany understands that during the time before such unilateral declaration is made, only the provisions of Article 3 common to the Geneva Conventions of 1949 apply.

HOLY SEE

Original: FRENCH

Article 85 of draft Protocol I

The delegation of the Holy See voted against Article 85. In principle it was in favour of having an article on "Reservations". Obviously, among the whole set of articles there are some that are more important than others and even essential from the humanitarian point of view.

The Holy See therefore indicated its assent to the group responsible for drawing up a list of articles not subject to reservations, indicating the articles which it thought belonged in that category.

Unfortunately, no agreement was reached, on account of the wide variety of criteria used in drawing up that list.

The delegation of the Holy See therefore felt unable to support Article 85 as submitted in document CDDH/421, because it found it too restrictive and discriminatory, and also because it included Article 42 quater, on which the Holy See had indicated its reservations in writing.

HONDURAS

Original: SPANISH

Article 85 of draft Protocol I

The delegation of Honduras voted against the adoption of the new Article 85 proposed at the Conference by the delegation of Saudi Arabia and other delegations in document CDDH/421, since it considers that the selection of articles included in the proposal was too restrictive; there was no reference to some articles that my Government would regard as most important, such as, for example, Article 65 on fundamental guarantees (now Article 75 in the new table of contents for draft Protocol I); and others of no less importance, particularly those concerning the protection of the civilian population in cases of armed conflict which, as we have previously stated, my country regards as representing primary aims in terms of the Conference and thus of the Protocols.

We also believe that the selection of articles referred to was made with the purpose of changing the essential direction of the Protocols; and although we understand the position of some countries that support the adoption of Article 85, our

decision is based on the view that its adoption would have given rise to confusion of a type that we and, we are confident, all other delegations participating in the Conference, would prefer to avoid.

In conclusion, we wish to inform the Conference that our Government, although it abstained from voting on certain articles of Protocol I, will not enter any reservations in respect of the content of those articles.

HUNGARY

Original: FRENCH

Article 85 of draft Protocol I

The Hungarian delegation abstained in the vote on amendment CDDH/421. This abstention in no way means that it is indifferent to the articles mentioned in the amendment. The Hungarian delegation voted for all those articles and, in its statements, stressed the major importance of their provisions. The articles mentioned in the amendment - together with several others, of course - are among those which form the aim and object of Protocol I; consequently, the general rules of international law preclude any possibility of reservations to the articles. Unfortunately, the Diplomatic Conference has not managed to find a balanced and generally acceptable solution to the problem of reservations, and the Hungarian delegation therefore found itself obliged to abstain on the amendment relating to Article 85.

INDIA

Original: ENGLISH

New article before or after Article 70 of draft Protocol I

The Indian delegation abstained in the voting on Article 70, as the sponsor of the proposal himself admitted that it was vague and imprecise and could be interpreted in different ways by different delegations. It has never been made clear whether this article prohibits or permits reprisals. The Indian delegation can never accept any interpretation that this article will permit collective reprisals against a Party to the conflict.

INDONESIA

Original: ENGLISH

New article before or after Article 70 and Articles 81 and 83 of draft Protocol I

New article before or after Article 70

My delegation abstained at Committee level when the new article before Article 70 was put to the vote. It was not entirely clear to my delegation why a distinction should be made

in regard to measures of reprisals in the situation of grave violations of the Conventions and the present Protocol, especially as regards the meaning of the words "act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter".

Article 81

My delegation proposed at Committee level that in the first sentence of Article 81 on ratifications the words "as soon as possible" should be deleted so that the wording of the paragraph would read as follows: "The present Protocol is subject to ratification. The instrument of ratification shall be deposited with the Swiss Confederation, depositary of the Conventions".

We would like to draw the attention of representatives in this plenary Conference to the fact, based on the legal system prevailing in certain countries, including Indonesia, that ratification of certain legal instruments needs procedures which generally require a considerable time. For instance, in the case of the Geneva Conventions of August 12, 1949, to which Indonesia is a Party, they were ratified only on September 10, 1958.

However, since Article 81 has been adopted, my delegation has joined the consensus on it.

Article 83

The Indonesian delegation shares the opinion of those delegations which in the Committee have expressed their opinion that the period of six months given for the present Protocol to come into force might perhaps constitute too long a period if and when Parties are already involved in an armed conflict.

Therefore, we feel it might be wiser to alter the six months period to ninety days or three months, as is normally the practice in certain Conventions.

Furthermore, we consider it also rather awkward that the Protocol should come into force after only two instruments of ratification have been deposited.

In view of the fact that at this fourth session of the Diplomatic Conference, some one hundred countries are taking part, we are of the opinion that it would be better to change the word "two" into the words "after half of the Parties to the Geneva Conventions plus one more State have deposited their instruments of ratification".

ISRAEL

Original: ENGLISH

Article 79 bis of draft Protocol I

The delegation of Israel voted in favour of Article 79 bis and wishes to emphasize the need for impartiality of the members of the International Fact-Finding Commission, as provided for in paragraph 1 (a) of the article. This need for impartiality implies, *inter alia*, that the seven members who undertake a specific inquiry have to be nationals of States that maintain diplomatic relations with all States Parties to the conflict.

ITALY

Original: FRENCH

New article before or after Article 70 and Article 79 bis of draft Protocol INew article before or after Article 70

The text of the new article as given in document CDDH/401 is so vague and imprecise that the Italian delegation felt constrained to abstain on it.

This provision refers to a duty incumbent upon the High Contracting Parties to act "in situations of serious violations of the Conventions or of this Protocol".

The first remark to be made is that this text gives the impression that the High Contracting Parties should hold aloof in the event of violations of humanitarian law which are not serious violations within the meaning of Article 74 of Protocol I. That is not acceptable: any State Party to Protocol I has the right to require any other Party to respect all the obligations arising from it in full.

The second remark concerns the action which the High Contracting Parties are authorized to undertake on the basis of this new article. It refers to a right to act jointly or individually, but does not specify the nature of such action. This is very dangerous. Fortunately, the article does state explicitly that the action envisaged must be undertaken "in conformity with the United Nations Charter". This defines the range of joint or individual measures to be undertaken, through the obligations arising from Article 2, paragraph 4, of the Charter. In other words, the action taken by the High Contracting Parties cannot involve the use of force, except in cases where the use of force is permissible under the United Nations system.

The last remark bears on the co-operation with the United Nations which is mentioned in the new article. It is obvious that any State Member of that Organization must co-operate with it in maintaining and restoring peace and international security. But the authority to take the necessary steps is vested in the organs of the United Nations itself, which must abide by the relevant provisions of the Charter. It is thus the States which must co-operate with the United Nations in pursuing its purposes, and not vice versa as the text of the article would imply. Furthermore, it is incongruous to think that an international convention such as Protocol I could allocate new functions to the United Nations, as the article under consideration would seem to be attempting to do.

Article 79 bis

The Italian delegation voted for Article 79 bis, as amended by the United States of America in document CDDH/416.

The system set forth in the article for an International Fact-Finding Commission certainly does not meet the oft-repeated requirements of the Italian delegation. True progress in humanitarian law depends not so much on the formulation of more satisfactory substantive rules as on the establishment of machinery capable of ensuring respect for those rules in all circumstances. The work of this Conference has clearly revealed, however, that most States are not prepared to accept that viewpoint even though the justification for it is obvious.

Having noted that lamentable circumstance, we have to fall back on more primitive but none the less useful solutions. Article 79 bis offers Parties a system for checking whether the rules of humanitarian law are actually observed, one which, although not compulsory, since it depends on agreement between the Parties to the conflict, can be of real use in certain instances.

During the discussions preceding the vote on Article 79 bis, my delegation spoke against the inclusion of amendments that would have made the Commission competent to carry out investigations at the request of one State alone if its territory was occupied.

My delegation now wishes to reaffirm its belief that the adoption of such an amendment would not have advanced humanitarian law. It would have been odd if, in the general context of a Fact-Finding Commission operating subject to agreement between the Parties to the conflict, an exception had been made solely in the case of occupied territory.

There is no basic difference in the need to verify the observance of rules of humanitarian law in occupation situations as opposed to any other situation. Moreover, the consent of the Occupying Power is in practice essential if the Commission is to function properly. But an Occupying Power (which is not necessarily an aggressor) would in all probability refuse to co-operate, however essential its co-operation might be, in the knowledge that the Fact-Finding Commission was theoretically entitled to investigate its conduct without its consent, whereas it could not do the same in the case of the adversary without that Party's consent.

JAMAICA

Original: ENGLISH

Article 84 of draft Protocol I

The Jamaican delegation was not present during the roll-call vote on Article 84 but wishes it to be recorded that had it been present, it would have voted in favour of the article in question.

JAPAN

Original: ENGLISH

Articles 79 bis, 82 and 84 of draft Protocol IArticle 79 bis

The Japanese delegation voted in favour of the final version of Article 79 bis as a whole at the forty-sixth plenary meeting of the Conference on 31 May 1977, as the delegation felt that the text had been improved by the amendments proposed in documents CDDH/416 and CDDH/420.

As one of the delegations which have actively participated in the formative processes of Article 79 bis since the third session of the Conference, the delegation of Japan cannot but state that it is not entirely satisfied with the outcome of the prolonged deliberations on this article. The delegation, however, finds it difficult not to share the optimism expressed by a large number of delegations that the international enquiry scheme envisaged in Article 79 bis will eventually prove to be useful despite its shortcomings and limitations.

Article 82

It is recorded in the report of Working Group C (CDDH/I/350/Rev.1) of Committee I, which deliberated on the final clauses, that Jordan, supported by Australia and Japan, proposed

that the words "six months after the signing of the Final Act" be inserted after the word "accession" in the first sentence of Article 82. It is also recorded that the Chairman of the Working Group had discussions with the sponsors of the amendment and that the latter, having agreed with him that their purpose could be achieved without amending Article 82, withdrew the proposed amendment.

It is the view of the Japanese delegation that States wishing to use accession as a method alternative to signature and ratification should be able to do so any time after Protocol I is opened for signature six months after the signing of the Final Act. The delegation maintains this view as it is the recent practice in treaty law that unless the treaty stipulates otherwise, accession may be effected at any time after the treaty has been concluded and opened for signature. As noted in a number of studies on treaty law, this modern practice is a result of the evolution in the concept of accession and is considered preferable to the traditional rule of not permitting accession during the signature period or until after the entry into force of the treaty, since this modern practice facilitates the early entry into force of treaties as well as the process of States becoming parties to treaties. In fact, the modern rule has specifically been adopted in some multilateral conventions such as the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (United Nations General Assembly resolution 2106 (XX)).

Article 84

The Japanese delegation abstained from voting on Article 84, paragraph 3, when it was adopted by Committee I. The view was expressed at that time by some delegations that, in the absence of the procedural stipulations contained in Article 84, paragraph 3, the Geneva Conventions and Protocol I would automatically apply, by virtue of Article 1, paragraph 4, to an armed conflict of the type referred to therein. The delegation of Japan finds this view untenable as this would mean that a High Contracting Party might be obliged to apply the Geneva Conventions and Protocol I even if the authority representing a people engaged against the High Contracting Party in the armed conflict concerned had not undertaken to apply the Conventions and the Protocol.

Now that Article 1, paragraph 4, has been adopted by the Conference, the delegation of Japan considers that the provisions of Article 84, paragraph 3, are essential, mainly for the following reasons:

(1). Inclusion of the provisions whose meanings are clear excludes the possibility of permitting the above-mentioned view to be taken.

(2). It is necessary to specify the procedural requirement for the application of the Geneva Conventions and Protocol I to an armed conflict of the type referred to in Article 1, paragraph 4.

(3). It is likewise necessary to specify the legal consequences of the commencement of such application for the purpose of the observance of the Conventions and the Protocol by all Parties to the conflict concerned.

The Japanese delegation therefore voted in favour of Article 84 at the forty-sixth meeting of the Conference, on 31 May 1977.

MAURITANIA

Original: FRENCH

Article 84 of draft Protocol I

In voting for Article 84 of draft Additional Protocol I the delegation of the Islamic Republic of Mauritania wishes once again to express its support for the just cause of the struggles of national liberation, to which Mauritania has always lent solid and continuing help and support at this Conference and in all regional and international forums.

However, my delegation wishes, in the interest of clarity, to point out that the phrase "the authority representing a people engaged", in Article 84, paragraph 3, denotes solely the movements of national liberation recognized by regional organizations, as envisaged in rule 58 of the rules of procedure of the Conference, who are fighting against colonial domination and foreign occupation, and against racist régimes.

MOZAMBIQUE

Original: FRENCH

Article 85 of draft Protocol I

The amendment submitted in document CDDH/421 of 30 May 1977, concerning reservations, was rejected because some said that a provision of the kind was contrary to well-established international principles which support the freedom to make reservations, while others went further, maintaining that Article 85 was discriminatory, political and anti-humanitarian.

With regard to the first argument, we would ask whether the Conventions of the International Labour Organisation do not form part of international law?

I think no one doubts their international status, but then, if the principle in question is the freedom to make reservations, why do some of that Organisation's conventions specify which of their provisions are not subject to reservations?

As for those who refer to discrimination, we should like to remind them that when Article 85 was being discussed in Committee I, we drew up a long list, which was turned down because it was, in their opinion, a very long one. Is that contradictory? No, it is discrimination on the part of those who accuse us of being discriminatory, who say in this plenary meeting that they want what they themselves turned down in Committee I.

Or is it a question of a change in interpretation? It cannot be this, either, since a change in interpretation occurs only when a meaning has followed the change. If this does not happen, the interpretation is neither static, nor changing; it is merely indifferent - not worth serious consideration.

To those who accuse us once again of submitting a provision they consider political and anti-humanitarian, we reiterate that we are opposed to law that defends the oppressor; we are concerned with the development of humanitarian law. Given that the struggle of the peoples for the right to self-determination is, basically, the most human of all struggles, liberation movements should be deserving of particular attention in humanitarian law.

Let it not be said that this amendment leaves the door open for countries to make reservations to the articles on fundamental guarantees, to those on the wounded and the sick and to other humanitarian provisions, because in the words of the Vienna Convention on the Law of Treaties, it is precisely on matters connected with humanitarian objects and aims that reservations cannot be made.

Finally, the results of the votes show clearly that the majority of the Conference will not agree to the formulation of reservations to Articles 1, 41, 42, 42 quater and 84, paragraph 3.

NETHERLANDS

Original: ENGLISH

Article 83 of draft Protocol I

Although only the Kingdom of the Netherlands as a whole is a subject of international law, and can as such become a party to treaties, it consists of two countries - the Netherlands and the Netherlands Antilles.

According to the Constitution of the Kingdom of the Netherlands, each of these two countries decides independently whether a treaty shall apply to it or not.

In view thereof the Netherlands delegation wishes to emphasize that when becoming a Party to the Protocol, the Government of the Kingdom of the Netherlands may restrict the application of the Protocol to either the Kingdom in Europe or the Netherlands Antilles.

If it so restricts the application initially to one of the two countries concerned, the Government of the Kingdom may at any later stage extend the application to the other country as well.

PERU

Original: SPANISH

New article before or after Article 70, and Article 79 bis of draft Protocol INew article before or after Article 70

The delegation of Peru abstained in the voting on the new article to precede or follow Article 70, as it considers that because of its ambiguity the text lends itself to various interpretations on so vital a matter as serious violations of the Conventions or even of the Protocol.

Even so, we might have voted for the draft if the expressions "jointly or individually" had been deleted, and if the word "co-operation" had been replaced by the words "through the United Nations". This, in the view of my delegation, would have considerably reduced the scope for divergent interpretations.

Article 79 bis

The delegation of Peru abstained in the vote on Article 79 bis for the same reasons as those which caused it to abstain on 13 May last in Committee I, namely, that in the opinion of Peru the International Fact-Finding Commission ought to be of a mandatory, not of a voluntary or optional, nature.

That is why it had been hoped all along that amendment CDDH/415 and Add.1 and 2 and Corr.1, of which Peru was a co-sponsor, would be accepted by the plenary; for that amendment offered a solution that would have met the arguments advanced by delegations.

REPUBLIC OF KOREA

Original: ENGLISH

Article 85 of draft Protocol I

My delegation in Committee I favoured draft Article 85 as it stood originally. It was the view of my delegation that even in the absence of provisions to that effect, the principle of customary and treaty international law should be observed, namely that the fundamental provisions of an international instrument should not be subject to reservations in a manner contrary to the basic objectives and purpose of that instrument.

The listing of fundamental provisions of the Protocol as contained in amendment CDDH/421 does not sufficiently or fairly represent the fundamental provisions of the Protocol, but, in the view of my delegation, could prejudice the position of various other fundamental articles. We therefore voted against the proposal in the belief that the above-stated principle, established in customary and treaty international law, would serve a better purpose in itself than such a provision in Protocol I.

SPAIN

Original: SPANISH

Article 84 of draft Protocol I

The Spanish delegation abstained from voting on Article 84 for reasons identical to those it gave for abstaining on paragraph 4 of Article 1. The point is that Article 84 refers in paragraph 3 to an "authority" which is assumed to direct the struggle of its people against a High Contracting Party. This concept, however, cannot be defined objectively, since there is no organ which can give an objective definition, nor is there any ruling in terms of which such a definition could be formulated. Moreover, Spain has always taken the view that only States and the responsible authorities thereof may commit acts of the kind referred to in the last paragraph of Article 84.

SYRIAN ARAB REPUBLIC

Original: FRENCH

Articles 79 bis, 80, 85 and new article before or after
Article 70 of draft Protocol I

Article 79 bis

The delegation of the Syrian Arab Republic voted against the adoption of Article 79 bis in its present form for a number of reasons.

In the first place, by providing for optional recourse by the opposing Parties to the proposed Fact-Finding Commission, paragraph 2 of the article adopted adds nothing to the legal position already in effect under the 1949 Geneva Conventions. On the contrary, the wording of sub-paragraph (a) of the paragraph concerned is a retrograde step compared with the Conventions. While Articles 52, 132 and 149 of the Conventions state that "an enquiry shall be instituted", if necessary, the wording of paragraph 2 of this article leaves it to the Parties to the conflict to decide whether or not to resort to an enquiry. There is no element of compulsion.

Moreover, we regret that the amendment in document CDDH/415 and Add.1 and 2 and Corr.1 of 25 May 1977, which would have improved the wording by allowing the Fact-Finding Commission to proceed in the case of an occupied territory at the request of the Party whose territory is occupied, failed to be adopted by a narrow margin. As a result, the occupying State is placed on the same footing as the occupied State. This is hardly consistent with the principles of international law, which condemns any form of occupation.

Furthermore, paragraph 5 (c), under which publication of the Commission's report depends on the wishes and request of all the Parties to the conflict, renders the enquiry completely ineffective. As such agreement is unlikely to be obtained, the results of the enquiry will simply be filed away. Publication of the findings - the only sanction open to the enquiry - can thus be prevented by the Party found to have committed a breach. The Party concerned is thus able to avoid public control and exposure and is free to continue to violate the provisions of the Conventions and of the Protocol. In other words, to deprive the Commission of its right automatically to publish its report is to deprive the enquiry procedure of one of its most effective means of pressure.

The delegation of the Syrian Arab Republic would have preferred a more clear-cut solution providing for the establishment of a commission with binding authority and the right to publish its findings without having to ask the Parties for their consent.

Article 80

Article 80 fails to satisfy the delegation of the Syrian Arab Republic. In its view, the two periods planned in this article, one of six months for reflexion before the Protocol is opened for signature and the other of twelve months for signature, are unnecessary and entail a major disadvantage. Unnecessary, since the effect would be to prevent those of the States taking part in the Conference, who have already studied the texts exhaustively, from signing them immediately, and for no valid reason. The disadvantage lies in the period of eighteen months allowed, which carries with it the risk that the Ministries concerned will forget the Protocol. It would have been more sensible to open the Protocol for signature immediately after the signature of the Final Act and to shorten the time allowed.

Article 85

To fail to retain in the Protocol an article ruling out reservations appears very regrettable to the delegation of the Syrian Arab Republic. Nevertheless, this situation can on no account imply that there is room for reservations on the part of the Contracting Parties in respect of the fundamental humanitarian obligations of the Conventions and the Protocol. A contrary interpretation would run counter to the provisions of Article 19 of the 1969 Vienna Convention on the Law of Treaties and to prevailing practice as enshrined in the jurisprudence of the International Court of Justice at The Hague. The Syrian delegation is firmly convinced that no articles should be open to reservations in a treaty on the regulation of humanitarian law.

New article before or after Article 70 of draft Protocol I

The delegation of the Syrian Arab Republic welcomes the adoption by the Conference of the new article which it had proposed with a view to regulating and limiting action designed to remedy situations resulting from serious violations of the 1949 Conventions and of Protocol I. It has to be made clear that such action may be undertaken only in co-operation with the United Nations. Therefore, the Contracting Parties cannot resort to self-protection, which, moreover, is prohibited by the Charter of the United Nations in Article 2, paragraph 4.

TURKEY

Original: ENGLISH

Articles 79 bis and 84 of draft Protocol IArticle 79 bis

The Turkish delegation agrees with the principle of the amendment to Article 79 bis appearing in document CDDH/415 and Add.1 and 2 and Corr.1. However, the wording of this amendment causes confusion of interpretation. In fact, the amendment in question constitutes an exception to one of the basic principles of Article 79 bis.

This principle, as is known, which was agreed upon after a long and exhaustive discussion in the Working Group as well as in Committee I, is the optional character of the enquiry Commission.

In the opinion of my delegation, any exception to a basic principle should be precise and exclusive in such a way that it would not have any adverse effect on the basic principle itself.

The expression "in the case of occupied territory" is far from being sufficient to cover the main idea behind the said principle. In our view the concept of occupation should be worded in such a way that it could reflect an aggressive, in other words illegal, occupation.

In fact the wording of the amendment is open to misinterpretation and it does not contain any distinction between an aggression in order to annex a territory of a Party by another Party and an occupation to which a Party is constrained for the purpose of self-defence and survival.

Since the wording of the amendment lacks the necessary clarity and leaves the door open to all kinds of misinterpretation, the Turkish delegation was not able to vote in favour of it.

Article 84

The Turkish delegation has already explained its vote concerning paragraph 3 of Article 84 during the debate in Committee I. As is known, the paragraph in question was a compromise formula achieved as a result of co-operation and understanding among all delegations.

Turkey has always supported the action of national liberation movements provided they have been recognized by regional inter-governmental organizations and universally and widely accepted. The Turkish delegation has accordingly voted in favour of paragraph 3, which it understands in relation to Article 42 of Protocol I.

UNITED KINGDOM OF GREAT BRITAIN Original: ENGLISH
AND NORTHERN IRELAND

Article 84 of draft Protocol I

The United Kingdom delegation was pleased to be able to vote in favour of this article. In particular, paragraph 3 of the article seems to us to provide a logical and acceptable machinery whereby, once paragraph 4 of Article 1 is included in the Protocol, its provisions can be accommodated - that is, a machinery enabling authorities representing peoples engaged in armed conflicts of the type referred to in the latter paragraph to undertake to apply the Conventions and the Protocol in relation to those conflicts by means of unilateral declarations. It is our understanding that only a declaration made by an authority which genuinely fulfils the criteria of Article 1, paragraph 4, can have the effects stated in paragraph 3 of Article 84.

URUGUAY

Original: SPANISH

Article 85 of draft Protocol I

The delegation of Uruguay abstained in the vote on the amendment to Article 85 because it considers that the drafting thereof introduced factors which if misinterpreted would have detracted from the provisions of other articles not mentioned in the text of the amendment but which, in our view, are fundamental to the Protocol.

Moreover, the difficulties encountered by Committee I in drawing up a list of articles that might encourage a consensus on Article 85 had already persuaded the Uruguayan delegation that there should be no rule concerning reservations in Protocol I and that it would be preferable if this were arranged within the scope of the rules of international law at present in force.