Revised and New Draft Conventions
for the Protection of War Victims

REMARKS AND PROPOSALS

SUBMITTED BY THE

INTERNATIONAL COMMITTEE OF THE RED CROSS

Document for the consideration
of Governments invited by the Swiss Federal Council
to attend the Diplomatic Conference
at Geneva (April 21, 1949)

Geneva
February 1949

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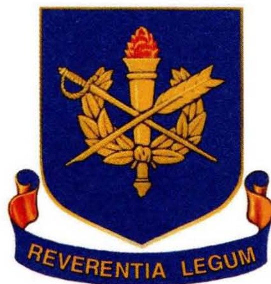

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ABBREVIATIONS

Preliminary Red Cross Conference	Preliminary Conference of National Red Cross Societies for the study of the Conventions and of various Problems relative to the Red Cross, convened by the ICRC at Geneva, July, 1946.
Government Experts	Conference of Government Experts for the study of the Conventions for the Protection of War Victims, convened by the ICRC at Geneva, April, 1947.
XVIIth Conference	XVIIth International Red Cross Conference, Stockholm, August, 1948.
Diplomatic Conference	Diplomatic Conference for the establishment of International Conventions for the Protection of War Victims, convened at Geneva on April 21, 1949, by the Swiss Federal Council.
Draft Wounded and Sick (WS) Convention	Draft Revision of the Geneva Convention of July 27, 1929, for the Relief of Wounded and Sick of Armies in the Field, approved by the XVIIth Conference.
Draft Maritime Convention	Draft Revision of the Tenth Hague Convention of October 18, 1907, for the adaptation to Maritime Warfare of the principles of the Geneva Convention of 1906, approved by the XVIIth Conference.
Draft Prisoner of War (PW) Convention	Draft Revision of the Convention concluded at Geneva on July 27, 1929, relating to the treatment of Prisoners of War, approved by the XVIIth Conference.
Draft Civilian Convention	Draft Convention for the Protection of Civilian Persons in Time of War, approved by the XVIIth Conference.
ICRC	International Committee of the Red Cross
PW	Prisoners of War.
WS	Wounded and Sick.

INTRODUCTION

In accordance with the mandate received from the XVIIth International Red Cross Conference which met in Stockholm in August 1948, the International Committee of the Red Cross, in October 1948, forwarded to the Governments concerned the Revised and New Draft Conventions for the Protection of War Victims, as approved and amended by the said Conference.

Since the early circulation of these texts was essential, the International Committee believed itself justified in transmitting them in October last in the form adopted by the Conference, without any further changes. Owing to lack of time the Conference was, in fact, unable to make the adjustments required in consequence to the amendments adopted.

In the present communication to Governments, prepared in anticipation of the Diplomatic Conference at which the Conventions will be given their ultimate form, the International Committee therefore advance a number of suggestions in regard to the said adjustments.

The Committee have added certain comments and proposals which they consider useful in the light of the exhaustive study of the Conventions they have now pursued for three years. Many of these proposals originate from National Red Cross Societies; the Committee, when transmitting the texts adopted by the XVIIth Conference, had asked these to make any remarks they considered useful.

The XVIIth International Red Cross Conference adopted a Resolution (No. 23), reading as follows :

Repression of Violations of the Humanitarian Conventions

" The XVIIth International Red Cross Conference,

" having examined the Report of the International Committee of the Red Cross on the repression of violations of the Humanitarian Conventions,

" recommends that the International Committee continue its work in connection with this important question and submit proposals to a later Conference. "

In the course of the Stockholm Conference the International Committee stated that, in their view, expert assistance would be required for the formulation of proposals sufficiently comprehensive to be submitted to Governments attending the Diplomatic Conference.

In December 1948, the Committee were happy to welcome to Geneva the following experts, who met under the chairmanship of M. Max Huber: Professor Lauterpacht, of Cambridge University; Colonel Phillimore, barrister-at-law, Member of the British Prosecution before the International Military Tribunal; Captain Mouton, Judge of the Netherland Supreme Court of Appeal; and M. Jean Graven, Professor of Law at the University of Geneva. The assistance lent by these eminent authorities who, together with the ICRC representatives, exhaustively studied the question, led to the drafting of four new Articles, which duly appear below in the remarks on each Draft Convention.

Furthermore, the XVIIth Conference adopted the following Resolution (No. 21):

Members of Medical Personnel
condemned on account of their Activities during the War

"The XVIIth International Red Cross Conference,

"requests the International Committee of the Red Cross, in view of the forthcoming Diplomatic Conference which will be called upon to study the Revised and New Draft Conventions for the Protection of War Victims, to transmit to the Governments the Report submitted by the said Committee."

In accordance with this Resolution, the International Committee append the said Report to the present document.

* * *

Finally, the International Committee wish to recall here the terms of the "General Recommendation" made by the XVIIth International Red Cross Conference on the Draft Revised and New Conventions. The Committee are of opinion that the Diplomatic Conference might take this Recommendation, and in particular Paragraphs 2 and 3, as a basis either for a Preamble to the Convention, or for a Statement to be inserted in the Final Act.

General Recommendation

"The XVIIth International Red Cross Conference,

"having studied the text of the Revised and New Conventions for the Protection of War Victims submitted by the International Committee of the Red Cross, and having introduced a certain number of amendments and recorded the reservations which have been expressed, states its approval of these Drafts;

"notes that these Drafts, in particular the new Convention on the Protection of Civilians, correspond to the fundamental aspirations of the peoples of the world and that they define the essential rules for that protection to which every human being is entitled;

" considers that the Draft Convention relative to the protection of Civilians merely completes and defines what may be regarded either as the customs of civilized nations, or as ideas already embodied in previous treaties, in particular the Hague Conventions of 1907, or as the most obvious demands of the world's conscience ;

" draws especially the attention of Governments to the urgent necessity of ensuring the effective protection of civilians in time of war by a Convention, the lack of which was so cruelly felt during the last war, and urges that all States, immediately and without awaiting the conclusion of this Convention, apply its principles in the cases provided for ;

" recommends furthermore that all Governments meet at the earliest possible in Diplomatic Conference for the adoption and signature of the texts now approved. "

NOTE

This English version of the " Remarques et Propositions " drafted by the ICRC reproduces all the amendments and corrections of the French text of the Draft Conventions submitted by the Committee, even if they do not affect the Revised Translation of the Draft Conventions, issued by the ICRC early in 1949.

In addition to the above, the following pages indicate a few mistakes and printer's errors which might usefully be corrected in the said Revised Translation.

I.

REVISION OF THE GENEVA CONVENTION OF JULY 27, 1929 FOR THE RELIEF OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD

PREAMBLE

In view of the fact that at the XVIIth Conference a Preamble was added to the Draft Convention relating to Civilians, it has been thought that the other three Draft Conventions might well be amplified in the same manner. The International Committee therefore submit the following text, based largely on a proposal from one of the National Red Cross Societies. This text sets forth the main principle underlying all the humanitarian Conventions and could therefore appear in all four Draft Conventions :

> *Respect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking.*
>
> *Such a principle demands that, in time of war, all those not actively engaged in the hostilities and all those placed* hors de combat *by reason of sickness, wounds, capture, or any other circumstance, shall be given due respect and have protection from the effects of war, and that those among them who are in suffering shall be succoured and tended without distinction of race, nationality, religious belief, political opinion or any other quality.*
>
> *The High Contracting Parties solemnly affirm their intention to adhere to this principle. They will ensure its application, by the terms of the present Convention, to the wounded and sick of armed forces in the field, and pledge themselves to respect, and at all times to ensure respect for, the said Convention.*

The ICRC believe that the above statement should be embodied in the Convention itself ; it might figure as Article 1, under the heading " Preamble ", and would thus replace the present Article 1, the text of which would be inserted in Paragraph 3.

ARTICLE 2

Paragraph 3. — The same provision appeared in both Geneva Conventions of 1929. It marked a considerable advance on the Hague Conventions of 1907, the application of which was subject to the so-called " clausula si omnes ".

This stipulation governs the case of a war engaging one or several States parties to the Convention in hostilities against one or several States not parties thereto. States parties to the Convention remain bound by it in their mutual relations.

On the other hand, there are no provisions governing the relations of States parties to the Convention with adverse States who are not parties thereto. It is obviously impossible to require that States not parties to a Convention should be bound by it, but it seems proper that certain obligations should be imposed on the contracting States, even where they are engaged in a war with non-contracting States. It may be recalled that the four Conventions are not merely instruments binding on the States which have ratified them, but that they are also the embodiment of generally accepted rules, the value of which is independent of any written form.

It therefore seems to be the duty of the contracting States to make every possible effort to ensure the application of the said Conventions, even in case of conflicts with non-contracting States.

In view of the above, the ICRC suggest the insertion of the two following clauses :

In the event of an international conflict between one of the High Contracting Parties and a Power which is not bound by the present Convention, the Contracting Party shall apply the provisions thereof. This obligation shall stand unless, after a reasonable lapse of time, the Power not bound by the present Convention states its refusal to apply it, or in fact fails to apply it.

Paragraph 4. — (French text.) In order to secure conformity of text between all four Conventions, the words " chacun des adversaires " should be replaced by " *chacune des parties au conflit.* " See Draft PW Convention, Art. 2. (No change in the English translation.)

ARTICLE 3

The word " interned " in line 4 should be replaced by "*received*", as members of belligerent medical personnel who take shelter in neutral countries are not necessarily interned.

Furthermore, it might be advisable to state clearly in this Article, in which the term " medical personnel " appears for the first time, that this expression includes the various categories of persons desig-

nated in Articles 19, 20 and 21, that is, not only medical personnel but also chaplains, the administrative staff of medical units, and so forth. The expression " protected personnel ", which was current during the recent War, might also be considered for adoption. Finally, it would perhaps be useful to state clearly that the medical, religious, administrative and other staff protected by the Convention are military personnel, although the fact is of course already implied.

These remarks might moreover be made in Art. 19, rather than in Art. 3.

(English text.) — In line 2, read *"wounded and sick, to members..."*

ARTICLE 4

Paragraph 2, line 5. — (French text.) Read " *des* accords ", instead of " les accords ". (No change in the English translation.)

NEW ARTICLE

On due consideration, it appears useful to insert in this Draft a provision similar to Art. 4 of the Draft PW Convention and Art. 4 of the Draft Civilian Convention. Like prisoners of war, detained members of the medical personnel should have the privilege of the Convention until their final repatriation.

This new Article, which would be placed between Articles 4 and 5, might run as follows :

> *The present Convention shall apply to the persons whom it protects and who have fallen into the hands of the enemy, until their final repatriation.*

ARTICLE 5

The reader is referred to the comments on Art. 6 of the Draft PW Convention.

ARTICLE 6

Paragraph 1. — (French text.) — The last word but one " étaient " should be replaced by *"sont"*, for syntactical reasons. (No change in the English translation.)

ARTICLE 8

Paragraph 2. — (French text.) — The words " (ne bénéficient) *pas ou ne bénéficient plus de l'activité* " have been accidentally omitted.

See the corresponding Articles in the other Drafts. (No change in the English translation.)

New Paragraph. — A new paragraph was inserted by the XVIIth Conference in the corresponding provision of the Draft PW Convention (Art. 9, Par. 3). — Its inclusion in the present Convention might be considered.

ARTICLE 10

Paragraph 1. — For the sake of clarity, we suggest : "... designated in Article 3, Paragraph 1, *sub-paragraphs (1) to (6)* of the Convention...".

Paragraph 3. — This Paragraph should form part of Paragraph 2. See Art. 11 of the Draft PW Convention.

Generally speaking, it would be advisable, whenever reference is made to an Article or a Paragraph of another Convention, to insert as a footnote in the final text the wording of the relevant Article or Paragraph.

ARTICLE 13

Paragraph 1. — Neither the Geneva Convention nor the PW Convention prescribes that the names of members of the medical personnel or of chaplains captured by the enemy shall be communicated to their home country. This is a serious omission and should be remedied by inserting towards the close of Paragraph 1 of Article 13, between the words " and dead discovered and collected " and " together with any indications which...", the passage "*and of members of the medical and religious personnel who have fallen into their hands.*"

Paragraph 3. — The words "*or having belonged to them*", or else "*or in the immediate vicinity*" should be added at the end of this Paragraph, as the articles in question need not be actually found on the dead.

ARTICLE 14

It may be asked, as one National Red Cross Society recently remarked, whether it is advisable to confine to first aid alone the welfare work which may be undertaken by the population. In Paragraph 2 at least the words " first aid " might be replaced by "*aid*", as the rendering of assistance is, in this case, open to each individual and is not an obligation.

ARTICLE 15

Paragraph 2. — The relevant wording in Art. 15 of the Draft Civilian Convention seems preferable and might be introduced here, as follows :

In view of the danger incurred by hospitals and medical establishments being close to military objectives, the responsible authorities shall ensure that such hospitals and medical establishments are situated as far as possible from the said objectives.

ARTICLE 16

The expression : " acts harmful to the enemy " which appears in the 1929 Convention is hardly satisfactory. The amendment suggested by the XVIIth Conference : " acts not compatible with their humanitarian duties " is scarcely an improvement.

If the 1929 text is to be amended, an attempt should be made to find a clearer definition.

In any case, Article 16 would become more intelligible if it included the wording of Article 17, as was done with the corresponding Article of the Draft Maritime Convention (Art. 29). See p. 30.

Article 16 and the beginning of Article 17 would then together read as follows :

The protection to which medical units and establishments are entitled shall not cease unless the said units or establishments take advantage of it to commit, outside their humanitarian duties, any acts the purpose or the effect of which is to harm the adverse party, by facilitating or impeding military operations. Protection may, however, cease only after due warning, naming a reasonable time limit, which warning remains unheeded.

The following acts shall not be considered as being harmful to the enemy in the sense of the above Paragraph :

. . . .

ARTICLE 18

Paragraph 1. — The corresponding Art. 12 of the Draft Civilian Convention contains, in line 2, the words " shall endeavour " instead of " may ". Conformity of texts should be secured. The ICRC recommends the expression *"shall endeavour"*.

Paragraph 2. — The word " mutual " (line 2) should be deleted, as it may lead to misunderstanding. It is conceivable that belligerents may recognise hospital zones and localities in enemy territory, without themselves wishing to establish similar zones and localities.

ARTICLE 19

It would be clearer to say : "... treatment of the wounded and sick belonging to the categories named in Article 3, Paragraph 1, *sub-paragraphs (1) to (6)* of the Convention...".

ARTICLE 21

Paragraph 4. — This provision, suggested by the Government Experts in 1947, seems to be the result of a misapprehension.

The identity documents provided for in Article 33 are issued by the military authorities of the belligerent employing the medical personnel. Personnel belonging to a neutral society lending assistance to a belligerent are merged with the medical service of the said belligerent.

Clearly then, neutral personnel could hardly be supplied, before leaving the neutral country, with identity papers issued by the belligerent whom they are assisting. It might, however, logically be stipulated that such personnel should be provided with the said documents " before any active employment ".

If the intention is that medical personnel belonging to a neutral country and leaving for a belligerent country shall be provided by their own national authorities with identity papers or any other particular certificate, the question must be discussed *per se*. The relevant papers could in no event be those provided for in Article 33.

The above example shows how misunderstandings may arise regarding the status of medical personnel who lend assistance to a belligerent. In order to meet the case, and in view of a communication received by the ICRC from one Government, the words : " *The said personnel and establishments shall be made subordinate to the belligerent* " might perhaps be inserted after the first sentence of Article 21.

ARTICLE 22

Paragraph 1. — (French text.) — Replace " ceux qui seront ainsi retenus " by *"les membres du personnel qui seront ainsi retenus"*. (No change in the English version).

Paragraph 1. — (French text.) — For reasons of style, begin this clause with the words " *En outre* ". (No change in the English version.)

Paragraph 2. — (English text.) — Last line : read "... the same allowances and the same pay as *are given* to ".

ARTICLE 23

Paragraph 3. — The clause inserted in Article 22, Par. 3 : " *Belligerents shall grant such personnel the same allowances and the same pay as are given to the corresponding personnel in their own forces* " might be added at the end of this Paragraph.

ARTICLE 24

Paragraph 1. — The words : " The selection of repatriates *by virtue of the foregoing Article* " which appear in line 1 of the relevant Article 33 of the Draft Maritime Convention should presumably be inserted here.

Paragraph 2. — The French text is ambiguous. Instead of " et sa répartition " read " et *la* répartition *de ce personnel* ". (No change in the English version.)
(English text.) — Last line : read " *the* said personnel ".

ARTICLE 26

Paragraph 2. — (English text.) — In line 3 read " *so long as* ".

ARTICLE 28

Paragraph 1. — If Article 28 is not amended, sentence 2 may be deleted, as it is wholly superflous. The first sentence in no way stipulates that the vehicles must be specially designed for medical transport.

The question of the fixed or temporary assignment of vehicles to medical purposes, the complexity of which was stressed by the XVIIth Conference, seems to have been of importance chiefly under the 1929 text (Arts. 14 and 17), particularly as regards the restitution of the said vehicles after their capture.

As the entire economy of the revised Convention derives from the principle that equipment shall not be liable to return, the question seems to be of no further importance.

According to the 1929 text, transports shall be respected and protected in all circumstances, and this provision covers both vehicles of the medical service solely assigned to medical purposes and to military vehicles temporarily used for similar ends. The first, however, must be returned after their capture, whereas the second are retained by the captor.

No doubt whatever seems admissible as to the protection due to any vehicle transporting wounded, whether it is employed temporarily or continuously for medical service. It is quite essential that wounded should be taken as quickly as possible to hospital, and as motor

ambulances of the medical service are not always available, recourse is taken to vehicles of any kind. This has always been the practice, and nobody may consider this as an excuse for firing on the wounded.

New Paragraph. — This Article contained a third Paragraph, taken from the 1929 text, which has unfortunately been omitted by error. It should be introduced afresh, as follows :

Civilian personnel and means of transport secured by requisition shall be subject to the general rules of international law.

ARTICLE 29

Paragraph 1. — The words " described in the present Article " (first line) are incorrect. The Article does not describe hospital aircraft.

By analogy to Art. 19 of the Draft Maritime Convention, relating to hospital ships, the following wording might be adopted :

Hospital aircraft, that is to say, aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents.

Paragraphs 6 and 7. — One National Red Cross Society recently observed that there was perhaps no justification for drawing a distinction between the position of a medical aircraft which makes a fortuitous landing in enemy territory (Par. 6), and that of an aircraft which is compelled to land (Par. 7). In both cases the aircraft should presumably be allowed to continue its flight, as is provided for in the 1929 text.

ARTICLE 31

Paragraph 2. — The general question of the plurality of emblems must here be reviewed. The facts are briefly as follows.

The Commission which, in 1937, drew up the first Draft Revision of the Geneva Convention, unanimously deplored the abandonment of a single emblem by the introduction, in 1929, of other exceptional emblems in addition to the red cross, namely the red crescent, and the red lion and sun. The Commission thought that it would be desirable to return to the former practice and pointed out that the red cross is an international symbol, that it is devoid of any religious significance, and that it was illogical to replace it by other symbols. Furthermore, such a course would create the risk of confusion with national flags, particularly in the case of States whose national emblem

is a red symbol on a white ground. The Commission recommended that, in any case, the text of the Convention should permit no exceptions whatever to the unity of the emblem, other than those which are now accepted.

The Preliminary Red Cross Conference (1946) discussed the question once more. Some Delegations spoke emphatically in favour of restoring the universal character of the emblem. They also recommended that suitable propaganda should be made in Near East countries, to explain the exact meaning of the Red Cross emblem.

The representative of a country using the red crescent, supported by other Delegations, stressed that it would be impossible for the time being to introduce the Red Cross emblem in Muslim countries, as this would deeply offend the religious sentiments of the population. He fully appreciated the advantage of reverting to the former practice and did not believe it impossible that unity, although impracticable at present, might be restored at some future time.

The Conference thereupon refrained from suggesting any amendment in this connexion.

The subject was again discussed by the Government Experts (1947) and, quite recently, by the XVIIth Conference. The latter meeting refrained from amending the present wording, but recommended that the Governments and National Societies concerned should endeavour to return as soon as possible to the unity of the Red Cross emblem.

As possible solutions of this delicate problem the following may be considered worthy of study.

(a) — The Geneva Convention might henceforth refuse to countenance the use of exceptional emblems, save as a provisional measure ; it might fix a period — for instance, ten years — during which all such symbols were to disappear. The countries using extraneous emblems could thus start educating public opinion at once and gradually substitute the Red Cross for any foreign emblems.

(b) — The emblem of the red cross on a white ground might be employed in all countries. In certain exceptional cases, countries would have authority to add, in one corner of the flag, a particular symbol of small dimensions. This additional sign would hardly impair visibility, and would relieve the principal emblem of the peculiarity which is a stumbling-block to certain populations.

The above course might also provide the solution of a difficult problem which has recently arisen. The Society of the " Mogen David Adom " (Red Shield of David), which acts as the Israeli Relief Society, is anxious to obtain recognition as a member of the International Red Cross, while retaining the right to use as emblem the red

shield (a red six-pointed star) on a white ground. This request certainly is not admissible in the present state of international legislation. It is, further, impossible to entertain a proposal to introduce a third exceptional emblem as a permanent measure. It must, however, be admitted that the above Society would be entitled, possibly as much as the corresponding Society of Iran, to claim a symbol which is neither the cross, nor the crescent. The above solution would allow the red shield to be inscribed in a corner of the flag.

(c) — The Geneva Convention might recognize, besides the red cross, one single exceptional and entirely new emblem, which would be employed by all the countries unable to adopt the red cross. This new emblem would therefore replace the red crescent, and the red lion and sun; it should be strictly neutral, easily recognizable from a distance and bear a name that might be acceptable to Relief Societies in the countries concerned. A white flag showing an oblique, vertical or horizontal band might be considered for adoption; it might be called the " red flame ". A red chevron or red square on a white ground might also serve.

(d) — Iran, the only State using the red lion and sun, might abandon that emblem and use the red cross or red crescent. The crescent would then be the only special emblem in use, and a firm and constant resolve never to recognize any other exceptional emblems would thereby be signified.

ARTICLE 36

Paragraph 1. — The use of the Red Cross emblem has always been governed by the Geneva Convention. As both the Draft Maritime Convention and the Draft Civilian Convention contain provisions authorizing the use of the emblem, it would be useful, in order to emphasize the fact that the Geneva Convention constitutes the primary agreement on the use of the emblem, to mention the fact in Article 36.

Paragraph 1 of this Article might therefore be worded as follows :

With the exception of the cases provided for in the last three Paragraphs of the present Article, likewise in Articles 38 to 40 of the Maritime Convention, Article 19 of the Civilian Convention, and Article 6 of Annex A of the same Convention, the emblem of the red cross on a white ground and the words " Red Cross " or " Geneva Cross " may not be employed, either in time of peace....

Paragraph 5. — Instead of " ambulances ", the expression " *motor ambulances* " should certainly be preferred, as these are what it is

intended to describe. The laws of many countries grant priority to motor ambulances, yet such vehicles must be clearly and uniformly marked. No other emblem makes the same appeal as the Red Cross, and the above amendment would merely confirm general practice.

ARTICLE 37

It appears advisable to make separate Articles of the two Paragraphs, as they are not correlated. This would further emphasize the great importance of Paragraph 2.

ARTICLES 39 AND 40

Below will be found, together with a brief statement of their purposes, the four Articles drawn up by the ICRC in co-operation with legal experts, in accordance with the recommendation made by the XVIIth Conference [1]. It is proposed that these Articles should appear, without change of wording, in each of the four Draft Conventions, and that they should replace Art. 39 and 40 in the Draft WS Convention.

ARTICLE 39

Penal sanctions

I. Legislative measures

The High Contracting Parties undertake to incorporate the present Convention as part of their national law, to ensure the prosecution of any act contrary to its provisions, and to enact provisions for the repression, by criminal penalties or appropriate disciplinary measures, of any breach of the Convention.

Within two years after the ratification of this Convention, the High Contracting Parties undertake to communicate to the Swiss Federal Council, for transmission to all signatory or adhering States, the laws and other measures adopted in pursuance of this Article.

ARTICLE 40

I. Grave Violation

Without prejudice to the provisions of the foregoing Article, grave breaches of the Convention shall be punished as crimes against the law of nations by the tribunals of any of the High Contracting Parties or by any international jurisdiction, the competence of which has been recognised by them. Grave breaches shall include in particular those which cause death, great human suffering, or serious injury to body or health, those which constitute a grave denial of personal liberty or a derogation from the dignity due to the person, or involve

[1] See above, p. 5.

extensive destruction of property, also breaches which by reason of their nature or persistence show a deliberate disregard of this Convention.

Each High Contracting Party shall in conformity with the foregoing Article enact suitable provisions for the extradition of any person accused of a grave breach of this Convention, whom the said High Contracting Party does not bring before its own tribunals.

ARTICLE 40 (a)

III. Superior order

The fact that the accused acted in obedience to the orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify.

Full responsibility shall attach to the person giving the order, even if in giving it he was acting in his official capacity as a servant of the State.

ARTICLE 40 (b)

IV. Safeguar

The High Contracting Parties undertake not to subject any person accused of a breach of this Convention, whatever his nationality, to any tribunal of extraordinary jurisdiction. They also agree that they will not apply any penalty or repressive messure which is more severe than those which are applied to their own nationals or which is contrary to the general principles of law and humanity. They shall grant any person accused all rights of defence and appeal recognised by common law.

The safeguards of proper trial and defence shall not in any case be less favourable than those provided by Article 95 and the following Articles of the Convention relative to the Treatment of Prisoners of War.

Safeguards of a similar nature shall apply if the accused is charged before any international jurisdiction.

The above four Articles call for brief comment.

Article 39. — The purpose of Article 39 (new) is to emphasize the obligation contracted by signatory States to incorporate the provisions of the Convention in their municipal law.

In conformity with the general principles of law, the offenders should be entitled, regardless of nationality, to trial under their own municipal law. Hence the necessity of embodying the provisions of the Convention in the laws of each signatory State.

Article 29 of the 1929 Convention merely stated that " the Governments of the High Contracting Parties shall also propose to their legislative assemblies the necessary measures for the repression of any act contrary to the provisions of the present Convention ". This wording has proved to be inadequate, as the majority of countries signatory to the Convention passed insufficient legislation on this point.

The new text carries a specific obligation which intentionally covers all the provisions of the Convention.

Violations must be repressed by " penal sanctions " or by " appropriate disciplinary measures ", which precludes any more or less arbitrary administrative measures and emphasizes the " penal " nature of the repression.

The phrase " any act contrary to the provisions of the present Convention " has a wholly general bearing, and it has not been thought necessary to state that the clause is valid " regardless of the offender's nationality ". In the opinion of the legal experts consulted, Article 39 justifies, if necessary, the extradition of offenders, in obedience to the laws of the State called upon to grant extradition.

The obligation which is entered into by all signatories under Paragraph 2, namely, to communicate the laws adopted in pursuance of the present Article to the other signatories within a period of two years after ratification of the Convention, provides for automatic verification of the appropriate measures of execution.

Article 40. — The subject of this Article is of particular gravity.

It may be described as a first step towards the introduction of penal legislation of an international character, since it defines as crimes " sui generis " offences known in ordinary parlance as " war crimes ".

Setting aside the political aspect of repression and, in consequence, the question of relative responsibility in the creation of a state of war, the object has been to lay before the conscience of the world a summary of particularly serious violations of the Convention which, if not subject to appropriate penalties, would lead to the degradation of human personality and a diminished sense of human worth.

Custom as regards methods of repression differ considerably on this point in English-speaking countries and in Continental States.

In Great Britain, for example, a person who is accused of such acts may, in the absence of legislation specifically defining the offence and prescribing the corresponding penalty, be prosecuted by virtue of the general rules governing civilised society, and which are held to override all municipal laws. In contradiction thereto, the procedure followed in countries strongly influenced by Roman civilization adheres strictly to the maxim " nulla poena sine lege ". This principle is regarded in such countries as the only safeguard against arbitrary forms of repression.

The object of the draft is to provide, in cognizance of this formal principle, a firm legal foundation for any future prosecutions.

The above text, acquiring force of law by virtue of the preceding Article (Art. 39) would henceforth override any objections such as those which may have arisen in the public mind in connection with certain trials.

The principle of the universality of jurisdiction has been adopted for the purpose of repressing such acts.

An international tribunal would doubtless be the instrument best qualified to judge similar breaches. Pending the establishment and regular functioning of such a court, it seems preferable to rely upon the joint responsibility of all signatory States for the repression of crimes against the law of nations. The guilty persons would thus be subject to various jurisdictions and have less chance of escaping punishment.

Submission to international jurisdiction is also provided for, subject to the approval of the said jurisdiction by the Contracting Parties.

As a result of the rule of universal repression the signatory States would be legally bound to grant the extradition of all accused who are not brought before their own tribunals.

In its present form, Article 40 stresses the gravity of certain acts that are regarded as crimes under the law of nations. These crimes also constitute serious violations of the Convention, but it does not follow that the foregoing Article has effect only in respect of minor infringements of the said Convention. The scope of Article 39 is, as already mentioned, quite general, and the initial sentence of Article 40 : " Without prejudice to the provisions of the foregoing Article " is intended to stress this fact.

Article 40 (a). — This is the requisite corollary to Article 40. It establishes, within prescribed limits, the responsibility of offenders ; it rejects the principle, recognised in various military penal codes, that orders received from a superior exculpate the subordinate who has carried them out.

The text proposed does not, however, go as far as the Declaration of London of August 8, 1945, which, in the case of " war crimes ", only admitted the plea of superior orders as a possible extenuating circumstance, the executor of the order bearing full responsibility.

The suggested text appears to the ICRC to be an acceptable compromise between obedience to orders, — an essential prerequisite of military discipline, — and the moral duty to oppose any patent atrocity, such as the massacre of defenceless women and children.

It should be noted that the onus of proof lies on the prosecution. This is important in view of the fact that certain legislations called upon the accused to prove that he was not guilty.

The experts debated whether, even in the case of flagrant participation in such violations, the threat of death were not sufficient to constitute a legal excuse for obeying superior orders. No concession of this kind was however made, as every latitude is left to the judge to mitigate or remit punishment. This power of discretion seems the best practical solution to the conflict on this point between English and Continental conceptions of law.

Article 40 (b). — This provides safeguards without which the sanction of the Convention could not be considered either appropriate or equitable, as from a humane point of view it would doubtless be less serious to leave criminals unpunished than to punish them contrarily to the principles of justice. This Article is thus inseparably linked to the three preceding ones. While providing a clear basis and procedure for the repression of violations of the Convention, the ICRC was anxious to supply an equally clear basis and procedure for the safeguards attaching to the defence.

The primary safeguard resides in the prohibition of all extraordinary jurisdiction. Furthermore, the fact that the accused are granted benefits of defence and procedure which are not inferior to those available to nationals, is a manifest guarantee of fair trial for all defendants tried by an enemy tribunal. Should it happen, as has occasionally been the case, that, by a legislative aberration, national safeguards of fair trial fall short of those implied in the general principles of law and humanity, the said principles would take precedence.

Furthermore, for the greater clarity of this basic statement — though it is in fact a matter of implementation — the minimum safeguards are defined by reference to Articles 95 and following, of the Draft PW Convention.

Finally, and in order to cover all eventualities, the same minimum safeguards are ensured in the event of the accused being tried under international jurisdiction. It is not intended to infer that such jurisdiction does not offer the same safeguards in principle, but the provision is designed to lay renewed emphasis on the fact that such guarantees are an inseparable concomitant of the right to punish at all.

* * *

Should the Diplomatic Conference adopt the above four Articles as they stand, or in amended form, the feasibility of enlarging their scope by, for instance, recommending their embodiment in the Final Act, might perhaps be studied.

The Draft Conventions presented to the Diplomatic Conference constitute in fact only a part, however important, of a body of international law designed to protect the human person in time of war. Should proceedings be instigated against persons guilty of violations of other Conventions or similar provisions in common law, these new provisions might properly be brought into play. As the prescriptions of international law applicable in the circumstances contemplated are in many cases ill-defined, the safeguards furnished by these new provisions will be all the more necessary.

ARTICLE 41

After the present document had gone to press, a proposal was received from one National Red Cross Society to the effect that the text of the Article be supplemented as follows :

> " The Report of the Commission shall be binding on the litigant States, who shall be required to comply with its directions, to punish the guilty and to inform the States concerned of the penalties inflicted ".

Whilst being unable, through lack of time, to study the proposal that the conclusions of the Commission of Enquiry should be binding, the ICRC felt it should bring this important suggestion to the notice of the Diplomatic Conference.

The same Red Cross Society further proposed that the word " qualified " in Paragraph 2, be deleted, so as to remove the limitation placed on the litigant States' choice.

ARTICLE 42

The present Article 28 of the Geneva Convention, requiring States to prevent misuse of the Red Cross emblem, does not distinguish between grave misuse of the protective emblem in time of war and misuse of the purely descriptive emblem, perhaps for commercial ends. This ambiguity is reflected in the municipal legislation enforcing the provision.

This unfortunate state of affairs doubtless arises from the long-standing misconception as to the fundamental difference between the two types of sign, one protective and the other merely descriptive. There are thus two kinds of misuse, widely different in nature. This distinction should certainly entail two separate provisions. Misuse of the protective emblem in war-time should be liable to extremely

severe penalties. The improper use of the Red Cross on buildings in a zone of military operations is likely to compromise the security of buildings lawfully entitled to display it. It should be noted that the Geneva Convention of 1906 stipulates in Article 28 that misuse of the emblem should be " punished as an unjustifiable adoption of military markings ". The same phrase appears in the Tenth Hague Convention of 1907 ; it thus still applies to vessels.

As regards the text of the Draft, the ICRC propose the adoption of simpler wording, closer to that of the 1929 text ; this change would, however, not alter the substance of the Article. Apart from its greater clearness, the proposed wording would facilitate in many cases the amendment of municipal law.

Article 42 would thus run as follows :

The High Contracting Parties whose legislation is not at present adequate for the purpose, shall adopt the measures necessary to repress, as an unjustifiable adoption of military markings, the misuse, in time of war, of the distinctive emblem which extends the protection of the Convention to buildings, units and persons entitled to respect under the said Convention.

The High Contracting Parties shall adopt the measures necessary to prevent at all times:

(a) — The use of the emblem or designation " Red Cross " or " Geneva Cross " by private individuals or associations, firms or companies, other than those entitled thereto under the present Convention, as well as the use of any sign or designation constituting an imitation thereof, whatever the object of such use.

(b) — By reason of the tribute paid to Switzerland by the adoption of the reversed Federal colours, the use by private individuals or associations, firms or companies of the arms of the Swiss Confederation, or of marks constituting an imitation thereof, whether as trade-marks or as parts of such marks, or for a purpose contrary to commercial honesty, or in circumstances capable of wounding Swiss national sentiment.

The prohibitions indicated in (a) and (b) shall become operative at a date fixed by the legislation of each State and in any case not later than five years after the entry into force of the present Convention, whatever the previous date of adoption of these trade-marks, commercial titles and names of associations, firms or companies, contrary to the above prohibitions.

Further it shall no longer be lawful, from the date of the entry into force of the present Convention, to adopt a trademark or commercial mark in contravention of these prohibitions.

In the territory of the High Contracting Parties who are already parties to the Geneva Convention of 1929, the prohibitions enacted by the present Article, being already contained in the 1929 Convention, shall come into effect without delay.

ARTICLE 43

New Paragraph. — It appears advisable to insert a second paragraph based on Art. 118 of the Draft PW Convention namely :

The High Contracting Parties shall communicate to one another through the Swiss Federal Council, and, during hostilities, through the Protecting Powers, the official translations of the present Convention.

ARTICLE 48

(French text.) — The marginal note " *Adhésions* " has been omitted in error and must be restored.

(Does not apply to the English text.)

ARTICLE 52

(English text.) — For " United Nations Organization ", read " *United Nations* ".

II.

REVISION OF THE TENTH HAGUE CONVENTION OF OCTOBER 18, 1907, FOR THE ADAPTATION TO MARITIME WARFARE OF THE PRINCIPLES OF THE GENEVA CONVENTION OF 1906

PREAMBLE

Respect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking.

Such a principle demands that, in time of war, all those not actively engaged in the hostilities and all those placed hors de combat *by reason of sickness, wounds, capture, or any other circumstance, shall be given due respect and have protection from the effects of war, and that those amongst them who are in suffering shall be succoured and tended without distinction of race, nationality, religious belief, political opinion or any other quality.*

The High Contracting Parties solemnly affirm their intention to adhere to this principle. They will ensure its application, by the terms of the present Convention, to the wounded and sick of armed forces in the field, and pledge themselves to respect, and at all times to ensure respect for, the said Convention.

The comment on the above text, which might replace Article 1 of the present Draft, will be found on p. 8. (Draft WS Convention.)

ARTICLE 2

Paragraph 3. — (French text.) In the last line, read " *elle* " instead of " elles ".

(No change in the English version.)

Paragraph 4. — Same comment as on Article 2, Par. 4, of the Draft WS Convention. See p. 9.

To secure conformity of text, replace the words " chacun des adversaires " by " *chacune des Parties au conflit* ".

(No change in the English text.)

ARTICLE 4

The same remark as on Art. 3 of the Draft WS Convention (p. 9). applies here.

The word "interned" at the close of the Article should be replaced by "*received*".

It might also be stated in this Article that the term "medical personnel" includes the persons covered by Articles 30 and 31.

NEW ARTICLE

The comment on the Draft WS Convention (see p. 10) applies here.

A new Article might be inserted here, between Articles 5 and 6; it would read as follows:

> *The present Convention shall apply to the persons protected from the time they fall into the hands of the adverse party, and until their final repatriation.*

ARTICLE 5

Paragraph 2. — (French text.) In the last line but two, read "*des*" instead of "les".

(No change in the English text.)

ARTICLE 7

Paragraph 1. — (French text.) — In the last line, read "*sont*" instead of "étaient".

(No change in the English version.)

ARTICLE 9

New Paragraph. — A new Paragraph has been inserted by the XVIIth Conference in the corresponding provisions of the Draft PW Convention (Art. 9, Par. 3). A similar insertion in the present Convention might be considered.

(English text.) — Penultimate line: read "*replacing the said Power in the sense...*".

ARTICLE 11

Paragraph 1. — Same remark as on Article 10, Par. 1 of the Draft WS Convention. It would be clearer to say:

"... designated in Article 3 *Paragraph 1, sub-paragraphs (1) to (6)* of the Convention...".

ARTICLE 15

Paragraph 3. — According to the Minutes of the XVIIth Conference it was agreed at Stockholm that hospital ships should be mentioned before merchant shipping. Owing doubtless to a technical error, this amendment was omitted from the texts submitted to the Plenary Assembly.

The proposed addition seems opportune. The reference is to hospital ships of neutral countries utilised by the said countries for their own requirements, rather than to neutral hospital ships which have been placed under the control of a belligerent (Art. 21).

ARTICLE 17

Paragraph 1. — Same comment as on Article 13 of the Draft WS Convention (p. 11). The words " *and of members of the medical and religious personnel who have fallen into their hands* " should be inserted, at the end of the Paragraph, between the phrases " dead discovered and collected " and " together with any indications ", etc.

Paragraph 3. — The words " *or having belonged to them* ", or " *in their immediate vicinity* " should be added at the end of the Paragraph. (See p. 11).

ARTICLE 19

The last condition mentioned for the protection of hospital ships (... " and that the handing out of this notification has been confirmed by the Protecting Power thirty days before the said ships are employed ") is less important than the others ; it is even doubtful whether it has any value at all.

Apart from the fact that thirty days seems a very long period and that serious consequences might arise for belligerents who are deprived of hospital ships during the whole first month of the war, confirmation by the Protecting Power that the notification has been handed out would be advantageous only to the belligerent employing such vessels. The belligerent concerned is, however, at liberty to ask the Protecting Power for confirmation and to await the latter before employing the hospital ship. This does not need to be specially provided for in the Convention.

It would be doubtless sufficient to say : " on condition... that their names and descriptions have been notified to the belligerent Powers *ten* (five or fifteen) *days* before the said ships are employed ".

ARTICLE 20

Paragraph 3. — It hardly seems advisable to provide for the protection of coastal life-boats employed by private persons. Such protection might lead to misuse, owing to the total absence of supervision. It is conceivable that many owners of small craft might, in time of war, describe their craft as life-boats.

The employment of such craft by duly recognised relief societies, on the other hand, would offer the required guarantees.

Hospital ships employed by private persons are dealt with in Paragraph 1 ; they must, however, have received an official commission from the belligerent Power on which they depend, a circumstance which removes any danger of misuse.

The term " coastal life-boats " is perhaps not sufficiently precise. It would perhaps be better to say that such boats shall be employed in coastal waters only.

ARTICLE 21

(French text.) — The words " pour autant " in the penultimate line are redundant.

In the English text replace " in so far as " by " *and that* ".

ARTICLE 22

Reference is made, in the first line, to Articles 19, 20 and 21. The last of these (Art. 21) is, however, scarcely relevant, as it refers to hospital ships of neutral countries. It is hardly possible or desirable to prevent such vessels from serving as hospital ships, since they are in no case liable to capture.

ARTICLE 23

This Article might serve as Paragraph 2 of Article 16, as in the case of the corresponding provisions (Art. 12) of the Draft WS Convention. It is moreover illogical to insert this Article in a Chapter entitled " Hospital Ships ".

ARTICLE 25

Paragraph 3. — (English text.) — " Sach ", in line 1, is an obvious misprint for " *Such* ".

ARTICLE 29

The comment on Article 16 of the Draft WS Convention (p. 12) applies here.

Further, it should be noticed that the wording of sub-paragraph (1) is not in conformity with the corresponding Article of the Draft WS Convention (Art. 17). The words " *and that they use the arms in their own defence* " should certainly be inserted in the Maritime Convention.

ARTICLE 31

(French text.) The last word is a printer's error ; read " *sanitaire* " instead of " militaire ".

(No change in the English version.)

Paragraph 4. — (English text.) The last lines should read " the same allowances and the same pay as *are given* to the corresponding personnel ".

Closer study of Article 39, which provides for the issue of armlets and identity cards to medical and religious personnel, leads us to conclude that Article 31 should be amended, so as to draw a distinction between medical personnel of warships (personnel attached to the naval medical service), and medical personnel of merchant ships (Mercantile Marine).

An amendment is required, if only for purely formal reasons. It is not possible to demand that medical personnel " of any captured ship " shall wear armlets and carry identity cards. Moreover, medical personnel may fall into enemy hands, despite the fact that their ship is not captured.

Furthermore, the above distinction should be drawn as a matter of principle. The mercantile marine does not form part of the armed forces, and doctors and hospital orderlies on board merchant ships are not attached to the medical services of those forces ; they should not, therefore, be given the identity documents proper to the regular medical personnel of the armed forces.

The status of the said personnel, when captured by the enemy, might conceivably be the same as that of the regular medical personnel on warships. This is indeed a traditional usage ; furthermore, Article 3 of the Draft PW Convention says that crews of the mercantile marine shall be treated as prisoners of war, unless they benefit by more favourable treatment under some other provision in international law.

To allow for this assimilation, while excluding the issue of armlets and identity cards, a new Article should be inserted.

The following amendments are suggested : *To Article 31 :* (a) — *Paragraph 1* — The words " of any captured ship " to be replaced by " *of warships belonging to the belligerents* ".

(b) — *Paragraph 2* — In line 1 insert the phrase " *falling into the hands of the adverse party* " after the words " the members of such personnel ".

New Article (To be inserted after Article 33).

Members of the religious, medical and hospital personnel of the mercantile marine falling into the hands of the enemy shall be treated in conformity with Articles 31, 32 and 33.

ARTICLE 32

Paragraph 1. — The same comment as on Art. 23 of the Draft WS Convention. The following sentence should be introduced at the close of the Paragraph : " *Belligerents shall grant such personnel the same allowances and the same pay as are given to the corresponding personnel in their own forces* ".

Furthermore, the heading reads " Return to the belligerents ", whereas that of the corresponding Article of the Draft WS Convention (Art. 23) reads " Return to the belligerent ". It would be better to unify the text ; the singular form seems more suitable.

ARTICLE 33

Paragraph 2. — See comment on Art. 24 of the Draft WS Convention. The last words of the paragraph should read : " *and the distribution of the said personnel in the camps* ".

ARTICLE 34

This Article might with advantage be re-inserted between Articles 28 and 29. Its contents do not correspond exactly to the title of the Chapter (" Material "), as it also refers to the protection due to sick-bays. If Article 34 is removed, Chapter V (" Material ") could be deleted, as it consists of this Article only.

Moreover, as Article 29 deals with the protection due to sick-bays and the lapse of the said protection, the Article establishing such protection should come first.

ARTICLE 35

This Article, drafted mainly by the Conference of Government Experts, does not seem to be sufficiently clear.

In the first place, it may be asked whether the word " chartered " (line 1) is really adequate. " To charter " means to hire a ship.

It is also not clear whether a provision that the " duties " of a ship conveying medical stores shall be approved by the adverse Party is equivalent to stating, as a general principle, that the immunity from capture of all transports of medical stores is conditional on the agreement of the adverse Power. Should this be the case, the whole stipulation would probably become valueless in practice.

It may further be asked whether the terms " medical equipment " and " medical stores " are sufficiently precise, when we remember that certain products, such as cotton and rubber, used to make dressings and so on, may also be employed for warlike purposes.

Last Paragraph. (French text.) — The last words should read : " *ceux qui leur sont habituellement nécessaires* ".

(No change in the English version.)

ARTICLE 36

Paragraph 1. — The comment on Article 29 of the Draft WS Convention also applies in this case. The Paragraph could be worded as follows :

Hospital aircraft, that is to say, aircraft exclusively reserved for the evacuation of the wounded and sick and for the transport of medical personnel and material, and seaplanes in particular, may not be the object of attack, but shall be respected by belligerents.

Paragraph 4. — (English text.) — Line 2 : read " likewise *over* any enemy military objectives ".

Paragraphs 6 and 7. — The same freedom to pursue the flight should presumably be granted to medical aircraft making involuntary landings in enemy territory (Par. 6), and to aircraft which are compelled to alight.

ARTICLE 38

The question of a return to the unity of the Red Cross emblem, which must be settled in connexion with Art. 31 of the Draft WS Convention, will also affect this Article.

It should be noted that the Draft makes no mention of the exceptional emblems (red crescent, red lion and sun).

ARTICLE 40

The comment on Article 38 also applies here.

Further, in Paragraph 3, sub-paragraph (b) it should be stated that the luminous three-dimensional red cross placed above the superstructure shall have parallelepipedal members. The second sentence of the sub-paragraph should therefore read " This cross shall consist of three luminous *parallelepipedal* members ".

ARTICLE 41

The same remark applies here as for Article 37 of the Draft WS Convention. The two Paragraphs of Article 41 might well be divided into two Articles.

ARTICLES 43 AND 44 [1]

The following four articles were drafted by the ICRC, with the assistance of legal experts, in pursuance of a recommendation passed by the XVIIth Conference [2]. These Articles should appear, with the same wording, in each of the four Conventions to be revised or concluded. In the present Draft Convention they would replace Articles 43 and 44.

ARTICLE 43

Penal Sanctio[ns]

I. Legislat[ive] measure[s]

The High Contracting Parties undertake to incorporate the present Convention as part of their national law, to ensure the prosecution of any act contrary to its provisions, and to enact provisions for the repression, by criminal penalties or appropriate disciplinary measures, of any breach of the Convention.

Within two years after the ratification of this Convention, the High Contracting Parties undertake to communicate to the Swiss Federal Council, for transmission to all signatory or adhering States, the laws and other measures adopted in pursuance of this Article.

ARTICLE 44

II. Grave violation[s]

Without prejudice to the provisions of the foregoing Article, grave breaches of the Convention shall be punished as crimes against

[1] In the French version the words "si elles le préfèrent" in Art. 44, line 6, (approved by the XVIIth Conference) are a clerical error and should read "*s'il le préfère*". (No change in the English version).

[2] See p. 5.

the law of nations by the tribunals of any of the High Contracting Parties or by any international jurisdiction, the competence of which has been recognised by them. Grave breaches shall include in particular those which cause death, great human suffering or serious injury to body or health, those which constitute a grave denial of personal liberty or a derogation from the dignity due to the person or involve extensive destruction of property, also breaches which by reason of their nature or persistence show a deliberate disregard of this Convention.

Each High Contracting Party shall in conformity with the foregoing Article enact suitable provisions for the extradition of any person accused of a grave breach of this Convention, whom the said High Contracting Party does not bring before its own tribunals.

ARTICLE 44 (a)

[. Superior orders

The fact that the accused acted in obedience to the orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify.

Full responsibility shall attach to the person giving the order, even if in giving it he was acting in his official capacity as a servant of the State.

ARTICLE 44 (b)

. Safeguards

The High Contracting Parties undertake not to subject any person accused of a breach of this Convention, whatever his nationality, to any tribunal of extraordinary jurisdiction. They also agree that they will not apply any penalty or repressive measure which is more severe than those which are applied to their own nationals or which is contrary to the general principles of law and humanity. They shall grant any person accused all rights of defence and appeal recognised by common law.

The safeguards of proper trial and defence shall not in any case be less favourable than those provided by Article 95 and the following Articles of the Convention relative to the Treatment of Prisoners of War.

Safeguards of a similar nature shall apply if the accused is charged before any international jurisdiction.

For the comment on the above four Articles see Draft WS Convention, pp. 19-22.

NEW ARTICLE

It has been seen, with regard to Article 42 of the Draft WS Convention (see p. 23), that the principle contained in Article 43, Paragraph 1, last sentence, of the present Draft should be maintained.

In view of the proposed wording (see above) of Articles 43 to 44 (b), a brief new Article should be inserted ; it might run as follows :

The High Contracting Parties whose penal laws are still inadequate shall take the measures required to repress in time of war, as an illegal use of military markings, the misuse by vessels not protected by the present Convention, of the distinctive markings named in Article 40.

ARTICLE 45

New Paragraph. — Through a clerical error, the last paragraph of the corresponding Article of the Draft WS Convention (Art. 41) has been omitted. A fifth paragraph should therefore be added, as follows :

All facilities shall be extended by the High Contracting Parties to the Commission of Enquiry for the fulfilment of its duties. Its members shall enjoy diplomatic privileges and immunities.

ARTICLE 46

New Paragraph. — The same comment applies as for Art. 43 of the Draft WS Convention. A second paragraph based on Art. 118 of the Draft PW Convention should be inserted. It might run as follows :

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention.

ARTICLE 55

See comment on Art. 140 of the Draft Civilian Convention.

(English text.) After " United Nations " delete " Organization ".

III.

REVISION OF THE CONVENTION SIGNED AT GENEVA ON JULY 27, 1929, RELATIVE TO THE TREATMENT OF PRISONERS OF WAR

PREAMBLE

Respect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking.

Such a principle demands that, in time of war, all those not actively engaged in the hostilities and all those placed hors de combat *by reason of sickness, wounds, capture, or any other circumstance, shall be given due respect and have protection from the effects of war, and that those amongst them who are in suffering shall be succoured and tended without distinction of race, nationality, religious belief, political opinion or any other quality.*

The High Contracting Parties solemnly affirm their intention to adhere to this principle. They will ensure its application, by the terms of the present Convention, to the wounded and sick of armed forces in the field, and pledge themselves to respect, and at all times to ensure respect for, the said Convention.

See Draft WS Convention, p. 8, for the comment on the above text. The " Preamble " might replace Art. 1 of the present Draft PW Convention.

ARTICLE 2

Paragraph 3. — See comment on Art. 2, Par. 3, of the Draft WS Convention, p. 9.

Paragraph 4. — The XVIIth Conference reaffirmed the principle laid down in 1929 prohibiting reprisals against prisoners of war. Any breach on the part of one of the Parties concerned shall not affect the treatment of the PW in the hands of the other Party. It is thus recognised that the treatment required under the Convention

constitutes the minimum satisfaction of humanitarian demands, apart from any question of reciprocity, although, of course, the application of the provisions concerning treatment is facilitated by such reciprocity.

The ICRC consider that these humanitarian demands remain unchanged in any international conflict, or during hostilities not of an international character which have taken on such dimensions that their conduct can no longer be regulated by municipal legislation but must be subject to international law. The Committee have for this reason omitted the reciprocity clause from the provisions governing the application of the Convention to conflicts not of an international character.

It has been objected under such a text that a Contracting Party would be obliged to grant the benefit of the Convention to offenders in the smallest civil disturbance and, furthermore, to allow the intervention of a Protecting Power nominated by these persons, although the said Power might be the originator of the disturbance. These objections do not appear to be well-founded. In the first place, whereas the Convention rightly abstains from defining an armed conflict not international in character, it does not follow that minor civil disturbance should come into this category.

Fair reference must be made to the standards usually accepted in international law, when determining whether a civil war conferring belligerent status on the parties concerned, is in existence. Secondly, current practice is such that while a Detaining Power may not oppose the intervention of any Protecting Power, it is not obliged to accept a Protecting Power which does not command its confidence.

It was furthermore objected that a State which is signatory to the Convention presumes not only that the other signatory States also intend to apply it, but that they are normally in a position to do so. It has been argued that this presumption has much less force in the case of civil war, as the very existence of such a conflict generally prevents the practical application by the insurgents of an extensive Convention such as this. Consequently, if a Government is aware that a future adversary will probably not be able to respect the Convention, it will not readily adhere, unless the reciprocity clause is included.

This objection, though seemingly just, is not conclusive in practice as the problem in fact arises in regard not only to civil war and insurgents, but also to international conflicts and all belligerents who are parties to the Convention. The question raised is that of belligerents who fail to apply the Convention, owing to simple inability to do so, generally for practical reasons. This question was discussed at length by the Government Experts in 1947 ; they agreed that such derogations should be implicitly allowed whenever belligerents plead, in

all good faith, inability to meet their obligations. Thus in a conflict not of an international character, there does not appear to be any reason why one of the parties concerned should not be covered by the general ruling laid down by the Experts, particularly in view of the fact that in conflicts of this nature, the responsibility for imperfect observance of the Convention may rest not with the insurgents alone, but with the legal Government also.

The ICRC wish to stress, as they have so far done in their comments on the Draft Conventions, and as one National Red Cross Society has recently remarked, that if the reciprocity clause is inserted in this Paragraph, the application of the Convention in the event of civil war may be completely stultified. One of the parties to the conflict could always assert, as would be all too easy in a war of this nature, that the adversary was not observing such and such a provision of the Convention.

For this and the preceding reasons, therefore, the ICRC believes it would be preferable to delete the words " subject to the adverse party likewise acting in obedience thereto " in the first sentence of the Paragraph.

ARTICLE 3

Paragraph 1, sub-paragraph (6). — The Government Experts (1947) agreed in general that the primary condition to be fulfilled by " partisans " if they were to be recognized as prisoners of war, was that they should constitute a military organization. In other words, the organization should have the main attributes common to all armed forces, namely discipline, military cadres, responsibility and military honour, besides those conditions enumerated under (b) of the Paragraph. The Experts considered that this requirement would constitute an additional guarantee of open and honourable warfare between partisans and occupation troops.

It may be asked whether the term " an organized resistance movement ", added by the XVIIth Conference, does not deviate considerably from the principle stated above, and whether, above all, the meaning of the term is clear enough. What type of organization does the word " organized " qualify ? Moreover, the use of the word " resistance " in a legal text of this nature is somewhat anomalous. Does it signify that the movement intends not only open hostilities against the occupants—as the wording " constituted in an occupied territory to resist the occupying Power " would imply—but also other forms of opposition ? If this addition is to stand, it should perhaps be worded more precisely.

Last Paragraph. — Both the purpose of this paragraph, added by the XVIIth Conference, and the categories of persons mentioned in

it are ill-defined. The vague terms employed, especially " persons who are captured or detained ", seem to defeat the main object of the revision, which was to define as precisely as possible (as in Paragraphs 1 and 2) the categories of persons to which the Convention should apply.

Further, this paragraph does not fall in with the general co-ordination of the Draft Conventions. Under the principle of this arrangement all persons whose protection is not ensured by a Convention dealing with a particular category, are covered by the Draft Civilian Convention.

If this Paragraph is intended to refer to a category not covered by this arrangement, that is to say guerillas fighting outside occupied territory, and to ensure their humane treatment and proper trial after capture, the ICRC believe that a recommendation to this effect should be included in the Preamble or the Final Act. It seems hardly suitable, however, to introduce this issue in the body of a Convention dealing with prisoners of war, and therefore with regular belligerents.

For the above reasons, the ICRC feel that the last Paragraph might be deleted.

ARTICLE 6

The XVIIth Conference wished to stress the principle enunciated in this Article. The wording employed is, however, unfortunate in that it places prisoners of war under a direct obligation, whereas the general effect of the Draft Convention is to impose obligations on the Contracting Parties only. Furthermore, if this obligation is to be borne by the prisoner, it is difficult to say what sanctions international law could prescribe for non-compliance. The text submitted by the ICRC should perhaps be restored, and strengthened in the following manner :

> *The High Contracting Parties shall in no circumstances deprive prisoners of war, either wholly or in part, of the rights conferred upon them by the present Convention and, where applicable, by the special agreements mentioned in the foregoing Article, even if the prisoners make an explicit request to that effect.*

ARTICLE 9

Paragraph 3. — When presenting the Draft Conventions the ICRC remarked that the wording " a body which offers all guarantees of impartiality and efficacity " in Article 9, Paragraph 1, should exclude any agencies set up by agreement between an occupying Power and

the authorities of the occupied territory. The XVIIth Conference did not believe that that wording had sufficient force and thought it better to introduce a new Paragraph 3, which the ICRC was also to consider for insertion in the other Conventions.

Should the Diplomatic Conference share the view of the XVIIth Conference, the ICRC hope for full recognition of the fact that the term " body " in this new Paragraph should not apply to a neutral State. Such States may have been chosen by the Parties as the Protecting Power before the occupation, and should therefore continue their duties ; there is, too, no reason why the occupied State and the occupying Power should not come to an agreement upon the choice of a neutral State, during the occupation.

To convey exactly the meaning desired, the text of the Paragraph should also exclude the appointment of a protecting body by agreement between the Detaining Power and such administrative authorities remaining on occupied soil as would not, properly speaking constitute a government. The wording could be expanded as follows :

> " If the territory of the Power on which the prisoners of war depend is occupied by the Detaining Power, or by one of its Allies, and if the Government *or certain authorities* of the aforesaid territory are approved by the Detaining Power and remain on occupied soil, the interests of the prisoners of war shall in no case be entrusted to a body set up or appointed by agreement between the Detaining Power and the said Government *or authorities.* "

The ICRC consider that such a provision, if really found essential, might appear in all four Conventions.

ARTICLE 10

Paragraph 1. — It is self-evident that, whenever the Protecting Powers are called upon, under the terms of this Article, to lend their good offices in order to facilitate the application of the Convention, their invariable aim will be, directly or indirectly, the welfare of the prisoners in their care. It might be inferred from the present wording of the French text that this is not always the case. It would thus be preferable, for the sake of clarity and uniformity, to revert to the wording of the corresponding clause in the Draft WS Convention (Art. 9, Par. 1), namely :

> *Whenever the Protecting Powers consider it desirable in the interest of prisoners of war, particularly in the event of disagreement between the Parties to the conflict regarding the application of the provisions of the present Convention, the said Powers...*

ARTICLE 12

Paragraph 3. — This requirement appears to be superfluous. The acts mentioned are only two special cases of inhuman treatment which, although particularly detestable, remain two instances amongst many which might be quoted. In the opinion of the ICRC such acts are forbidden explicitly enough under the terms of Paragraph 1, which calls for the humane treatment of prisoners of war. The very wide effect of this principle would be weakened rather than extended if detailed prescriptions were added. Paragraph 3 therefore might be deleted.

ARTICLE 15

Paragraph 3. — This Paragraph, which was introduced by the XVIIth Conference, has two apparent defects :

(1) — The rule proposed is too rigid. The Government Experts (1947) recognized that the identification of prisoners of war by means of special cards could only be a supplementary and optional measure. It thus seems hardly advisable to require States whose means may be restricted, to undertake the additional expense of providing a large proportion of their population with these cards. The cards should therefore be recommended, but not made obligatory.

(2) — The possible bearing of this Paragraph on the prisoner's obligation to give certain information, is not brought out clearly enough. Does the identity card mentioned in this Paragraph replace the prisoner's verbal declaration, or may the Detaining Power demand the declaration whatever the circumstances ? This point should be clarified ; the authors of this proposal certainly intended to allow prisoners of war holding an identity card, to discharge their obligation by handing the card to the interrogating authorities.

Paragraph 3 in its more general aspects revives the question as to what identification details a prisoner should, or may supply to the Detaining Power. Upon reconsideration of the question, the ICRC believe that it has not been dealt with satisfactorily. According to Article 112, Par. 4, the Detaining Power is entitled to ask the prisoner for other details as to identity, besides those which he must give under Article 15. These other details include : place of birth, nationality, parents' surname and first names, home address, or address of the person to be informed. Furthermore, Article 59 provides that the prisoner shall be invited, very soon after his capture, to fill in a capture card which, according to the specimen annexed to the Convention (see " Revised and New Draft Conventions for the Protection of War Victims established by the ICRC ", p. 152) also requests addi-

tional information of this nature. Thus, the introduction of a second category of questions which may be put to the prisoner, but to which he need not reply, is likely to confuse both him and the persons responsible for applying the Convention, particularly if no allusion, however slight, is made to it in Article 15, and if the connection between this Article and Article 112 is not established.

The simplest course would certainly be to make it compulsory for prisoners to give the information mentioned in Article 112. All these details are important, and in fact essential, for the work of the national Information Bureaux and of the Central Agency; they correspond to the details which prisoners were in general authorised to give during the last war, and could therefore hardly be considered as information that a belligerent might use for military purposes.

However, the Government Experts (1947) remarked that some of these details might, in some circumstances, prove dangerous to the prisoners themselves; the Detaining Power might take measures against the families or near relatives thus divulged. Such has been in fact the Committee's own experience, and in view of certain recent developments in warfare (occupation, partisan operations and so on), the ICRC feel that this objection should be borne in mind, and that the above solution should be discounted in favour of a wording which would provide for the two categories of information.

This arrangement should, if it is alone practicable, be more clearly defined in Article 15, as has already been suggested. The ICRC propose the following wording, based on the remarks made above and intended to replace the first three Paragraphs of this Article:

The Detaining Power may only ask prisoners of war, for identification purposes, to give the personal information expressly required in Article 112, Paragraph 4, in the interests of rapid notification of the next of kin.

Of this information, each prisoner of war shall be obliged to give his surname and first names, his date of birth, his rank, and his army number or the equivalent. Should he elect to disregard this rule, the prisoner may be liable to restriction of the privileges granted under the Convention to prisoners of war of his rank or standing. The prisoner may, however, if he deems it advisable, refuse to give the other information mentioned in Article 112, namely, nationality, place of birth, parents' surnames and first names, home address or address of the person to be informed.

Whenever possible, each belligerent shall furnish all persons under his jurisdiction who are liable to become prisoners of war, with an identity card showing at the least all the information which a prisoner is bound to give; the card may also bear the fingerprints of the holder and such of the other details mentioned above as may be deemed

advisable. Prisoners of war in possession of these cards may, in discharge of the obligation set forth in the previous Paragraph, merely hand the said card to the interrogating authorities.

ARTICLE 19

Paragraphs 3 and 4. — Through an oversight, the Commission which dealt with the Draft PW Convention at the Stockholm Conference omitted from its Report the last sentence of the amendment which had become Paragraph 3. Further, the text of Paragraph 4 given in this Report is entirely different to that adopted by the Commission. The sentence omitted in Paragraph 3, which was a recapitulation of the standard clause of the Hague Regulations, Art. 12, reads as follows :

> " Prisoners of war released on parole and recaptured whilst bearing arms against the Government to whom they had pledged their word, or against the Allies of that Government, forfeit their right to be treated as prisoners of war. "

The following text was adopted as Paragraph 4 :

> " Any prisoner released on parole and recaptured whilst attempting to escape may be brought before the courts in accordance with the prescriptions of Article 74 below. "

Since the Conference decided to introduce, in the Draft PW Convention, the Hague provisions relating to release on parole, it acted logically, in the Committee's view, by also inserting the ruling which is given above. However, the Conference also decided to modify Article 74 of the Committee's draft, in such a way as to uphold the right to treatment as PW even of those men who, before capture, had committed acts constituting serious breaches of the laws and customs of war. A prisoner who again takes up arms against a belligerent Power by whom he has been released on parole commits an act which, although reprehensible, is not, it would seem, more serious than many breaches such as those mentioned above. There would consequently seem to be no good reason why the right to the benefit of the Convention should be upheld in one case and withdrawn in another.

If therefore the rule contained in Article 12 of the Hague Regulations is to be reproduced, it should be adapted to the modified provisions of Article 74 ; the idea contained in the text adopted for Paragraph 4 might be used, as follows :

> *Prisoners of war released on parole and recaptured whilst attempting to escape, or whilst bearing arms against the Government*

to whom they had pledged their word, or against the Allies of that Government, shall continue to have the protection of the present Convention, but may be punished for the above-mentioned acts in conformity with the laws of the Detaining Power.

ARTICLE 21

Paragraph 2. — (English text) — A better translation of the second sentence might be : " In case of alarms, they *shall be free* to enter such shelters as *quickly* as possible, excepting those *who remain* for the defence of their quarters against the said hazards ".

See comment on the Draft Civilian Convention, Art. 77.

ARTICLE 24

Paragraph 1. — This Paragraph contradicts a very long-standing rule—one even that has entered common law—whereby prisoners of war should be placed on the same footing, as regards maintenance, as the troops of the Detaining Power.

This ruling has drawbacks when there is a great difference between the standard of living of the prisoners' own countries and that of the Detaining Power, but so far such cases have been comparatively few. Another frequent criticism of this ruling derives from the original wording of the 1929 PW Convention ; the troops to whom the PW were to be assimilated were described as " depot troops ", a category which does not exist in the military organization of some countries. This is, however, a minor shortcoming and does not affect the principle itself.

Despite these defects, the ICRC have often been impelled to emphasize the fundamental value of this ruling, brought out by their experience during two world wars. It did, in fact, provide their delegates (and probably those of the Protecting Powers) with a basis of reference which, if not perfect, was fully adequate for an appraisal during camp visits of the food rations allotted to prisoners, and for pressing home a demand for their improvement. If in doubt, the visiting delegate could always ask to see the ration allotted to the camp guards.

The basis of reference offered by the new text, namely, good health, weight and nutritional deficiencies, is inadequate. To be able to judge good health or deficiencies requires some medical training ; further, prisoners of war may be in poor health where this is not due to their rations. Finally, as been pointed out, the term "good health " is vague and should at least be replaced by " normal state

of health ". As regards weight, it is a recognised fact that a man may sometimes put on weight although he does not receive sufficient nourishment.

The above comments may be opposed on the grounds that they represent the opinion of those who supervise the application of the Conventions, whereas those who actually apply the Conventions will think differently. Apart from the fact that supervisory bodies must have the means of carrying out their duties, it may be replied that the time-honoured principle of assimilation, duly amended, best serves the interests even of the Detaining Power.

For all these reasons, the ICRC consider that the best course would be to revert to the wording of their draft, which not only maintains the principle of assimilation, with the necessary adjustments, but also includes two new safeguards—the maintenance of a normal state of health, and the issue of additional rations to working PW. To these could be added the stipulation concerning international nutrition standards, included in the Draft Civilian Convention (Art. 78). The text would thus read :

The food rations allotted to prisoners of war shall be at least equivalent to the rations given to those troops of the Detaining Power's own forces who are not engaged in military operations, unless such rations are manifestly superior to those issued to the forces to which the prisoners belong ; in such a case, prisoner of war rations may be reduced, but may not, however, fall below those of the said forces. The rations shall in any case be adequate in quantity, quality and variety to ensure a normal state of health. Any international standards for nutrition that may be adopted shall be applied to prisoners of war.

Prisoners of war who are obliged to work shall receive additional rations proportionate to the labour they perform.

Paragraph 3. — It might be considered, as was suggested by the Government Experts in 1947 and again recently by one National Red Cross Society, whether the Detaining Power should not be required to issue tobacco, as well as food rations, to prisoners of war.

Paragraph 4. — (French text) — The wording of the 1929 Convention appears better, and should be kept. Moreover, to ensure textual conformity with the corresponding provision of the Draft Civilian Convention (Art. 78), the word " disposeront " should be replaced by " *disposeraient* ".

(No change in the English version.)

ARTICLE 27

Paragraph 2. — To secure conformity with the corresponding ruling in the Draft Civilian Convention (Art. 75, Par. 3), the text of which is more precise, the ICRC propose the following wording :

> " Prisoners of war shall have for their use, day and night, *sanitary* conveniences which conform to the *demands* of hygiene, and are constantly maintained in a state of cleanliness. "

ARTICLE 28

Paragraph 1. — Having taken qualified medical advice on the subject, the ICRC believe that the isolation of PW suffering from infectious diseases is of the utmost importance, in view of the close contact in which PW generally live, and that the words " if necessary " in the second sentence should therefore be deleted.

ARTICLE 30

Paragraph 2, first sentence. — The contiguity of the terms " ministers of religion " and " prisoners of war " has led to some misapprehension. It is often wrongly supposed that ministers of religion nearly always become army chaplains, and that therefore they will in principle benefit by the provisions relative to protected personnel, should they fall into enemy hands.

In order to avoid any misunderstanding to which this juxtaposition of terms might give rise, the idea might be expressed as follows :

> *Prisoners of war who have not officiated as chaplains in their own armed forces, but who are ministers of religion, shall be allowed, whatever their religious denomination, to minister freely to the members of their community.*

Paragraph 2, third sentence. — The second and third sentences were added to the text of the original Art. 16, Par 2, of the 1929 Convention, so as to ensure that a mere lack of ministers of religion in any place of internment would not prevent PW from practising their religion. As the number of ministers of religion of a given denomination will rarely be sufficient to allow of their being present, even after careful distribution, in all places of internment containing PW of their faith, the Detaining Power should allow them to move from one place to another. This was intended by the wording " In case of need, they shall enjoy...", which was deleted by the XVIIth Conference. As a result of this deletion the third sentence gives

ministers of religion a general freedom of movement which is far from the original purpose of the text. Such liberty, which would be much greater even than that provided for camp spokesmen, could not be justified, and would hardly be acceptable to a Detaining Power. The ICRC therefore suggest that their draft wording, simplified as follows, be restored :

For that purpose, the Detaining Power shall ensure their equitable allocation amongst the various camps and labour detachments; if their numbers are insufficient they shall be allowed all facilities for moving from one camp or detachment to another.

Paragraph 2, last sentence. — The object of this sentence, inserted at the request of religious organizations, was to permit the offices of a minister of the country where the PW are detained, should no minister be available among these. The sentence has unfortunately been rendered unintelligible by the fact that the concluding phrase "appointed by the local religious authorities, with the approval of the Detaining Power" was inadvertently omitted from the Report of the Commission which dealt with the Draft PW Convention at the XVIIth Conference.

The words should therefore be restored and the ICRC suggest the following slightly amended text :

Failing ministers of the prisoners' faith, or should the said ministers be insufficient in number, spiritual aid may be given to prisoners by a minister of the same denomination, or in the absence of such a minister and if doctrinal considerations permit, by a minister of similar denomination appointed by the local ecclesiastical authorities, with the approval of the Detaining Power.

This sentence might appear as a new Paragraph 3 ; its contents are fairly distinct from the remainder of Paragraph 2, which would also be shortened thereby.

Paragraph 5. — The meaning of the term " official reports " is not clear. The reports sent by the representatives of the Detaining Powers only may be intended ; on the other hand, the term may embrace all reports sent by the delegates of the Protecting Power, the ICRC or other relief organizations on their visits to PW camps. If the last interpretation is correct, it would be preferable to remove this provision. The Protecting Power's procedure is designated by the State it represents and not by the Convention, which cannot therefore, as it would do here, prescribe the content of reports sent by the delegates of Protecting Powers ; the Convention may only lay down general provisions for those activities.

The ICRC, for their part, have always tried, in their reports on camp visits, to give the fullest possible attention to the spiritual affairs of PW ; however, any provision to this effect would prove a serious hindrance, as they are on occasion obliged, for particular reasons, to devote a report entirely to one subject.

ARTICLE 31

Paragraph 1. — Neither the term "individual preference", nor the expression "individual liberty" used in the Committee's draft, exactly meets the case. The object of this provision is to prevent PW being compelled, on educational or recreational pretexts, to join in activities which, in fact, have propaganda motives. However, the present wording might be construed in the sense that the prisoner may not avoid these activities, but may only choose those he prefers. The sentence should therefore be amended, as follows :

> "*Whilst leaving prisoners free to take part in them, or not,* the Detaining Power shall encourage the practice of intellectual, educational and recreational pursuits...".

ARTICLE 32

Paragraph 1. — To ensure conformity of wording with the corresponding text in the Draft Civilian Convention (Art. 88), the second sentence should read "The said officer shall have in his possession a copy of the present Convention *in his own language*".

Furthermore, the term "under the direction of his government" is imprecise, and also superfluous. The term "responsible officer" is sufficient, since it indicates that the camp commandant is responsible to his superiors, whose evident duty it is to supervise the conduct of his command. The "direction of his government", in other words, resides in the military chain of command, and need not be stressed here. Lastly, this expression might be interpreted as revoking, in certain cases, all individual responsibility for the treatment of PW, whereas Article 11, Par. 1, second sentence, expressly states that the Detaining Power's responsibility in no way releases individuals from their responsibility for their actions in respect of prisoners.

For the above reasons, it seems advisable to delete the words "under the direction of his government".

ARTICLE 34

Paragraph 2. — It has rightly been pointed out that the regulations, orders, etc., mentioned in this Paragraph might refer not only to the prisoners' conduct, but also to other matters, such as correspondence, pay, and so on. The first sentence could be modified as follows :

" Regulations, orders, notices and publications of every kind *concerning the prisoners of war* shall be issued to them in a language which they understand. "

ARTICLE 37

Paragraph 1. — Since special reference is made to PW of status equivalent to officers, both rank and standing should be mentioned. The sentence should therefore read thus :

" Officers and prisoners of equivalent status shall be treated with the regard due to their rank *or standing*, and to their age. "

ARTICLE 38

Paragraph 2. — On several occasions during and since the recent war, the ICRC have drawn the attention of Governments to the question of the safety of PW during transport by sea. The gravity of the problem is illustrated by the fact that, despite all measures taken by belligerents, over 10,000 PW perished in the course of such transfers. The ICRC therefore consider that the provisions of this Article, and of Paragraph 2 in particular, are not sufficient to prevent, in the greatest possible measure, the recurrence of such events in the future. Serious difficulties arise in respect to this problem, chiefly owing to the vital importance of shipping in modern warfare. In view of these difficulties, and also of the lack of time at their disposal, the Government Experts (1947) were unable to devise an alternative to the present clause. It is therefore to be hoped that the question will be closely studied by the Diplomatic Conference.

The ICRC think they may usefully indicate the few guiding principles which, in their opinion and on the basis of their experience, might lead to a solution. In the first place, a study should be made of the rules upon which the belligerents usually agreed, in response to the Committee's appeals, during the last war. One such rule was that, except where urgently necessary for military reasons, PW should not be transferred by sea. (" Evacuation " by sea, i.e. transport from the place of capture to the first internment camp, does not, of

course, enter into the discussion). Another rule, briefly stated in the present Draft, is that vessels conveying PW should be equipped with all the safety measures in general use, in particular with an adequate number of life-boats and life-belts and, whenever possible, should be escorted by craft to assist PW in case of shipwreck.

In the second place, arrangements should be sought whereby vessels carrying PW might be spared from destruction by belligerents. This only appears feasible, however, if it can be assumed that belligerents are in principle willing to respect ships which are engaged solely in the transport of PW, and, of course, of their guards. The ICRC long believed that this immunity could be ensured by marking the ships. However, in view of the belligerents' response to proposals of this nature, they now feel that the marking of ships should only be an additional precaution. The best method of securing immunity for vessels used for the sole transport of PW might be to use neutral ships only ; these vessels would be temporarily ceded by the neutral State to the Detaining Power for this purpose, and would have on board delegates of the Protecting Power, or of a body approved by both Parties, who would have full supervisory authority. Detailed conditions can be drafted at a more appropriate stage ; they could only be specified in actual cases and, in most instances, would doubtless require the assent of both parties.

These suggestions, which might also be considered in relation to the transfer of PW by air, could be embodied in a new Article, to follow Article 38, namely :

Prisoners of war shall not be transferred by sea, unless imperative military reasons, or their own interest demand. In the latter case, the transport vessels shall, in addition to the measures prescribed in Article 38, Paragraph 2, be equipped with all the safety devices in general use, in particular with an adequate number of life-boats and life-belts, and shall, whenever possible, be escorted by craft to assist the prisoners in case of shipwreck.

The belligerents shall in all circumstances make every effort to respect the vessels used for the sole transport of prisoners of war. This shall apply in particular to neutral vessels engaged solely in this activity, bearing special markings, if required, and carrying representatives of the Protecting Power or of a body approved by both parties, who shall have full supervisory authority, and to ships fulfilling conditions defined by agreement between the belligerents concerned.

ARTICLE 40

Paragraph 4. — Article 14, Paragraph 1, of the present Draft distinctly states that the Detaining Power shall provide free main-

tenance for prisoners. The existence of such a general provision makes it hardly necessary to assign responsibility specifically for transfer costs, as was justifiable in the 1929 Convention. This Paragraph could therefore be deleted.

ARTICLE 41

Paragraph 4. — As in Article 30, Paragraph 2, first sentence (see comment above, p. 46), and for the same reasons, the association of the terms " physicians, medical orderlies or chaplains " with " prisoners of war " has led to misapprehension. It is too often supposed that all medical practitioners or ministers of religion are automatically posted to the army medical service or to chaplaincies, and that they cannot by this fact become prisoners of war. To avert this misconception, the exact meaning should be brought out and an alternative wording is suggested below. Moreover, it has been thought useful to add a reference to pharmacists and dentists, whose services were often required in PW camps :

Prisoners who have not been assigned to medical or spiritual functions in their own armed forces, but who are doctors, pharmacists, dentists, medical orderlies or ministers of religion, may be required, whatever their rank, to exercise these duties...

ARTICLE 42

Paragraph 1. — Firstly, the wording of this paragraph is not clear. There is no apparent connection between the first part of the sentence and that part beginning with the words " but may not be employed " ; nor is it clear why the word " otherwise " was inserted. It seems that a provision has been omitted which should meet the prisoners' complaints regarding work allotted to them. In modern warfare any work, even that carried out in a manifest branch of peace-time economy such as agriculture, is an indirect contribution to the military strength of the Detaining Power, but PW cannot, for obvious reasons, refuse a whole variety of tasks on these grounds. PW labour would, in such circumstances, be entirely nullified. The new Paragraph 1 should accordingly be clarified by adding, for instance, after " human beings ", the words " even if this work is an indirect contribution to the war effort of the Detaining Power ".

The term " active military operations " [1] also is unsatisfactory, implying as it does that PW labour might be related to certain military

[1] In the English text, " operation " is a misprint.

operations. It would be preferable, as a Red Cross Society has recently remarked, to delete the word " active ". The Paragraph would thus read :

> " In addition to labour performed in connection with camp administration, installation or maintenance, prisoners of war may only be required to do work which is normally necessary for the feeding, sheltering, clothing, transportation and health of human beings, *even if this work is an indirect contribution to the war effort of the Detaining Power,* but they may not be employed on work which would *in any other sense* be of value for the conduct of military operations ".

Even with this amendment the text is a complete departure from the draft presented by the ICRC and is open to serious objections. It is to be feared that in fact it raises difficulties equal to those in the 1929 text, which is exactly what it was intended to avoid. Indeed, the degree to which work described as " normally required for the feeding... of human beings " is legitimate, may finally depend on the value of that work for the conduct of military operations, namely, its connection with these operations.

The construction of ordinary motor cars is, for instance, work normally required for the transportation of human beings, but frequently such cars are put, unmodified, to purely military uses. Similarly clothing material is made for the exclusive use of the army. Moreover, the category of permissible work contains some ambiguous cases. Does accommodation include heating and, if so, is work in the coal industry authorised ?

It would, therefore, seem that in most cases this text could not be applied without prior exposition. To assist those who will have to implement it, if retained, it would be well if the Minutes of the Diplomatic Conference were to give an interpretation of the largest possible number of cases likely to cause difficulties.

In any case, the ICRC consider that the question of prohibited work should be given particular study by the Diplomatic Conference, so that a solution more satisfactory than the proposals so far submitted, namely, the Committee's Draft and the present text, may be obtained.

Paragraph 2. — The right of complaint here attributed to PW is only one instance of a general right recognized by Article 68. In the 1929 Convention itself this right is explicitly stated in the Article on prohibited work ; this was done as a consequence of abuses reported during the 1914-1918 War, that is to say, to meet a particular case.

It may be wondered whether circumstances justify the maintenance of this provision. Its appearance in Article 43 might imply that, *a contrario,* the right of complaint does not prevail in the other

Articles of this Section, and indeed, of later Sections. To avoid this, it would be preferable to delete the Paragraph and, if necessary, to clarify the general principle laid down in Article 68 by replacing, in Paragraphs 1 and 2 of that Article, the words " their requests with regard to the conditions of captivity to which they are subjected " by the words " their requests with regard *to any aspect of their captivity* ".

ARTICLE 46

Paragraph 2. — A Red Cross Society rightly pointed out that it was not sufficient to state that a prisoner who is incapable of work shall be permitted to appear before the medical authorities. The authorities should also make some definite decision concerning his case. The ICRC propose that the words " *who shall decide whether he shall be exempted from work or not* " be added at the end of the first sentence of the Paragraph.

ARTICLE 47

Paragraph 2. — See comment on Article 32 with regard to the term " under the direction of their Government ".

ARTICLE 52

Paragraph 1. — The procedure described rejects the Hague ruling followed in the 1929 Convention, whereby the Detaining Power may deduct from wages paid to PW the cost of their maintenance and the expenses incurred to improve their conditions. Under the present Draft the rates fixed for the work of PW must be paid to them, or rather placed to their account, in full ; this of course does not in any way prevent the Detaining Power from directing employers, in view of the low scale of wages, to contribute towards the maintenance of the men.

Further, under the 1929 Convention, only officers, that is to say PW who do not work, receive pay. Enlisted men, who work, only receive their wages. The Draft provides that a PW who receives wages for his work is also entitled to pay.

In order to stress these two innovations and to prevent any confusion with the 1929 regulations, the first sentence of Article 52 should be amplified as follows :

> " *Without prejudice to the provisions of Article 14, Paragraph 1, and Article 51 of this Convention,* prisoners of war shall be paid fair wages by their employers, or direct by the detaining Authorities ".

Paragraph 4. — This new Paragraph was apparently added by analogy to Paragraph 3 of Article 51. The circumstances are, however, different. The explicit statement in Article 51 that belligerents could conclude special agreements changing the amount of pay due to PW —a right to which general reference is made in the same Article— was intended to stress the fact that belligerents could, by such agreements, change the rates of pay shown in the first Paragraph.

The effect of a similar reference in Article 52 is to state that the basic rate of wages laid down in Paragraph 1 may be changed by such agreements. The full intention of the authors of this Article was that the minimum named should be absolute ; in fact, some Government Experts have expressed the view that the minimum was too low, and the ICRC feel they should draw the attention of Governments to this fact.

For these reasons, belligerents should only be given the right to alter prisoners' wages provided that, in agreements to this effect, the rate be not lower than the stipulated minimum. However, such a safeguard is clearly understood in Article 5, which distinctly states that special agreements between belligerents may in no case restrict the rights conferred upon PW. Further reference to the fact is not required, and it would be preferable to delete this Paragraph.

ARTICLE 58

Paragraph 2. — It should be stated here, as is done in the relevant clause of the Draft Civilian Convention (Art. 94) that the Detaining Power may inform PW direct, and not merely through the Protecting Power, of the measures enforced under this Paragraph. Thus the words " *direct or* " should precede " through the Protecting Power " in the first sentence.

ARTICLE 60

Paragraph 4. — Certain postal authorities have informed the ICRC that, in their view, legislation such as that contained in Article 64 on free postage for PW mail should not be set forth in Red Cross Conventions, since those questions are the subject of Postal Conventions to which reference should merely be made. In their reply, the ICRC stressed the value of drafting the PW Convention as a comprehensive text referring, even though very briefly, to all the rights and privileges of PW and consequently to matters of postage. On the other hand, the ICRC recognised that the detailed application of the principle of free postage was a proper subject for postal conventions and regulations.

In the Committee's opinion, the contents of the present Paragraph 4, added at Stockholm, are in fact an example of rules for detailed application which should rather be defined in postal conventions and regulations. The Paragraph might therefore be deleted.

ARTICLE 61

Paragraph 3. — The ICRC, as they mentioned in their original comment on the Draft Convention, consider that it would be advisable not to lay down detailed regulations for the dispatch of relief consignments to PW, as this might become a lengthy task, but that it should maintain the general wording of this Paragraph and accept the practice usual in this field. To this effect, they propose the deletion of the last part of this Paragraph beginning " Books may not be included...".

ARTICLE 63

Paragraph 2. — (French text) — For textual conformity with the corresponding provision of the Draft Civilian Convention (Art. 99, Par. 2) the Paragraph should read :

" Les Puissances protectrices et les organismes qui *viennent* en aide aux prisonniers de guerre...".
(No change in the English version.)

ARTICLE 64

Paragraph 2. — The term "authorized" applied to "remittances" seems out of place in this Article, as limits are set in Article 53 to the receipt and dispatch of money by prisoners. It should therefore be deleted.

(French text) — For textual conformity with the corresponding portion of the Draft Civilian Convention, the word "exonérés" at the end of the Paragraph should be replaced by " *exempts* ".

(No change in the English version.)

ARTICLE 66

Paragraph 3. — For textual conformity with the corresponding provision in the Draft Civilian Convention (Art. 102, Par. 3), the word " belligerents " should be replaced by " *the Parties to the conflict* ".

ARTICLE 68

Paragraph 3. — The XVIIth Conference adopted the provision, in the corresponding Article of the Draft Civilian Convention (Art. 90, Par. 3), that requests and complaints should be transmitted in their original form. This provision should be introduced here by the addition of the words " *in their original form* " to the end of the first sentence.

ARTICLE 69

Paragraphs 1 and 2. — The XVIIth Conference made fairly extensive changes in this Article, in order to settle a question which was not considered by the Government Experts in 1947, but which arose on several occasions during the War, that of the designation of camp spokesmen in camps containing both officers and men. The present wording is not, however, entirely satisfactory.

In the French version of Paragraph 1, the words " ceux-ci " should be replaced by " *les prisonniers* ", to avoid all confusion. (No change in the English text.)

Paragraph 2. — According to the present text, the spokesman's advisers in mixed camps shall be chosen by the officers only, which it was certainly not intended to imply. Further, in mixed camps where there are as many officers as men, the officers would certainly be entitled to demand that advisers should be chosen from amongst them also.

Moreover, neither the present wording nor that of the Committee's Draft specifies the number of advisers ; this may give rise to difficulties or abuses. It would seem that a provision for two advisers would ensure adequate representation of the camp population ; the problem of choosing advisers in mixed camps could be solved by saying that each category of PW should supply an adviser. Paragraph 2 would thus read :

> *In camp for officers and persons of equivalent status or in mixed camps, the senior officer prisoner of the highest rank shall be recognised as the camp spokesman. He shall be assisted by two advisers chosen by the whole camp, one of whom shall, in mixed camps, be chosen from amongst the men.*

It should be noted in respect of Paragraph 1 that, under an amendment made by the XVIIth Conference in the corresponding clause (Art. 91) of the Draft Civilian Convention, the election of the members of the camp committee is to be effected freely and by secret ballot. If this provision is retained in the above Draft, it should also be

introduced in the present Convention. The relevant phrase should therefore read : " The said prisoners shall freely elect, *by secret ballot* and every six months. "

Paragraph 3. — For simplicity, and conformity with the corresponding provision in the Draft Civilian Convention (Art. 91, Par. 2), it seems preferable to refer here, rather than at the end of Article 71, to the dismissal of camp spokesmen. The second sentence of Paragraph 3 would therefore read :

" The reasons for any refusal *or dismissal* shall be communicated to the Protecting Powers concerned. "

ARTICLE 70

Paragraph 2. — This Paragraph enumerates the Articles of the Convention in which special duties are assigned to the camp spokesman. There is no need for such an enumeration, which may produce a restrictive effect. For these reasons, and for conformity with the corresponding provision of the Draft Civilian Convention (Art. 92, Par. 2), the last phrase " especially... 96 and 103 " should be deleted.

ARTICLE 71

Paragraph 6. — The ICRC suggest that the contents of this provision be added to Paragraph 3 of Article 69 (see comment on that Article), and that the present Paragraph be deleted.

ARTICLE 75

Paragraph 1. — The present wording may lead to an interpretation which is quite contrary to the object of the clause. As the text stands, if the reservation expressed in the second part of the sentence is borne out in practice, and the laws of the Detaining Power do in fact ascribe sole competence to the regular courts in certain cases, then the Detaining Power will not be bound by the first part of the sentence, which states that prisoners may, as a general principle, be tried only by military courts. To avoid this misconstruction, the Paragraph should be amended as follows :

Prisoners of war shall be tried by military courts ; they may only be brought before regular courts in respect of offences for which members of the national armed forces of the Detaining Power are, under the legislation in force, themselves subject to the jurisdiction of such courts.

ARTICLE 79

In order to avoid all possible abuse of disciplinary punishment which might arise from the indefinite wording of Art. 54 Par. 1 of the 1929 Convention, the Government Experts (1947) proposed that the revised Convention should expressly name the various penalties to which prisoners are liable. In drawing up such a list the Experts took account of the camp commandant's need for varied and effective forms of punishment, and included disciplinary drill and additional work, while prescribing all the necessary safeguards for the last two punishments, particularly in regard to their duration (not more than two hours daily—see Art. 80, Par. 1—for thirty consecutive days) and their execution (in no case to be inhuman, brutal or detrimental to health ; see Art. 79, Par. 3).

These two penalties were rejected by the XVIIth Conference. The question now arises whether the penalties remaining at the camp commandant's disposal, namely fines, fatigues, withdrawal of privileges and confinement, are sufficiently deterrent for the maintenance of discipline. This is all the more significant a question in view of the opinion held by some Experts that confinement, during the last war, was fairly ineffective as a disciplinary measure. There is no doubt that some of the conditions, even if intended only to prevent abuses, which are attached to this punishment and already included in the 1929 Convention (such as facilities for remaining out of doors two hours daily and, in particular, for reading) render the penalty much less severe than in most national armed forces.

In view of the limits set in Articles 79 and 89 to disciplinary penalties, and of the considerations given above, the ICRC feel they should draw the attention of Governments to the question of the efficacy of disciplinary penalties.

ARTICLE 82

Paragraph 3. — This new Paragraph is doubtless borne out by the unfortunate experiences of certain occupied countries during the last war. However, the ICRC do not feel the correct place for it is in the Draft PW Convention. The spirit, if not the letter of the text refers to persons in occupied territory released by the Detaining Power, which at the same time is the occupying Power ; they thus again become civilians and are regarded and treated as such by the occupying Power. These provisions would, therefore, be more conveniently placed in the Draft Civilian Convention, more particularly in Part III, Section III, " Occupied Territories ".

It might be argued that Art. 3, Par. 3, sub-par. 1, provides for application of the present Convention, in certain cases, to the abovementioned class of persons.

However, it may properly be answered that the Convention there applies only during the period of internment of these persons, held because they were members of the armed forces. The parallel between this detention and PW captivity is a sufficient reason for this. However, the Convention would not apply, under Art. 3, Par. 3, sub-par. 1—as the present new Paragraph 3 of Art. 82 would require—outside the period of internment.

On the substance of this provision the ICRC, without prejudging the deliberations of the Diplomatic Conference, would like to make two comments.

Firstly, a ruling such as this might discourage a Detaining Power from releasing PW who are nationals of an occupied country ; a release of this sort may, to the individual, be a gain equivalent to an escape, gallant though that may be, to rejoin armed forces outside the occupied territory.

Secondly, there seems to be no reason why this ruling should be restricted to released PW, and why it should not apply to any man or woman attempting to escape from occupied territory in order to take service with the enemy of the occupying Power.

ARTICLE 83

Paragraph 3. — This reference to offences against public property was intended to prevent, in particular, the indictment and trial—as actually happened—of PW simply for digging a hole or breaking through the camp fencing in an attempt to escape.

It has, however, been justly observed that much more serious offences against public property might be committed, such as the blowing-up of bridges or buildings. The prisoner's anxiety to ensure his escape hardly justifies such offences, which may be gravely harmful to the general public and which are equivalent to acts of war, even if not committed in this intention. For this reason, it would be advisable to replace in this Paragraph the term " offences against public property " by the words " *petty* offences against public property ".

ARTICLE 89

See comment on Article 79.

ARTICLE 90

Paragraph 1. — The present wording does not specify the State which is the source of the laws in question. However, under the terms of Article 72, this can clearly only be the Detaining Power.

In order to avoid any misunderstanding it would be advisable to state the fact by adding after " laws " the words " *of the Detaining Power* ".

ARTICLE 94

Last Paragraph. — The French version is not satisfactory and could be improved by the following wording :

> *Si, à l'ouverture des débats, la preuve n'est pas apportée que la Puissance protectrice intéressée a reçu l'avis prévu ci-dessus dans les délais fixés, les débats ne pourront avoir lieu et seront ajournés.*

The English version might, consequently, be amended, as follows :

> *Unless, at the opening of the trial, evidence is produced that the Protecting Power concerned has received the above notification within the prescribed time-limit, the hearing may not proceed and shall be adjourned.*

ARTICLE 95

Paragraph 2, first sentence. — The amendment adopted by the XVIIth Conference places the Protecting Power under an obligation to choose a defending counsel for the PW, if he has not already done so himself. As has already been observed (see comment on Art. 30, Par. 5, p. 47) the Convention cannot properly indicate, except in very general terms, the duties of the Protecting Power, since these are assigned by the Power concerned. In practice, this last Power may, possibly for financial reasons, instruct the Protecting Power not to provide counsel for PW unless, for example, the charge is a serious one. It therefore seems advisable to revert to the Committee's draft, which by the words " the Protecting Power *may* find him an advocate ", merely gave the Protecting Power the option to secure counsel.

Paragraph 2, second sentence. — The Government Experts (1947) wondered whether the Detaining Power should be required to select counsel for the defence of the accused, where none is procured, for any reason, by the Protecting Power. They finally decided that some Powers would find it difficult to carry out an obligation of this nature, and considered that it was preferable to retain the principle of Art. 90, Par. 3, whereby a PW cannot be convicted without having had the assistance of qualified counsel. It was thought the Parties concerned would in this way be obliged to take practical steps appropriate to each individual case where a PW is entirely undefended. This seems the wisest solution, and the ICRC suggest that the sentence " Failing a choice of counsel... to conduct the defence ", be deleted.

ARTICLE 100

The somewhat laconic wording of Par. 3, and the apparent lack of any connection between this clause and Par. 1, in the Committee's Draft gave rise to ambiguities, and hence to the more detailed wording of the present text. To clarify still further the fact that the ruling contained in Par. 3 is complementary to the principle set forth in Par. 1, and in the interests of a more logical sequence of ideas, it would be better to make these two Paragraphs consecutive, and to introduce the entirely distinct question of accommodation in neutral countries as a final paragraph. The two first Paragraphs of Article 100 would therefore read as follows, with slight amendments of style :

Belligerents shall be bound to repatriate, irrespective of number or rank, all seriously sick and seriously wounded prisoners of war, under the terms of Article 101, Par. 1, after having restored them to a condition where they can be transported.

Nevertheless, no sick or wounded prisoner of war who is eligible for repatriation under the foregoing Paragraph may be repatriated against his will during hostilities.

ARTICLE 110

Paragraph 4. — In the corresponding provision of the Draft Civilian Convention (Art. 119, Par. 5) the XVIIth Conference felt it should define once again the conditions in which cremation of deceased civilian internees may be practised. These conditions should apply in the case of PW ; the second sentence of this Paragraph should therefore read " Bodies may be cremated only for imperative reasons of hygiene, *or in consequence of the religion of the deceased or if he or she has expressed the wish* ".

The duties imposed by Art. 13 of the Draft WS Convention on belligerents as regards the dead on the battlefield, are more numerous and detailed than those contained in the present Article. It might be considered whether some of these should be included here, as well as in the corresponding clause of the Draft Civilian Convention.

ARTICLE 111

Paragraph 1. — With the present wording even a minor injury should be followed by an official enquiry. This is obviously demanding too much of the Detaining Power. It would therefore be better to revert to the more suitable wording " *serious injury* ", used in Article 120 of the Draft Civilian Convention.

ARTICLE 113

Paragraph 3. — The object of this Paragraph is, rightly, to ensure that the work of the Central Agency will continue, whatever the circumstances ; however, the text, in so doing, does not sufficiently allow for the character and experience of that Agency.

The principle of proportionate responsibility for costs would require the Agency's several departments to charge each of many hundreds of thousands of applications, transmissions or enquiries separately to each Power concerned. Not only would this involve great book-keeping difficulties, but the task would be complicated by the fact that these applications and enquiries concern categories of war victims other than prisoners of war. Experience in this field has shown that costs can be charged only on a relatively proportionate basis. Furthermore, this provision disregards the fact that every step undertaken by the Agency in behalf of a PW benefits both the State of which he is a national and, indirectly and to a certain extent, the Power by whom he is detained.

Moreover, the stipulation that only belligerents whose nationals benefit by the Agency's services shall bear the costs, raises the question of services in behalf of those PW who, for the time being or throughout their captivity, have no government able to meet this expense. Apparently the Agency's services should then be discontinued, although it is this category of PW which most requires them. Undoubtedly, the costs of the Agency's work should be borne in the first place by the Governments who benefit thereby. Yet it was implicit in the original provision for the Agency, in the 1929 Convention, as in the present text, that this is a universal service, intended for all prisoners, and that all Governments endorsing the principle should contribute according to their means towards the Agency's maintenance.

The ICRC propose the following amendment, which would respect the motive for the introduction of the Paragraph, whilst taking into account the foregoing remarks and providing the flexibility required on this point :

The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give to the said Agency the financial aid it may require.

ARTICLE 115

The new wording proposed for Paragraphs 1 and 2 of this Article will be found in the comment on Article 116, Par. 5, below.

ARTICLE 116

Paragraph 3. — The words " if necessary " are superfluous and should be deleted.

Paragraph 5. — Several organizations affected by this Article have pointed out to the ICRC that their visits to PW had no sort of supervisory character, and that this provision should be placed elsewhere in the Convention. The ICRC referred the matter to the experts present at the XVIIth Conference. An adjustment was made in the Draft Civilian Convention, in that the last Paragraph of Article 126 was transferred to Article 28, but the corresponding adjustment was apparently overlooked in the present Draft. The ICRC therefore suggest that the substance of the last Paragraph of Article 116 be embodied in a new sentence, placed immediately after the first sentence of Article 115, Par. 1, which appears to be the most suitable point for insertion. To shorten this Paragraph, the last sentence could be placed in Paragraph 2. Article 115, Par. 1 and 2 would then read :

> " Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, Relief Societies, or any other body assisting prisoners of war, shall receive from the said Powers, for themselves or for their duly accredited agents, all facilities for distributing to prisoners of war relief supplies and material from any source intended for recreative, educational and religious purposes, and for assisting them in organizing their leisure time within the camps. *These delegates shall also be authorised to visit prisoners of war to whom they wish to give spiritual or material aid.*
>
> Such Societies or bodies may be constituted in the territory of the Detaining Power, or in any other country, where they may have an international character. The Detaining Power may limit the number of Societies and bodies whose delegates are allowed to function in its territory and under its supervision, on condition, however, that such limitation shall not hinder the supply of effective and sufficient relief to all prisoners of war ."

ARTICLE 117

Paragraph 1. — When dealing with the corresponding provisions of the Draft WS Convention (Art. 38), the XVIIth Conference met the objections of one government delegation by providing that the Detaining Power should incorporate the study of the humanitarian Conventions in their program of civil instruction only in so far as

this was possible. The words " if possible " should therefore be inserted between " military and " and " civil instruction ", in the present Paragraph.

ARTICLE 119

The following four Articles were drafted by the ICRC with expert legal assistance, in accordance with a recommendation expressed by the XVIIth Conference. These Articles are intended for insertion, with the same wording, in each of the four Draft Conventions. In the present Draft, they will replace Article 119.

ARTICLE 119

Penal Sanctions

Legislative measures

The High Contracting Parties undertake to incorporate the present Convention as part of their national law, to ensure the prosecution of any act contrary to its provisions, and to enact provisions for the repression, by criminal penalties or appropriate disciplinary measures, of any breach of the Convention.

Within two years after the ratification of this Convention, the High Contracting Parties undertake to communicate to the Swiss Federal Council, for transmission to all signatory or adhering States, the laws and other measures adopted in pursuance of this Article.

ARTICLE 119 (a)

. Grave violations

Without prejudice to the provisions of the foregoing Article, grave breaches of the Convention shall be punished as crimes against the law of nations by the tribunals of any of the High Contracting Parties or by any international jurisdiction the competence of which has been recognised by them. Grave breaches shall include in particular those which cause death, great human suffering or serious injury to body or health, those which constitute a grave denial of personal liberty or a derogation from the dignity due to the person or involve extensive destruction of property, also breaches which by reason of their nature or persistence show a deliberate disregard of this Convention.

Each High Contracting Party shall in conformity with the foregoing Article enact suitable provisions for the extradition of any person accused of a grave breach of this Convention, whom the said High Contracting Party does not bring before its own tribunals.

ARTICLE 119 (b)

I. Superior orders

The fact that the accused acted in obedience to the orders of a superior or in pursuance of a law or regulation shall not constitute

a valid defence, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify.

Full responsibility shall attach to the person giving the order, even if in giving it he was acting in his official capacity as a servant of the State.

ARTICLE 119 (c)

IV. Safeguard

The High Contracting Parties undertake not to subject any person accused of a breach of this Convention, whatever his nationality, to any tribunal of extraordinary jurisdiction. They also agree that they will not apply any penalty or repressive measure which is more severe than those which are applied to their own nationals or which is contrary to the general principles of law and humanity. They shall grant any person accused all rights of defence and appeal recognised by common law.

The safeguards of proper trial and defence shall not in any case be less favourable than those provided by Article 95 and the following Articles of the Convention relative to the Treatment of Prisoners of War.

Safeguards of a similar nature shall apply if the accused is charged before any international jurisdiction.

The comment on these four new Articles will be found in the Remarks on the Draft WS Convention, Art. 39 and 40, pp. 19-22.

IV.

DRAFT CONVENTION FOR THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR

PREAMBLE

The XVIIth International Red Cross Conference added to this Draft Convention a Preamble setting down a number of general principles. This is certainly a useful innovation, which the International Committee fully support.

In view of the nature of this Preamble, it might however be preferable to use the title " *Preliminary Declarations* ", as was done in other Conventions.

Opinions are fairly divided as to the most suitable contents of the text and it is difficult to decide what is essential and what is not. The ICRC consider it would be highly expedient to include a passage in confirmation of the generally accepted ruling that the civilian population should remain completely outside all warlike operations. This principle underlies the present Convention, although it is not explicitly stated therein.

Furthermore, the fundamental rights enumerated should include the right to receive and send news ; this is a vital humanitarian provision. Moreover, persons whose place of residence is known are far less exposed to the risk of disappearing without trace.

It was also suggested that deportations should be prohibited by the Declaration. This is no doubt also an important point. In present circumstances, however, it would be difficult to claim that this principle should be applicable at all times and in all places, even within the territory of a State. Nevertheless, if Governments agreed to subscribe to this ruling, the ICRC would welcome their action.

In consideration of the foregoing, the ICRC propose the following text as a basis of discussion.

PRELIMINARY DECLARATIONS

At the outset of the present Convention, the High Contracting Parties desire to reaffirm their conviction that the civilian population must remain outside all warlike operations, in so far as military requirements allow, and their intention to adopt suitable measures for the protection of civilian lives during military operations.

The High Contracting Parties furthermore desire, in establishing and signing the present Convention, to define the rules which shall govern the protection of civilians in the circumstances described in this instrument. They wish, however, to stress that, in their view, the principles which are given below and which figure in the present Convention are at the root of all human law and should be respected at all times and in all places:—

(1) — *Individuals shall be protected against any violence to their life and person. Torture of any kind is prohibited.*

(2) — *The taking of hostages and deportation are forbidden.*

(3) — *Executions may be carried out only if prior judgment has been passed by a regularly constituted tribunal, offering all those judicial safeguards deemed indispensable by civilised peoples.*

(4) — *No one, even when deprived of his liberty, shall be prevented from giving news to his next of kin.*

The text of the Preamble proposed by the ICRC for the other three Draft Conventions might also serve, as follows.

Respect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking.

Such a principle demands that, in time of war, all those not actively engaged in the hostilities and all those placed hors de combat *by reason of sickness, wounds, capture, or any other circumstance, shall be given due respect and have protection from the effects of war, and that those amongst them who are in suffering shall be succoured and tended without distinction of race, nationality, religious belief, political opinion or any other quality.*

The High Contracting Parties solemnly affirm their intention to adhere to this principle. They will ensure its application, by the terms of the present Convention, to civilian persons in time of war, and pledge themselves to respect and at all times to ensure respect for, the said Convention.

" CIVILIANS "

For the comment on this text, which would replace Article 1 of this Draft, see Draft WS Convention, p. 8.

ARTICLE 2

Paragraph 3. — See comment on Art. 2 of the Draft WS Convention p. 9.

Paragraph 4. — See comment on Art. 2 of the Draft PW Convention p. 9.

ARTICLE 3

Paragraph 1. — The second clause, modified by the XVIIth Conference, is intended to define those persons who are protected by the Convention in the case of civil war. All persons who are not nationals of the country where the conflict takes place are protected; there was no disagreement on this score. As regards the nationals of the country in conflict, the combatants should presumably be excluded; these should, if they fall into enemy hands, be treated as prisoners of war. The ICRC had accordingly proposed the wording " Nationals of the State where the conflict is in progress who take no active part in the hostilities ". This phrasing did not, however, cover those who commit hostile acts whilst not being regular combatants, such as *saboteurs* and *francs-tireurs*. The XVIIth Conference therefore adopted the wording " who are not covered by other international conventions ".

This phrase unfortunately lacks precision; the term " other international conventions " is particularly vague. It can, moreover, be wrongly interpreted in relation to Paragraph 3 of the same Article, which refers to the Draft WS and Draft PW Conventions. It would seem that the term " *who do not belong to the armed forces* " meets the objections raised at Stockholm.

Another question arises in regard to the same Paragraph, that of the provisions of the Convention which should be applied, in the case of civil war, to the nationals of the country where the conflict takes place. Should those provisions be applied which concern aliens in the territory of a party to the conflict, or those which refer to occupied regions? The point has so far not been settled, and the Draft Convention is incomplete in this respect. It would probably be best to stipulate that these civilians should be given the same treatment, by both adversaries, as the population of an occupied territory.

Paragraph 2. — If the recommendation of the XVIIth Conference is observed, namely that the provisions of Part II should be placed at the end of the Convention, this Paragraph could be deleted.

Paragraph 3. — The changes made in Paragraph 1 and the deletion of Paragraph 2 call for complete re-casting of the Article, involving the insertion of Paragraph 3 immediately after the first clause of Paragraph 1.

Article 3 might therefore read :—

Persons protected under the present Convention are those who, at a given moment and in whatever manner, find themselves, in the the case of a conflict or occupation, in the hands of a Power of which they are not nationals. Persons such as prisoners of war, the sick and wounded, the members of medical personnel, who are the subject of other international conventions, remain protected by the said Conventions.

Furthermore, in case of a conflict not international in character, the nationals of the country where the conflict takes place are likewise protected by the present Convention, under the provisions relating to occupied territories.

ARTICLE 5

Paragraph 1. — To secure wording equivalent to that of the Draft PW Convention (Art. 5) this should be amended thus :"... *all matters relating to protected persons...*".

ARTICLE 6

(French text) — For " assure " read " *assurent* ". (No change in the English text.) See also comment on the Draft PW Convention, Art. 6, p. 39.

ARTICLE 7

(French text) — Paragraph 1, last line, " *sont invoquées* " would be preferable to " étaient invoquées ". (No change in the English text).

ARTICLE 9

In Art. 9 of the Draft PW Convention, which covers the same subject, the XVIIth Conference added a new Paragraph. It remains to be decided whether the same Paragraph should also be added to this Article.

ARTICLE 10

Paragraph 1. — This provision appears in all four Conventions and should have the same wording. The following text, adopted for the Draft WS Convention, seems the most suitable, and the ICRC propose that it should figure in the present Draft.

Whenever the Protecting Powers deem it advisable in the interests of protected persons, particularly in the event of disagreement between the Parties to the conflict regarding the application of the provisions of the present Convention, the said Powers shall lend their good offices in order to facilitate such application.

PART II

GENERAL PROTECTION OF POPULATIONS AGAINST CERTAIN CONSEQUENCES OF WAR

The XVIIth Conference recommended that Part II should be placed at the end of the Convention. Having carefully studied the point, the ICRC wholeheartedly support this suggestion and propose that Part II be placed between Parts III and IV (as they now stand). Articles 11 to 23 would thus become Articles 113 to 126. As this alteration would involve a complete change in the numbering of the Articles as from Article 11, the ICRC will later prepare a full version of the Convention in the new numbering, the original number of each Article being shown in brackets.

ARTICLE 11

If the new version of Article 3, proposed by the ICRC, is accepted, Article 11 should be slightly amended to bring out the fact that the provisions of this Part cover not only protected persons, but the entire population. The following wording could be taken as an example :—

In addition to protected persons as defined in Article 3, the provisions of the present Part shall apply... (and so forth, as at present).

ARTICLE 12

Paragraph 1. — The Draft WS Convention, Art. 18, contains a similar provision. The XVIIth Conference deleted the last clause

of that Article which referred to the personnel, on the grounds that this was a point of detail that could be included in the annexed Draft Agreement.

The same policy should no doubt be adopted here. The phrase "and the personnel entrusted with the organization and administration of such zones and localities and with the care of the persons assembled therein" should therefore be deleted.

Paragraph 2. — See comment on the Draft WS Convention, Art. 18, p. 12.

Paragraph 3. — In the Draft WS Convention, Art. 18, the XVIIth Conference substituted for the term "shall lend their good offices" the words "*are invited to lend their good offices*". The ICRC suggest that the same expression be adopted in the present Article.

ARTICLE 13

Paragraph 2. — The ICRC propose that the words "as far as military considerations allow" be deleted.

The use of the word "facilitate" later in the phrase sufficiently weakens the force of this recommendation.

ARTICLE 16

The heading of this Article has the word "lapse", whereas the Draft WS Convention (Art. 18) speaks of the "end of protection". To secure conformity, the word "*end*" might be used here.

Paragraph 1. — (English text) — The last clause should read:

In any case, a sufficient period shall be allowed for the removal of the wounded and sick.

Paragraph 2. — See comment on the Draft WS Convention, Art. 16, (p. 12) concerning the expression "acts harmful to the enemy".

ARTICLE 17

Paragraph 3. — The introduction of the word "normal" somewhat obscures the meaning of this provision; it might be better to state, more simply: "*The material and stores of civilian hospitals cannot be requisitioned so long as...*".

ARTICLES 18 AND 19 *b*

Paragraph 2. — The draft submitted by the ICRC to the XVIIth Conference provided that civilian hospitals, recognized as such by the State and organized to give permanent care to the wounded and sick, the infirm and maternity cases, should be distinguished by means of the Red Cross emblem. This was the only extension of its use admitted—and that only after serious misgiving.

The XVIIth Conference went still further and proposed that the use of the red cross emblem be extended to all transports conveying wounded and sick civilians and to all personnel in charge of them, provided they wore armlets. This extension seems dangerous, since any widening of the applicability of the red cross emblem will inevitably entail a far greater risk of misuse and violation ; this in turn might compromise the repute attaching to the emblem and undermine its very great significance and good name. Hitherto, the use of the emblem has been confined to a clearly defined category of persons who are subject to military discipline. Even in these circumstances, the prevention of misuse has met with no small difficulties. If, therefore, the use of the emblem is extended to ill-defined categories of civilians, scattered over the country, who are not subject to discipline, proper registration or strict supervision, the combating of abuse would become impracticable, and the consequences would be borne by those who are legally entitled to the protection of the emblem.

Members of the army medical personnel were authorized to wear the emblem solely because they belong to the category of military personnel, that is to say, those who may lawfully be attacked.

The law of nations however rests on the principle that hostilities should be confined to armed forces, and that civil populations should be generally immune. The whole economy of the new Civilian Convention derives from this acceptance. Since it is illegal to fire upon any civilian, clearly it is inadmissible to fire upon civilians in charge of the sick. Article 13 of the present Convention expressly states, in fact, that the parties to the conflict shall allow medical personnel of all categories to carry out their duties. To seek protection for certain categories of civilians would be an admission, at the outset, that the new Convention would not be respected in the case of other civilians ; this would be a confession of poor faith in the new treaty, and would weaken its authority.

No doubt the XVIIth Conference was prevented by want of time from studying all the aspects of the problem and from assessing the full effect of the proposed extension. An exception might perhaps still be made for the use of the emblem by the regular staffs of civilian hospitals, who are a well defined category of persons, duly registered by the State and holding identity documents to this effect. If a

protective emblem for all civilian medical personnel is still desired, however, it would be better to examine the possibility of using a special device, entirely distinct from the Red Cross emblem.

ARTICLE 18

Paragraph 3. — The ICRC have been approached from several quarters with requests for the restoration of the last sentence, deleted by the XVIIth Conference. They must support these requests ; if effective protection is desired for civilian hospitals these must fulfil certain obligations.

Should the sentence which has been deleted not be restored, the whole Paragraph might be omitted, as it contains an obligation which is virtually self-evident.

ARTICLE 19 *(a)*

See comment on Article 18, Paragraph 2, above.
(English text) - For " 19 (b) ", read " 19 (a) ".

ARTICLE 20

Paragraph 1. — The XVIIth Conference wished to stipulate that the medical stores must be intended for civilians.

The original text did not expressly state that medical supplies might be intended for wounded and sick combatants (which in any case would not have been relevant in a Convention in respect of civilians), but it did not exclude this possibility.

In face of the present addition it might permissibly be claimed *a contrario* that consignments intended for military personnel are excluded. This would be regrettable, since the purport of the Geneva Convention is that relief to wounded and sick combatants is always legitimate.

It may, in fact, be asked whether the free passage of medical supplies to wounded and sick combatants, particularly to besieged or encircled zones, should not be made the subject of a special provision, which might then be inserted in Article 12 of the Draft WS Convention.

ARTICLE 24

The words " *against their will* " might well be added after the word " detained ", in order to stress the respect due to the liberty of the individual.

Further, Article 25, which is more general in scope, should take the place of Article 24.

ARTICLE 27

Paragraph 1. — The International Alliance of Women and the International Abolitionist Federation have suggested a new text to the ICRC. The proposed wording has decided advantages and the ICRC fully support it. It reads as follows :

> " Women shall be specially protected against any attacks on their honour, *in particular against rape, enforced prostitution and any form of indecent assault.* "

ARTICLE 37

Paragraph 1. — (English text) — In the third line, read : " but they *may* not be employed...".

Paragraphs 1 and 2. — See comment on Article 42, Draft PW Convention.

New Paragraph. — The XVIIth Conference adopted for Article 37 a new wording which, doubtless by error, omitted Paragraph 3 of the Article proposed by the ICRC, which reads :

> *Protected persons shall enjoy the same working conditions as nationals of the country, especially as regards wages, hours of work, equipment, preliminary training and protection against occupational accidents.*

ARTICLE 40

Paragraph 1. — One delegation to the XVIIth Conference observed that decisions for the internment of persons who had not applied for repatriation, should also be examined again at regular intervals. This remark seems entirely justified and calls for the following addition :

> *If the tribunal maintains the decision for internment, the internee may, at half-yearly intervals, request that his case be examined again by the tribunal, in view of his or her release.*

ARTICLE 41

The XVIIth Conference made some very suitable changes in this Article. Nevertheless, the words " or (of) occupation " in Paragraphs

2 and 4 are superfluous and may lead to misunderstanding. This Article only concerns protected persons in the territory of a Party to the conflict ; for this reason reference should be made only to the cessation of hostilities, and not to the end of occupation.

ARTICLE 49

Paragraph 2. — (French text). In view of the addition made to Paragraph 1, Paragraph 2 should begin with the words " *La Puissance occupante* ". (No change in the English version.)

ARTICLE 59

Paragraph 1. — (English text) — In line 2, delete the second " but ", and read " *but which does not constitute* ".

Paragraph 1. — It has been observed that this Paragraph would allow a sentence of internment for an indefinite period to be pronounced for minor offences which could be punished by very brief terms of imprisonment. This seems a justified objection, and the ICRC proposes that the following phrase be added :

> *and for a period equal to the term of imprisonment that may be inflicted for this offence.*

Paragraph 2. — In their Draft, the ICRC had provided for the death sentence only in the case of homicide, or any other wilful offence directly causing the death of a person or persons. The wording adopted by the XVIIth Conference calls for thought.

The first point at issue is whether the legislation in question is that applying in time of peace or in time of war. The draft refers to the law in force in the occupied Power " at the outbreak of hostilities ", an expression which lacks clarity. This question is important as, on the outbreak of hostilities, the States concerned introduce penal laws which, at least for certain offences, are much more severe than in time of peace. Some penal codes also prescribe different penalties for the same offence, according as it is committed in peacetime, or in time of war. The point should in any case be clarified.

A further disadvantage of the wording adopted is that it sets up different systems, according to the legislation applying in the occupied country. Where, for instance, the laws of the occupied Power do not provide for it, the death penalty might be totally barred —a solution which the ICRC could, of course, only regard with satisfaction.

Lastly, the word " offence " should be replaced by " *crime* ", the deeds in question being punishable by death.

In view of the above objections it might perhaps be preferable to revert to the wording originally submitted by the ICRC. This text could, if required, be amended to include further offences.

Paragraph 3. — This paragraph amplifies the idea advanced at the end of Article 58, and the same terminology should therefore be used throughout. In the French version, Articles 58 and 59, the words " allégeance " and " obéissance " are used respectively, where " duty of allegiance " only appears in the English. In Article 77 of the Draft PW Convention, the French version uses the expression " devoir de fidélité ".

The word " obéissance " should in any case be excluded. The right of the occupying Power to enact penal laws having been recognized, it must be admitted that the inhabitants of the occupied territory are bound to obey the lawful regulations of the occupying Power. It is, however, difficult to decide between " allégeance " and " devoir de fidélité ", which have practically the same meaning in French, the first-mentioned (" allégeance ") being however better known in English-speaking countries than on the European Continent. There seems to be no objection to the word " allegiance " appearing in the English text, whilst the term " devoir de fidélité " could be used in the French version.

It is not altogether correct say that the accused is held by the occupying Power ,, by reason of circumstances independent of his will ". Any person in occupied territory who is guilty of an offence against the occupying Power must expect occupation authorities to make every effort to arrest and punish him. It would be preferable to delete this part of the sentence.

With the amendments proposed, the Paragraph would read :

The death penalty may not be pronounced against a protected person unless the attention of the Court has been particularly called to the fact that the accused, not being a national of the occupying Power, is not bound to it by any form of allegiance.

ARTICLE 60

Paragraph 2. — The wording adopted in Stockholm assumes that the following conditions hold :

(1) — The offence was committed before the outbreak of war ;

(2) — The offence was committed outside the occupied territory.

The first condition is clear : a person may have grievances against the government of his country and attack it in whatever way he may think fit (press, wireless, and so on). The moment, however, his country is at war, such action is considered to be treasonable.

The effect of the second condition is, however, less apparent. To take a case in point : a German national who in 1937 had taken refuge in another country and who had there been active against the German Government, would surely have been entitled to protection when the German forces occupied that country. Or should he have entered another equally occupied country, to obtain protection ?

The ICRC believe that the sole test should be the date when the offence was committed. They therefore propose that the expression " from the consequences of an offence committed outside the occupied territory " be replaced by " *from the consequences of an offence committed prior to the outbreak of the conflict* ".

ARTICLE 72

Paragraph 2. — It would be more logical to place the sentences of this paragraph in the following order :

Furthermore, members of the same family, and in particular parents and children, shall be lodged in the same camp throughout the duration of their internment. They may not be separated, except temporarily for reasons of employment. Internees may request that their children who are left at liberty shall be interned with them. So far as possible, specially arranged camps for family units shall be reserved for members of such units.

ARTICLE 73

The XVIIth Conference stressed the desirability of a text similar to that of the Draft PW Convention, Art. 21. The present Article might therefore be worded as follows :

The Detaining Powers shall communicate to one another, through the medium of the Protecting Powers, all useful information regarding the geographical location of places of internment.

Places of internment shall be indicated in the day-time by the letters " IC " placed so as to be clearly visible from the air. The Detaining Powers may, however, agree upon any other system of marking.

ARTICLE 75

Paragraph 3. — This paragraph might more usefully be given wording similar to Art. 27, Paragraph 2 and 3, of the Draft PW Convention, as follows :

> *Internees shall have for their use, day and night, sanitary conveniences which conform to the demands of hygiene and are constantly maintained in a state of cleanliness.*
> *Furthermore, and without prejudice to the baths and showers with which the camps shall be furnished, internees shall be provided with sufficient water and soap for their personal toilet, and for washing their underwear; the necessary installations and facilities shall be granted them for that purpose.*

ARTICLE 76

Paragraph 1. — The XVIIth Conference adopted, in place of the term " at the local market prices ", the wording used in the Draft PW Convention, Art. 26 : " *The tariff shall never be in excess of local market prices.* " The ICRC will support the latter wording, which is more exact.

Paragraph 3. — The Draft PW Convention, Art. 26, prescribes :

> *When a camp is closed down, the profits of canteens shall be handed to an international welfare organization, to be employed...*

The ICRC propose that this wording be adopted in the present Article.

ARTICLE 77

Paragraph 1. — The second sentence of this Paragraph should have the same wording as the corresponding Article 21 of the Draft PW Convention.

In the French read " *pourront* " instead of " seront autorisés ", and " *participeraient* " for " participent ". The amended English translation, which should also appear in Art. 21 of the Draft PW Convention (p. 44) then reads as follows :

" In case of alarms, they *shall be free* to enter such shelters as *quickly* as possible, excepting those *who remain* for the defence of their quarters against the said hazards ".

ARTICLE 78

Paragraph 1. — Without expressing any preference, the ICRC would point out that the text adopted at the same point in the Draft PW Convention (Art. 24) is substantially different.

It should, moreover, be remarked that one National Red Cross Society proposed that the level of the internees' rations should not be inferior to that of the civilian population of the Detaining Power.

ARTICLE 79

Paragraph 1. — (English text) — The following text of the second sentence would be more grammatical : " Should the internees not have sufficient clothing and *be unable to* procure any...".

ARTICLE 80

Paragraph 1. — See remarks on Art. 28, Draft PW Convention.

ARTICLE 81

In the corresponding Art. 29 of the Draft PW Convention, the XVIIth Conference deleted the words " if possible " in the last sentence. The same might be done here.

ARTICLE 82

Paragraph 2. — The deletion of the words " in case of need " is likely to make the provision far less acceptable.

The proper interpretation is, the ICRC believes, that if there are too few ministers of a given denomination to allow of one in each camp, they should be allowed to move about from one camp to another to give their ministrations. It is not implied, however, that they are to be granted freedom of movement without relation to their religious duties.

Furthermore, the close of the paragraph does not clearly convey the idea desired. This sentence should admit the possibility of calling upon ministers of a given denomination residing in the country of internment, if there are too few ministers, or none at all, amongst the internees. See also comment on Art. 30, Draft PW Convention.

In view of the above, the ICRC propose the following wording :

Ministers of religion who are interned shall, whatever their religious denomination, be allowed to minister freely to the members of their community. For that purpose, the Detaining Power shall ensure their equitable allocation amongst the various places of internment ; if they are too few in number, they shall enjoy all facilities for moving about from one camp to another.

If, amongst the internees, there are too few ministers of the said internees' faith, or none at all, spiritual aid may be rendered either by ministers of the said denomination who are held as prisoners of war in the same area, or by ministers of the same, or a similar denomination, so far as doctrinal considerations allow, who shall be designated by the local religious authorities, with the approval of the Detaining Power.

(English text) — The last phrase might be more simply worded : " *If doctrinal considerations permit.* "

Paragraph 5. — The ICRC advise the deletion of this Paragraph. (See remarks on Art. 30 of the Draft PW Convention.)

ARTICLE 83

Paragraph 1. — In the corresponding Article 31 of the Draft PW Convention, the XVIIth Conference replaced the words " individual liberty " by " individual preferences ". The term " liberty " is certainly incongruous when applied to persons who have none. However, the term " individual preferences " does not express the exact meaning the ICRC had in mind. The Committee wished to exclude any possibility of PW or internees being compelled to attend cultural or other occasions organized by the Detaining Power.

The ICRC therefore advise the following wording :

" *Whilst leaving each internee free to take part in them or not,* the Detaining Power shall encourage...".

ARTICLE 85

In the corresponding Art. 32 and 47 of the Draft PW Convention, the XVIIth Conference inserted, after " responsible ", the words " under the direction of their government ". See comment on Art. 32, p. 48.

At the close of this Article also the expression " who are authorized to visit the camp " is used, whilst Art. 47 of the Draft PW Convention reads " *who may visit the camp* ". The latter appears preferable and might be adopted.

ARTICLE 88

Paragraph 1. — The same terminology as in Art. 32 of the Draft PW Convention might be used. The paragraph would then read as follows :

Every place of internment shall be put under the authority of a responsible officer, chosen from amongst the regular military forces or the regular civil administration of the Detaining Power. The said officer or civil official shall have a copy of the present Convention, in his own language ; he shall ensure that its provisions and the regulations adopted to ensure its application are known to the camp guard and shall be responsible for their observance.

Paragraph 2. — Here, too, the text of the Draft PW Convention (Art. 34) might be adopted, as follows :

In every place of internment the text of the present Convention and its annexes, and of the special agreements provided for in Article 5, shall be posted in the internees' own language, at places where all may read it, or be in the possession of the internee committee named in Article 91.

ARTICLE 90

Paragraph 3. — (French text) — For textual conformity with the corresponding Article 68 in the Draft PW Convention this paragraph should run : "*aux représentants des Puissances protectrices*", and not "aux représentants de la Puissance protectrice".

(No change in the English version.)

(English version) — Instead of "and without alteration" read "*in their original form*".

ARTICLE 96

Paragraph 1. — In the corresponding Paragraph of Article 60, Draft PW Convention, the XVIIth Conference added the words "exclusive of the capture cards provided for in Article 59". This clause should be inserted here, as follows : "... and four cards monthly, *exclusive of the capture cards provided for in Article 95 ;* these shall be drawn up, in so far as possible...".

Paragraph 2. — The following sentence should be appended to this paragraph, as in the Draft PW Convention, Art. 60, Par. 2 : "*They shall likewise benefit by this measure in cases of recognised urgency*".

ARTICLE 102

Paragraph 2. — The words " if possible ", in the first sentence of this Paragraph, have been deleted in the corresponding provision of the Draft PW Convention (Art. 66, Par. 2).

ARTICLE 105

As regards internees in occupied territory (Par. 1) the XVIIth Conference adopted a text similar in principle to that submitted by the ICRC. Internees in territory belonging to a party to the conflict are, however, dealt with differently (Par. 2).

The reasons for this distinction are not quite clear. It is to be assumed, on the contrary, that internees in enemy territory most need protection of this nature. In occupied territory, prosecutions and law suits are conducted under domestic procedure and there is consequently less risk of abuse than in enemy territory.

The ICRC therefore hope for the restoration of the original wording. If that text is thought too rigid, its tone might be softened, in the following way :

No measure of distraint may be taken against internees or members of their families, during the period of their internment and the month following their return to their domicile, if it is established that the fact of their internment prevented them from fulfilling their obligations.

Civil law suits to which internees are a party may, on the latter's request or on that of their mandataries, be adjourned for the duration of their internment and the month following their return to their domicile, if it is established that the fact of their internment prevented the internees from pursuing their case.

ARTICLE 108

Paragraph 1. — This gave rise to a lengthy discussion, the other paragraphs incurring no criticism. The XVIIth Conference requested the ICRC to submit a new draft.

Objections were of two kinds :

(1) The powers given to courts to reduce the prescribed penalty runs counter to the municipal legislation of several States, and the said laws would therefore have to be amended if this principle were upheld.

(2) Internees in enemy territory who are domiciled in this territory owe a certain duty of obedience or allegiance, and it would therefore be incorrect to state in a general way that they "are not bound to the Detaining Power by any duty of allegiance ".

These objections carry undoubted weight and should be taken into account. Internees in occupied territory are covered by Articles 55 to 68, which treat of the question of allegiance. On the other hand, in view of the objections raised, the case of internees in enemy territory should be left aside.

The principle whereby courts may be free to reduce the penalty prescribed is accepted in the Draft PW Convention (Art. 77). In the case of prisoners of war it will, if retained, require the amendment of municipal legislation. The ICRC therefore suggest that the decision made on the said Article 77 be here followed.

The rest of the Article might remain unchanged.

ARTICLE 109

Paragraph 1. — Sub-paragraph 3 (Fatigue Duties). — In the corresponding Article 79 of the Draft PW Convention the clause " not to exceed two hours daily " has been inserted. This proviso should also be introduced here.

ARTICLE 111

Paragraph 1. — See remarks on Article 83, Draft PW Convention, p. 59.

ARTICLE 113

Paragraph 2. — Article 86, Par. 2 of the Draft PW Convention reads " in the presence of the accused prisoner of war ". Here, therefore, the wording should be : " *in the presence of the accused internee* ".

ARTICLE 116

For " Articles 60 to 67 ", read " *Articles 61 to 67* ".

ARTICLE 117

Paragraph 1. — In the corresponding Article 38 of the Draft PW Convention, the first sentence runs as follows : " The transfer of prisoners of war shall always be effected humanely...".

The ICRC propose that the same wording be used, namely : " *The transfer of internees shall always be effected humanely. As a general rule, it shall be carried out...*".

Similarly the title of Chapter 10 should then become : " *Transfer of Internees* ", instead of " Transfers of Internees ".

ARTICLE 118

Paragraphs 3 and 4. — These two Paragraphs might be joined, as in the corresponding Art. 40 of the Draft PW Convention.

Paragraph 5 (possible). — The XVIIth Conference added the following Paragraph to Art. 40 of the Draft PW Convention :

" The costs of transfers shall be borne by the Detaining Power. "

If this addition, which the ICRC consider superfluous, is maintained, it should also be inserted in the Draft Civilian Convention.

ARTICLE 126

Paragraph 2. — (French text) — Read " auront accès *à* tous les locaux ", and not " dans ". (No change in the English version.)

ARTICLE 128

Paragraph 2. — As this Paragraph appears in all four Draft Conventions, the same wording should be used and the ICRC propose that the text employed be that of the Draft WS Convention (Art. 38), namely :

"... and, in particular, to incorporate the study thereof in their programmes of military and, *if possible,* civil instruction...".

ARTICLE 130

Below will be found the four Articles drawn up by the ICRC with expert legal assistance, in accordance with the recommendation of the XVIIth Conference. [1] These Articles are intended for insertion verbatim in each of the four Conventions to be revised or concluded. In the Draft Civilian Convention they will replace Article 130.

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[1] See above, p. 5.

ARTICLE 130

Penal sanctions

I. Legislativ measures

The High Contracting Parties undertake to incorporate the present Convention as part of their national law, to ensure the prosecution of any act contrary to its provisions, and to enact provisions for the repression, by criminal penalties or appropriate disciplinary measures, of any breach of the Convention.

Within two years after the ratification of this Convention, the High Contracting Parties undertake to communicate to the Swiss Federal Council, for transmission to all signatory or adhering States, the laws and other measures adopted in pursuance of this Article.

ARTICLE 130 (a)

II. Grave violatio

Without prejudice to the provisions of the foregoing Article, grave breaches of the Convention shall be punished as crimes against the law of nations by the tribunals of any of the High Contracting Parties or by any international jurisdiction the competence of which has been recognised by them. Grave breaches shall include in particular those which cause death, great human suffering or serious injury to body or health, those which constitute a grave denial of personal liberty or a derogation from the dignity due to the person or involve extensive destruction of property, also breaches which by reason of their nature or persistence show a deliberate disregard of this Convention.

Each High Contracting Party shall in conformity with the foregoing Article enact suitable provisions for the extradition of any person accused of a grave breach of this Convention, whom the said High Contracting Party does not bring before its own tribunals.

ARTICLE 130 (b)

III. Superi orders

The fact that the accused acted in obedience to the orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify.

Full responsibility shall attach to the person giving the order, even if in giving it he was acting in his official capacity as a servant of the State.

ARTICLE 130 (c)

IV. Safegu

The High Contracting Parties undertake not to subject any person accused of a breach of this Convention, whatever his nationality, to any tribunal of extraordinary jurisdiction. They also agree that they

will not apply any penalty or repressive measure which is more severe than those which are applied to their own nationals, or which is contrary to the general principles of law and humanity. They shall grant any person accused all rights of defence and appeal recognised by common law.

The safeguards of proper trial and defence shall not in any case be less favourable than those provided by Article 95 and the following Articles of the Convention relative to the Treatment of Prisoners of War.

Safeguards of a similar nature shall apply if the accused is charged before any international jurisdiction.

For comment on these four new Articles, see Draft WS Convention, Art. 39 to 40 (b), pp. 19-22.

ARTICLE 140

(French text) — The wording adopted may appear somewhat ambiguous. It would be preferable to say : " *La présente Convention sera transmise par le Conseil fédéral suisse aux Nations Unies, aux fins d'enregistrement.*" (No change in the English version.)

(English text). — Instead of " the United Nations Organization ", read " *the United Nations* ".

ANNEX A

ARTICLE I

Paragraph 1. — The following clause, deleted in Art. 12 of the present Draft Convention, should be inserted here :

" ... *and the personnel entrusted with the organization and administration of such zones and localities, and with the care of the persons assembled therein.* "

ARTICLE II

Paragraph 2. — (French text) — For " des personnes qui y étaient recueillies ", read " des personnes qui y *sont* recueillies ".
(No change in the English text.)

ANNEX

MEMBERS OF MEDICAL PERSONNEL SENTENCED ON ACCOUNT OF THEIR ACTIVITIES DURING THE WAR [1]

Report submitted by the International Committee of the Red Cross to the XVIIth International Red Cross Conference, held at Stockholm in August 1948

The ICRC have received information on a fairly large number of instances where medical personnel of countries occupied during the second World War joined the German Red Cross or the Medical Service of the German Forces. Upon their return to their own country, these persons were, in many cases, brought before the courts and sometimes convicted for having contracted such an engagement. (Cf. the full statement below, pp. 89-90).

The ICRC consider that the XVIIth Conference should examine this question, and this is also the view of several National Societies.

In their opinion, discussion should not be confined to the instance referred to ; on the contrary, the debate should be extended to all cases of medical personnel who, as a consequence of the war, may find themselves individually threatened on account of the work they performed. The ICRC, for their part, have sought a solution capable of the widest possible application, and particularly to the following categories :

(a) — Members of medical personnel who followed a Government into exile. (Norwegians, Dutch, Poles, French and others) ;

(b) — Members of medical personnel who accepted appointment in the Red Cross or Army Medical Service of the occupying Power, in order to carry on their work in the territory of their own country ;

(c) — Members of medical personnel who accepted appointment in the Red Cross or Army Medical Service of the occupying Power, in order to carry on work outside the territory of their own country ;

[1] See above. p. 6.

(d) — Members of the medical personnel who served in a national force which fought on the side of the occupying Power (French Legion of Combatants on the Eastern Front, and others) ;

(e) — Members of the medical personnel who enlisted for service in the medical units of " partisan " groups ;

(f) — Members of the medical personnel of a neutral country who enlisted, either individually or collectively, in the Medical Service or the Red Cross of a belligerent Power which subsequently became an enemy of their country (Article 11, Geneva Convention).

The Geneva WS Convention does not offer a solution for such cases, at all events in precise terms. Whilst laying it down that the wounded and sick should be cared for, irrespective of nationality, its provisions cover those who care for them only in so far as they are members of Army medical personnel in regular service with the armed forces of a country. The solution should therefore be sought, not in the Conventions themselves, but in the principle on which they rest.

The ICRC note, in the first place, that medical personnel, and especially that of National Red Cross Societies, receive in general very little instruction as to the attitude they must observe in time of war. This fact has doubtless some part in the difficulties which were experienced.

The Committee therefore consider that, in future, it would be advisable to fix more clearly what are the duties of members of the medical personnel towards their own country, and what obligations they may have towards an occupying Power.

In this connection, the ICRC feel it necessary once more to state the principle that *the giving of care to the wounded and sick should never be considered in itself an unlawful act.* [1]

This principle being established, rules should be framed which could be applied to the engagements contracted by the medical personnel in time of war. In this respect, the ICRC advance the following principles as a basis for discussion :

(1) — *Members of medical personnel shall not suffer penalties or be molested in any way when serving in the medical service of their own country, or in the medical service of any unit composed of their compatriots.*

This rule should apply in the case of *(a)* members of medical personnel who have joined a unit of partisans ; *(b)* members of the

[1] This principle has been confirmed by Art. 14, Par. 3 of the Draft WS Convention, adopted by the XVIIth Conference.

medical personnel enrolled in a national corps fighting on the side of the occupying State, and *(c)* members of medical personnel who follow their own Government into exile and serve in the forces which that Government has been able to organize outside the national territory.

(2) — *In an occupied territory, members of the medical personnel who are nationals of the country, may serve in any medical unit carrying on its activities in that territory, even if the unit belongs to the occupying Power ; they may take service in a medical unit of the occupying Power working outside the occupied territory only if they are unemployed and have no other means of finding occupation suited to their abilities.*

For the conscription of members of medical personnel in occupied countries, reference should be made to Art. 47 of the Draft Civilian Convention.

It should be added that the first sentence of Principle (2) above is in conformity with the contents of Art. 5 of the Geneva Convention of 1929, which stipulates that the military authorities may appeal to the charitable zeal of the inhabitants to collect, and afford medical assistance to, the wounded and sick.

The purpose of these principles submitted by the ICRC is to ensure the greatest possible assistance for the wounded and sick, due regard being paid to the allegiance owed by each individual to the State of which he is a national.

The ICRC sincerely trust the rules formulated above will be approved by the National Red Cross Societies, and especially by those which suffered the hardships of occupation. They are well aware that these regulations may run counter to the feelings of many who had much to endure from the occupation. Nevertheless, the work of the Red Cross is in itself an entrenchment on the hostility of a people towards its enemy. The ICRC consider that the effort to set aside national feelings in this particular respect might well be made, for the maintenance of those principles which alone have enabled the Red Cross to carry out the work which now stands to its name.

* * *

In regard to the individual problem of the prosecution in their own country of members of medical personnel for serving in the Red Cross or Army Medical Corps of the occupying Power, the ICRC have asked the Ministers of Justice of the countries concerned to inform them of the general attitude adopted by them in these cases.

Five States have replied to this enquiry.

Of these replies, one merely confirmed that numerous verdicts based on provisions in the Penal Code had been returned against medical officers and auxiliaries who had taken service in medical units of the enemy forces, as well as against women who had joined the Red Cross of the occupying country.

Two other replies declared that enlistment of this kind, even for purely humanitarian reasons, assisted the enemy and was punishable on those grounds.

Another reply, however, stated that the authorities had exercised the greatest caution in proceeding against persons who had performed Red Cross work for the occupying Power, when their engagement was inspired by humanitarian motives.

The remaining reply was more precise and stated that service in the Red Cross of the occupying Power was not considered as an offence. The conviction of a few persons who had accepted service in the enemy Red Cross followed, not because of that service, but because they had acted against the interests of their own country.

In the Revised and New Draft Conventions, the ICRC have been impelled to submit a recommendation, to figure in the Final Act of the forthcoming Diplomatic Conference, on the position of medical personnel who served in the Army Medical Corps or Red Cross of an occupying country. [1] The Committee consider in any case that the position of these persons can in no wise be compared with that of persons who enlisted in the armed forces of an occupying Power. The Committee also hope that the National Red Cross Societies will give explicit directions to their staff on their duty in time of war. This problem calls for the inclusion of the question in the training syllabus for personnel of National Red Cross Societies, and the ICRC would be ready to assist in the preparation of recommendations for circulation to all National Societies. [2]

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[1] Cf. Report No 4a of the ICRC to the XVIIth Conference : " Revised and New Draft Conventions for the Protection of War Victims ", p. 33.

[2] After the XVIIth Conference, the ICRC received a letter from the Norwegian Red Cross, rejecting some of the arguments advanced by the Committee. This letter is available to those interested.

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